CHAPTER X

FRANCE, FROM THE 1500's TO THE REVOLUTION


§ 596. Discretionary Character of the Penal System.

§ 597. Crimes: General Notions and Classification.

§ 598. Penalties in Use.

§ 599. The Several Crimes and their Punishments.

§ 600. General Features: Lack of a Criminal Code.—The 1500's find France virtually at the end of the internal struggle for domination between the royal power and the feudal estates. By the 1500's the estates are organically united under the kingdom. By the 1600's, under Louis XIII and Richelieu, the feudal system is completely absorbed in the sovereign royal power. In the 1700's, under Louis XIV and his successors, royal absolutism reaches its height. And though the seigniorial jurisdictions still survive, and the royal jurisdiction is divided into the two classes of ordinary and extraordinary jurisdiction, yet the law both of crimes and of criminal procedure was substantially the same in all the courts of this period.

Amidst this progress of political centralization, its accompanying activity in general legislation and legal science, and its thoroughgoing changes in private and public law, the notable fact is that the criminal law of France underwent no radical change. It may be asserted without exaggeration that the law of the 1200's is that of the 1700's.

1) This Chapter is taken from L. von Sarre's "Geschichte des französischen Strafrechts und des Prozesses," 2d ed. 1876, pp. 281-630; the translator is Mr. Millar. For this author and work, and the translator, see the Editorial Preface.

§ 596 represents a condensation of the author's text; §§ 597-9 are a translation; slight liberties were taken with the text to adapt it to the purpose. — En]

1) For the history of criminal procedure in France, see Bowra's "History of Continental Criminal Procedure," translated by Stumpo, being Vol. V of the present Series. — En]

259
The royal legislation, exhibiting the activity of the new royal power, fills the first half of the 1500's, and includes the Ordinance of 1493 and Louis XII's Ordinance of Blois of 1498, dealing with courts and procedure. It culminates, for that century, with the Ordinance of Villers-Cotterets, in 1558, which became the foundation-stone of the judicial system for the whole ensuing period. A second great group of legislative achievements begins under Louis XIV, with the Civil Ordinance of 1667, regulating civil procedure; 3 followed by the Criminal Ordinance of 1670, regulating criminal procedure. In 1673 came the Ordinance of Commerce, and in 1681 the Ordinance of Maritime. — two great monuments to the initiative genius of Colbert the statesman. But amidst these varied legislative products, no code of criminal law was enacted. The Old Regime in France never had a Criminal Code. The reason for this notable fact may perhaps chiefly in the peculiar history of French criminal procedure. The great invention of France in this field was the public prosecutor. 4 This official, as a part of his function, was accustomed to make a motion ("conclusion") specifying the penalty which he demanded to be imposed on the accused. In these "conclusions", therefore, there was a wider range of variation than there would have been under the strict letter of a criminal code; and the power and authority of the official prosecutor was correspondingly enhanced. The infliction of some punishment, apart from the details of the specific penalty, was enough to satisfy the interests of the State. And thus the criminal law was content to be embodied in these "conclusions," while at the same time it preserved the wide discretionary range which was regarded as essential. — This may explain the lack of any legislation during this period comparable to Charles V's German code.

Roman Principles in France. — The study of the Roman law in France culminates in the middle of the 1500's. Alecat, the Humanist, Cujas, Baudouin, Doneau, Donareau, Hotman, — these were the notable names of the world in that epoch. 5 But the

3 [The work of Colbert is described in Vol. II of the present Series.]
4 [The work of Alecat is described in Vol. II of the present Series.]
5 [These jurists, and their work in making France the center of Roman law study, are described in Vol. I of the present Series, "A General Survey of Events, Sources, Persons, and Movements in Continental Legal History," alecat and Cujas are the subjects of special studies in Vol. II of the present Series, "Great Jurists of the World." — Eds.]

260
need be noted: Jean Duret's "Traité des peines et des amendes," of 1583, which shows the main outlines as they persisted until the 1800s; Ayrault's "L'ordre, formalité et instruction judiciaire," of 1576; Soulages' "Traité des crimes," of 1782; Jousse's "Traité de la justice criminelle," of 1771, which is the standard source of information for the 1700s; and Mayet de Vouglaire's "Instituts du droit criminel," 1747, "Lois criminelles de la France dans leur ordre naturel," 1780 (in which the author sought to do for criminal law what Domat had done for the Pan-
dects of civil law).

§ 506. Discretionary Character of the Penal System. — The criminal law of this whole period stands in a close and peculiar relation to procedure. While the latter, even as to matters of detail, came to be treated with the utmost clearness and precision, it was far otherwise with the former. Neither legislation nor legal science discloses anything like a systematic and well-defined body of criminal law. Positive enactments concerning crimes and punishments did not produce, as they did in Germany, a recognized subject-matter to which the functioning of procedure is restricted; in the field of repression, procedure holds absolute sway.

It was this situation, more than anything else, which, in the preceding period, had brought about the ascendency of the royal judicial officers, — which had enabled them to make themselves both respected and feared, throughout the kingdom, as the relentless pursuers of crime and criminals, irrespective of kind or degree. The supplanting of earlier forms of criminal procedure by that of public prosecution,¹ which became an accomplished fact in the 1800s, had placed what was left of the seigniorial power completely in their hands. Moreover, it seems to be true that crime, in its essence, consists in the idea of an injury sustained by the general personality through the injury to the individual. Now, when this general personality attains to supremacy, it is quick to feel injury, and encounters on every hand what it regards as occasions of offense. Thus occurs the phenomenon, of which we have met an example, namely, that the punishing power increases in strength as the ruling organism advances toward absolute dominion. The magistrates of the King looked upon themselves as the State; it was therefore but natural that they

¹ [i.e. the form of procedure that came in with the public prosecutor. See ante, § 596, note 5. — Tran.]
to emphasize the need for a system of penal legislation resting upon entirely different principles.

Writing in the middle of the 1500s, Imbert says: "In this kingdom, all punishments are discretionary." And, in a note to the same passage, Jousseaume concedes that "where a punishment is discretionary, and is left to be determined by offici judicii, the judge has power to sentence the offender to death", as, indeed, had been recognized by a Decree of 1545. Only new punishments the judge is not allowed to invent or apply: he is restricted to those already in use. This fearful power is still un shackled in the 1700s. We find Jousseaume using the identical words of Imbert: "In this kingdom, all punishments are discretionary." Criminal law is really nothing else than the unfettered will of the judges. Nowhere than in this field is more manifest the final and decisive triumph of the royal magistracy over the old law: here these agents of the monarchy reach the zenith of their domination over public and private rights.

Moreover, this state of things moulds all legal thought in penal matters. Because of the legislative authority of the judges and prosecutors, the writers, as early as the 1500s, are compelled to devote their attention to causes, instead of to principles. They deal solely with individual crimes, and, even with these, in a fragmentary way. Although fuller and more orderly, Jousseaume's treatment is essentially but little different from that of Du Rey. A science of criminal law that the merchant class, crouched on the steps of the royal judiciary. Thus Du Rey classes as punishable offenses such matters as the giving of "false directions as to the way," the attempt to exact excessive dowries and marriage portions ("dotes et douaires"), failing in "submission or reverence to the great of the land," and drunkenness (complaining that "over-indulgence in wine is not punished according to the equitable law of the Canons, whereby the drunkard is inexorably put to death"). Here too, he includes idleness, mendicancy, and vagabondage. Idleness and mendicancy, it is

Chapter XI | FRANCE, FROM THE 1500S TO THE REVOLUTION [§ 596]

what, in the main, were the limits of the prevailing notions of crime and punishment; the second, briefly to survey the several crimes in so far as they came within the purview of definite legislation. From a practical standpoint, the first is the more important; and in dealing with it, we are not to lose sight of the fact that the courts were the principal instrument, not only in designating the manner and measure of punishment, but also in the development of the notions into which we are inquiring.

§ 595. Crime; General Notions and Classification. — Under conditions such as those above outlined, the conception of crime must necessarily be far from scientific. In the older days, before the Criminal Ordinance of 1670, there had been no attempt whatever to attain any definiteness in this respect; the matter in all likelihood having been left entirely to the interpretation of the courts. Even in the 1700s, the notion is still vague and sterile. There was no less uncertainty as to the old distinction between "crime" and "délit." "Délit" and "crime" soon became convertible terms. Soon, too, and especially in practice, more police offenses became classed as "délits." Any clear-cut notion of crime was consequently out of the question. Crime was anything that could be made the subject of punishment; and anything could be made the subject of punishment that the judge regarded as punishable. This feature appears to have been most pronounced in the 1500s — a time when the disturbed condition of the public peace necessitated and excusing resolution in impressments on the part of the judiciary. Thus Du Rey classes as punishable offenses such matters as the giving of "false directions as to the way," the attempt to exact excessive dowries and marriage portions ("dotes et douaires"), failing in "submission or reverence to the great of the land," and drunkenness (complaining that "over-indulgence in wine is not punished according to the equitable law of the Canons, whereby the drunkard is inexorably put to death"). Here too, he includes idleness, mendicancy, and vagabondage. Idleness and mendicancy, it is

1 Jousseaume, "Justice criminelle," Pt. I.
2 Crime signifies any unjust act tending to injure society and disturb the public peace, which is forbidden by law and deserves to be punished with more or less severity. "L'Empire," "Nouvelle pratique," Bk. 1, c. 1, pp. 2, 3.
3 "According to the usage of the bar," "délits" are "the lesser crimes," and those which require a merely civil reparation or a pecuniary penalty.
5 Ibid., pp. 56-58.
6 Ibid., pp. 134, 129.
7 Ibid., p. 97 b.
to be noted, were punished under Henry II, by consignment to the
galleys. For vagabondage the penalty was ordinarily corporal
chastisement, but, in case of repeated offenses, the offender was
to be put to death (Ordinance of 21 October, 1561), and every
judge had jurisdiction to inflict the death penalty.

The first step out of this confusion was the Criminal Ordinances
of 1670. By introducing a definite order and scale of punishments,
it came to supply the division of crimes according to their penal
consequences, and thus to pave the way for systematization of
the criminal law, with the attendant limitation of the arbitrary
powers of the courts. After this repent, we begin to see at-
ttempts at classification. These, however, are wholly destitute
of scientific value, being in part purely arbitrary, in part merely
practical. Jousseaule’s "eight ways of considering crime." Of
his arrangement we need only mention two features. One is the
division of offenses into public and private, atrocious, aggra-
ivated ("qualifiés"), minor ("légers"), capital, and non-capit-
al. The other is the distribution of offenses committed by
ecclesiastical persons, under the three heads of common offenses
("défis communs"), privileged offenses (or cases), and purely
ecclesiastical offenses. Common offenses were those over which
the secular courts had exclusive jurisdiction; privileged offenses
(or cases) those over which the secular and ecclesiastical tribunals
exercised jurisdiction in common for purposes of investigation,
but whose punishment rested solely with the secular courts. The
third class, purely ecclesiastical offenses, concerned only the
ecclesiastical courts. But classifications of this description could
lead to no system of criminal law. They represented no more
than abstract standards from which individual crimes were
regarded.

Equally unsatisfactory is the further treatment of crime in
general. In dealing with this part of his subject, Jousseaule does not
once touch upon the notion of plurality of offenses, moral

1 Durée, op. cit., pp. 125, 126.
2 Loc. cit.
3 "How then," asks Lange (op. cit., p. 3) can we support the distinction
between capital and non-capital crimes, when "all punishments are dis-
ceivatory in this kingdom?" "To be sure," he continues, "there is not
distinction has hitherto been found in the code that prevents the
judges from turning minor offenses into offenses of a graver description...." This passage gives us
some idea of the fury with which men were still bent in the year 1785.
4 "Concurrence! in the original = "consensus officiorum" (Pj. "con-

CHAPTER X] FRANCE, FROM THE 1500'S TO THE REVOLUTION [§ 59c
responsibility, criminal attempt, criminal intent, or the constitu-
ent elements of crime. The only thing taken into consideration
is the impulse ("mouvement"), and it is this which determines the
"quantum" of punishment. How Roman law conceptions
had invaded this field is apparent from Duret. In his intro-
duction, he tells us that "there is ordinarily a presumption of mal-
cious intent ("dol et fraude") in the case of crimes", and
that punishment is to be increased or lessened according to the criminal
impulse ("impétuosité"), the manner of the harm ("coutume du mal"), and the circumstances in general. The judge will
weigh the criminal facts ("qualités") on every hand, and there-
upon decree a "more grievous penalty," or else "the judge, after considering the cause, may limit, or altogether dispense with,
the punishment, according to the personal condition of the offender,
his ignorance, or unforeseen error." Out of these disjointed
dicta, Jousseaule constructs a kind of system in his chapter: "Con-

considering the Aggravation or Mitigation of Punishment." What
we find here is in truth much the same as what Beausirehad
said in the 1200's: there is but little advance. Crimes are more
or less serious according to the impulse "which brings about
their commission", or according to "their attendant cir-
stances." On the other hand, the subject of accomplices has
a whole Title to itself, and is dealt with at considerable length. Signi-
ficant of the absence of scientific treatment is the fact that
neither the same nor idea of Principal solely anywhere appears. And
this, we take it, simply because, to Jousseaule’s mind, the real ques-
tion is that of the punishment of the participants, and, in the case
of the principal, that question answered itself. It is settled by the
rule now adopted from the Italians, Julius Clasius and Funinacius:
all who join in the offense are to be punished alike, whether the
case is that of conspiracy, joint principalship, by remaining
on watch extended by one to the other, employment of one by the
other to commit the crime, or instigation of one by the other to
the same end. Where the offense is very serious, even guilty
knowledge encounters punishment of an identical
cours de plusieurs délits") which exists where "a plurality of yet un-
punished offenses comes before a court as the subject-matter of a single
judgment." Geer, "in non Holtenendorf's" "Rechtstheorie," i.e. "Kon-
nehmer!" "Pratique!" "Pratique!"

5 Ibid., p. 8 b.
6 Ibid., p. 9 a.
7 "Justice criminelle," pp. 9-17.
8 Ibid., Tit. II.

267
with that inflicted on the actual doer of the criminal act. In this regard, especially, Farinacius dominated the views of jurists in the 1700s. But in case of a remote participation, where the accomplice is not the proximate cause of the crime, his punishment is always moderated according to circumstances. The same is true of assistance rendered after the fact—receiving stolen goods, concealing the offender, extending him more advice and comfort. More exact determination is left for the individual case.

§ 59d. Penalties in Use. In France, the history of punishment, as the means whereby the State tends to its own the will of the individual, reflects, even more faithfully than does that of crime, the several stages in the nation’s political development. At first, according to the greater consensus of historical opinion, the infliction of punishments is a purely local matter and their form varies with locality; next, the system is thrown into confusion through the intrusion of Romain law and the usurpations of the royal magistrates; finally, in the period before us, there arises a general consciousness that, as all France is under the sway of one body of royal officials, so also it is due to have one system of punishments which shall prevail throughout the land.

At the outset, a certain element of uniformity was attained in that the magistrates, of their own accord, had not imposed the same sort of penalties. The underlying cause was the adherence to the old methods of punishment brought in from Germanic sources: the judges, as we have seen, were forbidden to invent new forms. But the application of punitive measures was completely discretionary: even the provisions of positive enactments affecting the case seem to have been rather a guide than a rule. So far as legislation is concerned, there was no such thing as a system of punishments, and even the legal writers treat these in a cursory and merely illustrative fashion.

The resulting absence of safeguards for life and property brought about the Criminal Ordinance (1670). In Title XXV, Article 13, this enactment specified certain punishments as forming a second class following the death penalty; and thus laid the foundation for a penal classification. Menagre as the provision in

1 See Emberg, op. cit., and also Jouve, "Justice criminelle", I, tit. p. 44.
2 Although Duret follows his preface with the outlines of a schema of punishment, he does not furnish any description of the punishments themselves. Emberg (Book I, c. XXI) speaks of some punishments, but without any intention of treating the subject exhaustively.

Chapter XI. France, from the 1500s to the Revolution

question, the Ordinance was received with much satisfaction; for men felt that there was here a return to the old order of things and the starting point of a complete penal system. Not before the 1700s, however, does the latter become fixed. The best and most comprehensive exposition of it is that given by Jouve. As this system had incorporated all the earlier punishments, a brief outline of it will be sufficient for our purpose.

Capital punishments form the first class. These are:

(A) The death penalty (natural death): burning at the stake; breaking on the wheel; quartering; hanging; or beheading.

(B) And further:

(c) Consignment to the galleys for life. The punishment of the galleys must have come into use in France at the beginning of the 1500s, but definite historical proof as to its origin is lacking. The earliest Ordinance which refers to the punishment is that of March 15, 1548, but Guyot cites two Decrees of 1532 and 1535, respectively, in which mention of it is made. Before commencing his service the prisoner is branded; and, according to a Declaration of 1677, whoever mains himself to escape the punishment is

1The Article runs thus: "After the punishment of natural death, the most rigorous are those of torture with reservation of the proofs in their entirety ("question avec la reserve des preuves en leur entier"), consignment to the galleys, banishment for life, torture without reservation of the proofs ("sans reserve des preuves"), consignment to the galleys for a term of years, flagellation, "amende honorable"; and banishment for a term of years." The distinction between torture with and without reservation of the proofs was this: in the former case the prisoner was not released if he successfully withstood the torture: the proofs in hand could still be used against him and might result in his conviction (although not in a sentence of death): while, in the case of torture without reservation of the proofs, ability to withstand the torture resulted in the prisoner’s acqittal: the proofs in hand were said to be "nulles" and were not used against him. See Stein, pp. 687, 688; and see also Roman, "History of Continental Criminal Procedure", trad. Simpson, being Vol. V of the present Series. - Trans.

2 "Justice criminelle": PI. I, Tit. III, with which the same author’s notes on the Criminal Ordinances may be profitably compared.

3 Gp. cit., p. 42 el seq.

4 The headman’s block took the place of the gallows in the case of persons of noble birth.

5 A popular account accords the first employment of convict rowers in France to the 1600s: when Jacques Cour, the rich merchant of Bourges, put into service four galleys thus manned. Galleys labor as an official punishment is said to date from the seizure of three four vessels by Charles VII. Alboy, "Les bagnoles", pp. 2, 3 (Paris, 1840); Quinet, "Deutsches Zinskund und Gefangenenreis", p. 150 (Leipzig, 1861); Trans.

6 "Recueil général des anciennes lois françaises": XIII, p. 70. It speaks only incidentally of convicts ("fornicides") and galleys.

7 "Dictionnaire de Jurisprudence": s. v. "Galcre." This account does not refer to the Ordinance of 1548.

268
put to death. In the case of offenders not physically fit for labor in the galleys, the sentence is generally changed to that of banishment for life. Of earlier date is the rule by which convicts released from the galleys are forbidden to return to Paris under pain of renewed galley-service. For women, life-imprisonment, or whipping followed by banishment for life, takes the place of the galleys. It is not unusual for a designated part of the country (“hors du ressort”) or else from the kingdom at large. It was much disputed whether there could be a banishment from the kingdom for a term of years, and whether banishment for life from a given locality could be classed as a capital punishment. In the case of extremely serious offenses, criminal proceedings may be brought against the dead. Two punishments were for some time in use, namely: dragging the corpse on a hurdle (“sur la claie”), and judicial condemnation of the decedent’s memory. These are important on account of their consequences. Every capital punishment brings with it confiscation of the offender’s property; pronounced against the living, it brings also civic death. Confinement (as it passed from the old law into the regional customs, and thence into the newer criminal law) is in principle simply the reversion of the estate to the feudal superior, whose grant is regarded as revoked by the sentence of capital punishment. It therefore requires no special judgment, but follows automatically upon the judgment of conviction. That it must have redounded to the decided benefit of the feudal lords and the judges goes without saying. The situation is clearly expressed by the maxim which forms Article 183 of the Custom of Paris: “He who confiscates the body confiscates the estate.” It is this close connection with the feudal relation (and consequently with the history of the transformation of the old alodial holdings into fiefs, which, in itself, assumed such manifold forms) that enables us to perceive how the right of confiscation came to exist. But confiscation was in no wise a general consequence of every capital punishment throughout France. For one thing, it was by many of the customs customary to the single case of “laiss-majeste.” Then, again, a variety of rules prevailed as to the kind of property subject to confiscation. And, finally, in the regions of written law, the right did not obtain at all. Soon, however, attempts to make it general began to appear. These were fostered by two things: the lack of definiteness as to what constituted “laiss-majeste,” and the uniformity of procedure. The magistrates invented the rule that, in regions where confiscation was not recognized, the heirs were to be assessed a suitable fine. As early as 1588, we find the Parliament compelled to enact, by special Decree, that the fine in question “must not eat up the greater part of the convicted man’s property.” By the Ordinance, of July, 1659, it was fixed at one-fourth of the estate. As might be expected from the nature of the right, the confiscated property went to the local lord of the High Justice. Naturally, too, these confiscations produced an important revenue. Like other matters of the sort, they were of the subject of agriculture, and it was chiefly the existence of this practice which stood in the way of their abolition.

Closely akin to confiscation is, however, the other consequence of capital punishment.

18 "Qui confisque le corps, il confisque le bien." 19 Confinement in cases of this character was first directed by the Ordinance of 1529, which provided for and regulated its application (Art. 11). By Art. 13 of the Ordinance of 1679, the duty is put on the same footing as live majors.

See Jouve, op. cit., p. 100.

See Art. 45.

Jouve, op. cit., p. 100.

("Seigneur Haut-Judicteur du Bas.") For the high, the low, and the middle classes, see Brissaud, "History of French Public Law," tr. the rule stated in the text gave place to a host of questions as to the persons thereby entitled to these questions are discussed by Jouve, loc. cit., but need not be here entered into.

271
punishments, namely civic death. It is derived, in part, from the rules of the feudal law regarding the loss of "responsum en cour", and in part, from the feudal law notions of "infamia" and "damnatio in metallum". Civic death means the absolute loss of all civil rights; "it sundered completely every bond between society and the man who has incurred it; he has ceased to be a citizen, but cannot be looked upon as an alien, for he is without a country; he does not exist save as a human being, and this, by a sort of condemnation which has no source in the law." Such a notion of civic death appears to have been too dreadful even for the legal writers of the period. Thus Joussea lay it down that civic death destroys only the civil rights, the right to sue, to testify in a court of justice, to make a will or take under a will, to transfer or take by gift, leaving intact such rights as appertain to the "jus gentium" - the capacity to contract, and even to enter into the marriage relation. But marriage, under these circumstances, is without civil consequences: the children are incapable of inheriting from either father or mother. The effect of civic death dates from the publication of final judgment: from that instant, the man is as dead, and administration of his estate takes place. Nevertheless, the obligation to pay a life-rent remains unaffected; and he is equally liable for an unpaid marriage portion due to his wife, inasmuch as the matrimonial relation is still regarded as good.

No mention of this penal consequence is required in the judgment; it follows as a matter of course, and is effective (without exception) throughout the kingdom. In regions where the law permitted civil death was accomplished by confiscation; elsewhere, by a fine assessed against the heirs. When confiscation first took its place as a specific and independent consequence of

(Here was said to have lost the "responsum en cour", "when he has lost the right to testify in a court of justice, or to act as surety," "Requis et Laquiers," "Glossaire du droit français;"

"Romanus" (Nietz, 1882). - Trans.)

"Otherwise "installos ceocia" or "damnatio ad metallam"; condonation to hard labor in the mines ("Dizetg Italiano; XVIII, p. 1442"). This under the Empire was regarded as the heaviest punishment after that of death, and, as in the case of the latter, was provided by law. It carried with it the loss of liberty and accessibility of property and other rights. (Mommase, "Römische Strafrechtsp.; 1880. 455, 460.") - Trans.)

"A death of a distinguished citizen of the somewhat milder character. (Ibid., p. 951. - Trans.)

"Ougot," "Expatriation," etc., "Mort civil."

"Joussea, "Justice criminale," etc.

Numerous controversies, tending in effect to a mitigation of those rules, are more mentioned by Joussea.

---

Chapter XI: France, from the 1500s to the Revolution (p. 252)

Capital punishment does not clearly appear. The earliest ordinance, in which it is mentioned, coupled it with transportation. All persons sentenced to banishment from the kingdom and to civil death are to be transported to Corsica, and there held in confinement.

To punishments of the second and third classes the term "afflictive" is applied. The second class comprises punishments which are at once afflictive and corporal. It includes:

(a) Manumising punishments: slitting or piercing the tongue; cutting off the lips; cutting off the nose; cutting or burning off the hand.

(b) Non-mansing corporeal punishments: branding (scarcely ever imposed except in connection with flogging or consignment to the galleys); flogging (generally employed where the offender belonged to the lower classes and as an accompaniment of banishment for a term of years); the "carcan" and the pillory (these

Ordinance of December, 1566, "Receuil des anciennes lois françaises", XIII, p. 657. Confiscation is not referred to by either Letort or Duret.

Transportation later was to French: "Ordonnance de 1763, Receuil général des anciennes lois françaises", XXII, p. 394.

In the period under discussion the term "afflictive" as applied to punishment appears to be without any very fixed meaning. Joussea's use of the term differs widely from that of Mayard de Vaugelas. The latter includes all the punishments specified in Tit. XXXV, Art. 13, of the Criminal Ordinance. (Note, p. 9 note 3); in his first case, which he treats under the heading of "Corporal Punishments," he says: "We shall call by this name, all those punishments which tend to destroy the body or to afflict it in some manner, whether by the imposition of its members, or on account of the physical suffering which they impose. For the same reason, they are called 'afflictive' punishments, although this latter term is ordinarily employed to designate such as tend merely to deprive the man of his liberty" ("Institutions au droit criminel", p. 366, Paris, 1757).

By what a distinguished French author of our own day calls "as evil heritage from the old law", punishments under the present French penal code (as part of the case of public offenses, "conspirations") are either afflictive and infamous ("afflictives et infamantes") or infamous abuse, or corporal ("condamnation") corporal. "If then," says this writer, "we seek a definition of 'afflictive' punishments" - a definition whose traces we have lost for want of historical data, and which is not longer capable of exact formulation." - we can only say that afflictive punishments are those which are imposed on the offender with the purpose of afflicting him, of making him suffer; while correctional punishments are those applied to the criminal with the object of reforming him. This is how we are to term "deletion" (imprisonment for political offenses), "reduction" (penitentiary imprisonment) as afflictive punishments, and "emprisonment" (imprisonment as extraneous, although all and merely punishments which deprive the man of liberty, too often, indeed, undergone in the same establishment. ("Ordonnance, Elements du droit penal", Vol. I, pp. 80 et seq., Paris, 1767.) - Trans.)

Burning, however, was recorded to only in cases of major majesty in the first degree.

The "carcan" consisted of an iron collar which was clamped around

---

273
also being frequently recognized as proper in connection with other punishments).

In the third class (according to Jouas), that of non-corporal affective punishments, are comprised:

Consignment to the galleys for a term of years; imprisonment ("exclusion") for a term of years: exile ("exit"); servile labor (degrading labor performed in public); and "amende honorable."

Exile is almost always pronounced by "lettres de cachet" and is to be distinguished from banishment ("bannissement") in that it entails no infamy. Servile labor is mentioned in an Edict of 10 November, 1542, and is unquestionably taken from the Roman law. Allied punishments sometimes imposed are condemnation to the military service, and degradation from nobiliary rank, the latter occurring only as a complement of other punishments.

The punishment of "amende honorable" deserves special notice. It dates from the 1100's: the "Etablissements de Normandie" mention it in connection with particide and infanticide; it lasts until the Revolution. As treated by Imbert, it is of but one sort, and is pronounced "in case of an offense against the honor and authority of God, of the King, of the public welfare ("chosis publique"), or of a private person." Subsequently, it is imposed in cases of "public scandals," and appears in two forms: simple or dry ("simple ou sèche") and "in figuris." Simple "amende honorable" requires the offender's presence in the Chamber of Council, where, kneeling and with bare head, he craves pardon, but only of the persons injured by his act. This, therefore, is the most drastic form of personal apology that can be exacted. The "amende honorable in figuris" is the true "amende honorable" of an older period. It takes place in public, and is, in essence, an apology of the culprit before God and man for the offense which he has committed. Glad only in a shirt, with a torch or taper in his hand, and frequently with a halter about his neck, he appears before the door of the court house, or the church (sometimes both), and there on bended knees, the offender's neck and, by means of an attached chain, served to secure him to a wall or post. 

CHAPTER XI FRENCH, FROM THE 1500's TO THE REVOLUTION

he declares that "falsely and in despite of truth, he has said or done such and such a thing, and that he craves pardon of God, of the King, of the officers of the law, and of the offended person." At a later day, the expressions to be used are specified in the judgment. The "amende honorable in figuris" was seldom imposed as an independent penalty; it was generally combined with a capital punishment, and took place before the execution of the latter. Women as well as men were subject to it, and it could even be pronounced in the case of an offending corporation.

With the single exception of exile, all these punishments entail the infamy of the offender,—a feature which they share with the fourth class, where infamy is really the punishment itself. In this fourth class,—the infamous ("infamantes") punishments—are included:

Compelling the offender to wear a sort of foolscap, and conveying him in this ignominious headdress through the streets; public exhibition on a scaffold or ladder; public reproof or reprimand ("blame") (in suffering which the offender is bareheaded and kitted); deprivation of public offices or privileges; the public burning of sedition writings; and fines ("amendes").

The burning of sedition writings takes place, without any preliminary judicial investigation, upon the simple requisition ("requête") of the public prosecutor. It is accompanied by prohibition of printing or sale, and the command to all and sundry to deliver up any copies of the objectionable writing that may be in their possession.

In the highest degree characteristic of the tendencies of the criminal law is the position to which the fine becomes relegated in this period. The fine rests upon the notion that reparation of the injury inflicted is an essential part of the punishment for every crime. Hence, as the State comes to regard the sheer criminal impulse as the chief element of crime, the fine, as a punishment, disappears, and true punishments take its place. While, in the period before this, the fine had been restricted to the case of mere...
police offenses, a wide field had yet been left to its exclusive dominion. In the present period, however, the time of the absolute monarchy, it has wholly ceased to exist as a true punishment. Even the influence of such of the Custumals as still recognize it as such, has been unable to preserve it for the old significance; and it becomes nothing more than a mere appendage of the punishing power proper. How this evolution has been brought about best appears from an examination of the result—namely, the law of fines in the 1700s. Here we find a distinction made between criminal fines, police fines ("amendes de contravention"), and civil fines. A civil fine is the judgment for damages awarded in favor of the civil party. Police fines ("amendes de contravention") are applicable in an extensive and well-defined category of offenses: injury to vert, setting timber, stealing wool, poaching ("amendes de chasse"), and other procedural fines ("amendes de consignation et condemnation") and fines for violations of the regulations concerning the administration of tax-farming grants ("droits des fermes"), which last-mentioned class had its origin in the criminal law of the Custumals.

Criminal fines, in short, represent merely the form under which the penal fines of the old law linger in this period. Only in the most exceptional way are they independent punishments: "The fine is scarcely ever imposed by itself; it is almost always combined with some other punishment." In all cases where this occurs, its amount is discretionary, but must be at least equal to the costs of prosecution. In payment, it is postponed to the judgment in favor of the civil party, but takes precedence of all other pecuniary penal actions, even that of confiscation, and can be enforced by execution against the body of the defendant, i.e., the latter can be imprisoned until the pays. How this result had been worked out, it is difficult to say. It is not unlikely, however, that the fine-maxims of the ancient Custumals had been the original basis for determining the amount. In any event, these fines formed the mainstay of the magisterial power in its dealings with the lower classes of society, and could not be other than a grievous burden to the suffering masses.

Infamy, as has been said, was an essential feature of the foregoing punishments. The notion of infamy is plainly taken from the Roman law, and we find it here quite as loose as it was there. A distinction is made between infamy in law and infamy in fact. What their respective consequences were, does not distinctly appear: even Jousses is not entirely clear. Infamy disqualifies one from taking office; the official who incurs it is compelled to relinquish his place; the infamous man cannot testify, or else his testimony is regarded as untrustworthy. An important question in this connection concerns the imposition of an unconditional fine. If this is not to be followed by infamy, the judgment must expressly so declare, by adding the words "without that the said fine carries any note of infamy." The fifth class consists of the merely civil punishments ("peines non infamantes"), which are:

Admonition or warning (sometimes coupled with a fine); the "aumône" (a pecuniary mulet distinguishes from the "amende" in being non-infamous); the "pena dupli, tripli," etc. (applicable only in the case of embezzlement of public moneys and complicity in criminal bankruptcy); and some others of lesser moment. These remain to be mentioned the matter of imprisonment. Imprisonment is distinctive in its nature, in that, with its adoption as a punitive measure, there begins to arise the notion of an end in punishing, other than mere chastisement and intimidation. Where the necessity of attaining this end has not impressed itself upon the State, imprisonment, as a means of true punishment, is bound to fail. Hence, in France down to the Revolution, imprisonment was in theory a mere means of securing the execution of the sentence, —although, to be sure, it was found at times practical employment as a real punishment. In this view, there was uniform reliance on the text of the Digest: "carcer ad continendos homines, non ad puniendos haberi debet." The prisons are therefore to be used "for the safe-keeping of criminals during the judicial investigation of their causes," and

"Justicia criminielle", pp. 113-115.

[3] Called from the fact that it was devoted as an atlas to plans and charitable purposes. The particular objects are specified in "Traite de Geographie", pp. 410 sqq. — Trans.]

"De la sentence", pp. 77-84.

"Lib. XLVIII", Tit. 19, "De poenis."
cannot be treated as a means of "punishment to be inflicted by the judges." Only individual exceptions appear: the most important are the commutation of the punishment of death or that of the galleys into that of imprisonment for life, and the recognition of imprisonment ("reclusion") in a penitentiary establishment ("maison de force") in the case of women and minors. These, too, are the only instances in which imprisonment has infamy as a consequence. But a true system of punishment, based upon deprivation of liberty, did not exist.

From among the punishments above enumerated the public prosecutor made his selection in the individual instance, when no penalty had been expressly appointed by Ordinance. Yet, even if it had been specified, the judge had the power to increase or diminish "the legal punishment according to circumstances." To the system existing by virtue of such legislative provisions it now becomes necessary to turn. 

§ 592. The Several Crimes and their Punishments. — In this field the specific principles found application. Definitions, the constituent elements of crime, exonerating and aggravating circumstances, — these are all topics of discussion by the jurists of the period. The treatment often has a certain amount of historical background; with Ayруз and Duret, however, this is chiefly a matter of reference to the Roman law, feudal law being completely neglected. The authorities invoked were, first, the various Ordinances and the decrees of the courts, in particular those of the different Parliaments; secondly, the Roman law and the writings of the Italian practical jurists, Julius Clarus and Farinacius. The borrowing from the last is in part direct (this is especially the case with Joussé), and in part indirect, that is to say, from the commentators on the regional Customs, and through these from the French criminalists proper. Responsible as was the influence of Clarus and Farinacius for a great enhancement of severity in punitive measures, the French law nevertheless remains indebted to them in many particulars for perspicacity and comprehensiveness. Indeed, the learning devoted to this part of the subject attained a volume and precision which cannot even approximately be here reproduced. All that we can do is to lay before the reader a brief characterization of the several crimes, — requiring him to bear in mind that a systematic classification does not appear before the end of the 1700s (when, indeed, it still falls short of being a general one), so that even Joussé follows the old plan of Duret and enumerates the different crimes alphabetically.

The first group, that of offenses against religion and the church, by Imbert, and even at a later day, termed "spiritual treason" ("laz majesté divine"), consists of the several crimes now to be mentioned:

Sacrilege is "any profanation of sacred things." It thus embraces all offenses (whether by way of theft or not) against property dedicated to the service of God, and all crimes committed in "holy places." According to Joussé, the punishment is discretionary, yet under the Declaration of 1682 it is ordinarily death; all accomplices are to receive the same sentence. 2

Heresy comprises a whole group of offenses which find separate treatment. Among these are the assembling for sectarian worship; the practice of baptismal rites by persons other than priests; every adoption or acceptance of the "pretended reformed" religion; every relapse to that religion; the lending of aid or countenance to Protestants in their beliefs; as well as failure to conform to the marriage observances of the Catholic Church. So, too, it was heresy for Protestants to emigrate from the Kingdom. By the Edicts of 31 May, 1685, and 13 September, 1699, such emigrants, together with all who aided in their attempt to escape, are to be sentenced to the galleys for life. Other instances of heresy are the refusal to receive spiritual succor, while in a state of illness; apostasy; adherence to any schism; and, finally, atheism. At first, the punishment was burning at the stake; later, it was varied "according to the character of the heresy and the accompanying circumstances," although for this there was a series 3 of legislative enactments.

Under magic and sorcery, four classes of offenses are recognized: witchcraft and sorcery; pretended foretelling of the future; etc. These are found in Vol. III, p. 212 to Vol. IV, p. 322. Our references will be chiefly to this writer, ingenious as he is the best known.

1 These are assembled in "Code pénal, pp. 13 et seq. (The book thus entitled is a collection of the principal Ordinances, Edicts, and Declarations touching crimes and punishments. It was compiled by Lassee, and appeared in 1702. Stein, p. 823. — Tr.)"


addiction to superstitious practices; and the combination of any of these with impiety and sacrilege. In the 1500's and early 1600's, belief in witchcraft and in "intercourse and communion with evil spirits" still found acceptance, as appears from the text of Duret. But the Ordinance of July, 1666, openly declaring all such matters to be "illusions", legal opinion accordingly adopted the more reasonable view that, although there were no "real sorcerers or soothsayers", the practices of such persons are nevertheless the subject of punishment, "either because of their impiety or because of the harm that they work to others." The punishment for this crime varied from burning at the stake to flogging. Simon not only the buying or selling of "things spiritual." Grouped with this offense is "confidence", which exists where one either relies upon the enjoyment of a spiritual or ecclesiastical right and the performance of the duties thereto appurtenant, with intent to make over this right to another at a later day. The punishment of such offenses is loss of all benefits vested in the wrong-doer. Here belongs also, the taking possession of an ecclesiastical living by high-handed means, —which likewise brings about the forfeiture of all benefits.

Next come blasphemy and profanity. Blasphemy may be committed either by writing or word of mouth. It occurs when a man ascribes false attributes to the Divinity, or denies the Divinity's true attributes, or whenever there is insult offered to God, the Virgin, or the Saints. The penalties prescribed by the Ordinances are of many different sorts. The upshot, however, is that simple blasphemy and profanity are punished with a discretionary fine, which is to be doubled in case of a second offense. By the Declaration of 30 July, 1666, the punishment is increased to such


11 "(Cf. the remark of Selden, quoted in Professor Thome's "Trial by Jury," Vol. III, p. 750.)

12 Specifically, "a confidence" is a contract by which an ecclesiastical receives a benefice on condition of paying the endowments, or a part of them, to a third person; or a benefice to resign the preferment at a specified time. The person holding a benefice on such terms is called a "confidential." W. R. P. Jenner, "A History of the Church of France," etc., Vol. I, p. 212; note (London, 1872)."
all officinall is included in the notion of the State, and all crimes committed within this circle or against any member of it share the same common character. Specifically these crimes are:

“lèse majesté” proper: that is to say, attempt upon the life of the Prince, or of any member of the princely house. Extraordinary punishment is provided for this crime by the Ordinance of 1539. The offender is to be [omitted] and his estate confiscated. Under the Criminal Ordinance of 1670, there is even a criminal proceeding against his corpse. All other species of “lèse majesté” in the first degree are followed by confiscation, the razing of the offender’s dwelling, and death; even guilty knowledge is visited with the like punishment. On a par with the offense in question, according to the view of Jousses, is every species of rebellion, but here the death penalty is inflicted in a less aggravated form.

High treason; which includes every resistance to the royal command, every insult to the King, every appeal from the King to the Emperor, or to the Pope, the assembling with weapons or followers in derogation of the royal authority, the fortifying of castles, and a large number of kindred acts. In serious cases the punishment usually is “confiscation of the body and estate”; in other instances its extent depends upon the circumstances of the particular offense.

Under this head of high treason, also fall, for the reason assigned, certain specific crimes of a different description, namely:

Counterfeiting of money. — Two principal species are recognized: counterfeiting of money, proper, and “billonage.” The former consists of unauthorized coined, coined with false weight and standard, imitation or counterfeiting of inscriptions, clipping coin, or uttering false money. “Billonage” is the melting down of good coin or in any other manner converting it into bullion or exporting coined money from the realm.

Chapter X - France, from the 1500's to the Revolution [Page 596]

Counterfeiting of the royal letters or seal.

Peculation: that is to say, the embezzlement of royal or public moneys, or the use of such moneys for one’s own benefit “through an infinity of evil artifices contrived by the financiers to enrich themselves at the expense of the King and the public.” The punishment is consignment to the galleys for life, but, in the course of time, this has come to be seldom applied, and the court uses a discretionary power in fixing the penalty.

Extortion and malversation in office. — In this case, likewise, the practice is to modify the punishment according to circumstances. By the Ordinances of Moulins and of Blois, extortion by officials was punishable with “confiscation of body and estate,” yet the death penalty is scarcely ever inflicted, — giving way to banishment coupled with one of the infamous punishments.

Dues of imprisonment (“chartre privée”) which exists where a private person, with strong hand, deprives another of liberty. It is numbered among attacks upon the sovereign rights of the State, under “lèse majesté.” The principal doctrinal source is the Roman Code. The punishment is a matter of judicial discretion, but based on Farinaus.

Obstruction of public justice (“rebellion à justice”). This occurs through any resistance to the exercise of the judicial power, or concealment of criminals. An associated offense is that of prison breaking. In spite of the provisions of the Criminal Ordinance, escape from prison is seldom punished except when accompanied by the use of violence or the commission of some other crime. The turnkey who affords a prisoner the means of escape incurs consignment to the galleys. In other cases there is a fine and, at times, heavier punishment.

Dueling. — By the opening of the 1500's, the duel had completely fallen into disuse as a procedural feature. In the period with which we are dealing, it is not only disowned, but for-
bidding under rigorous penalties. Indeed, the hatred which the French kings displayed toward this one-time institution is quite remarkable. The last instance of a formally sanctioned duel was that between the Lords de Chataignerac and de Jarnac, in the presence of Francis I. In the combat, de Jarnac, a favorite of the then Dauphin (afterwards Henry II) lost his life; his death so affected the Dauphin that when the latter came to the throne he vowed that never again would a duel be permitted in his Kingdom. At a later day, Louis XIV swore by his kingly honor, and publicly declared in the two Edicts of 1631 and 1679, that the offense of duelling was beyond the hope of pardon — a declaration repeated by Louis XV in the Edict of February, 1723. The attitude thus adopted by the monarchs had necessarily a great influence upon legal opinion. Jouvene says that duelling is "more criminal than homicide," and the Ordinance of 1673 classed it as a species of "lizze majestet." For these reasons the details of the offense are a matter of close study. Distinction is made between challenge without combat and the consummated duel. Sending a challenge is punishable with two years' imprisonment, a heavy fine (to be paid to the nearest hospice), and suspension from all offices for a period of three years, — subject to increase according to circumstances. The same consequences attend acceptance of a challenge. In the case of a consummated duel, the punishment of both parties is death "without remission," and this regardless of their wounds. Nor does death in the combat stay the action of the penal law. Here there is judicial condemnation of the deceased's memory, and confiscation of his estate, or, where that is not possible under the local rule, two-thirds of the estate is taken, by way of fine, for pious uses. All who participated, visited with severe punishment. He who delivers the challenge incurs flogging and branding, and, upon a second offense, consignment to the galleys for life; the mere looker-on loses all his offices and dignities, or else the fourth part of his property. One good effect of this unreasonable severity was that it occasioned the reestablishment of Courts of Honor. By the Edict of August, 1679, as judges of honor were appointed the Marshals of France, in his consummate study of the duel in France, Alexander Coxe makes it clear that the royalty authorized duel of the 1400s and early 1500s, such as the one here mentioned, was quite other than that final by battle. "Verfall des offiziellen und Entstehung des privaten Zweck-Kampfes in Frankreich," p. 138 (Gierke's "Untersuchungen zur deutschen Staats- und Rechtsgeschichte," 99 Hft). — Trans. I. Art. 24. Art. 36. Art. 2.

§ 596. THE RENASCENCE AND THE REFORMATION (Part I, Title III)

Chapter XI: France, from the 1500's to the Revolution (§ 596)

the Governors-General and their Lieutenants. These, again, were authorized to appoint a certain number of nobles, in every province, as arbitrators, with jurisdiction to determine questions of personal honor and, incidentally, to cite before them the contending parties. From the decisions of such local tribunals, an appeal lay to the Marshals. The unlawful carrying of arms and the wearing of masks were forbidden by the Ordinance of 1487 — a prohibition which is often repeated. The Ordinance of 9 May, 1538, allowed the populace to over-power and kill ("courir sus") the offender, but by that of 5 August, 1590, imprisonment and the loss of weapons were prescribed. Later, both cases are treated as mere police offenses.

Crime against the person constitute the third main class. Homicide in general ("homicide") is grouped under four heads: (a) justifiable homicide ("homicide par nécessité"); (b) accidental homicide; (c) homicide by negligence, and (d) murder ("homicide volontaire"); "meurtrier", "assassinat"). The killing of an adulterer is not punishable. Where there has been a wounding, the case is one of homicide if death ensues within forty days. Attempt to kill, in general, is not punished as severely as the consummated offense. It is only the proximate attempt, conspiracy to kill ("machination de tuer"), the hiring of an assassin, and instigation of another to commit homicide, which are visited with the death penalty. Self-defense is discussed quite fully. But the learning of homicide is without anything distinctive: on principle, it is based upon Parma. The punishment for murder is breaking on the wheel; more exact determination is left to the courts. Poisoning ("crime de poison") is dealt with as a separate offense, and is more serious than ordinary murder. Its punishment is death in an aggravated form, varying with the circumstances of the case.

Furtwille is murder committed upon the person of a relative,— even upon that of a natural ascendant or descendant, or of a relative by marriage. In a wider sense, it includes infanticide, concealment of pregnancy, and exposure of children, as also the murder of the master of the house by his servant. The notions here involved are the common ones of the 1700's.

based upon the Italian practical jurists, and hence need not further detain us.4

Suicide is still a crime. The estate is to be confiscated and a criminal proceeding had against the corpse. These rules, however, become greatly modified in practice.4

Crimes against marriage, i.e., adultery and bigamy, likewise present a situation where the punishment is governed by a general practice. The chief doctrinal sources, as to adultery, are the 134th Novel, c. 10 and the Authenticata "Sed hodie Codici ad legem Julianum de adulterii." The woman who offends is "authentica," i.e., is immured in a cloister, and loses her property rights. The man is punished in different ways, sometimes by banishment, but latterly at the discretion of the judge.4 Similar considerations apply to bigamy and polygamy, in default of special laws.4

For the several forms of the crime against nature the punishment is burning at the stake.4

Of the offenses grouped under the designation of carnality ("luxure"), rape is punished with death, as is also carnal connection with a female child. In other cases, resort is had to some severe penalty of a different description, although death is usually specified in the prosecutor's demand.4

Pandering is attended with punishment, loss of the ears, whipping, and the like. Later, punishment comes into general use.4

Incest comprises every case of sexual intercourse between kindred, as far as the degree of aunt and nephew. It does not, however, cover commerce between persons who are akin only by


4 "Jouann, op. cit. IV, pp. 130-142.

4 In the first nine books of the Code, the Glossators inserted "extracts from the Novels which completed or modified a considerable number of conditions. These extracts were called 'Authentica', in contradistinction to the collection of Novels in nine collations called 'Authenticae' or 'Corpus authenticorum'". Tarde, "Histoire des sources du droit français", p. 121 (Paris, 1890); and see also Vol. I of the present series: "A General Survey of Events, Sources, Persons, and Movements in Continental Legal History," p. 159.


4 "Jouann, op. cit. III, pp. 218-234.

4 Ibid. IV, pp. 51-56.

4 Ibid., pp. 700-752.

Private falsification includes the forgery of documents and falsification generally by word or act (wherein is embraced the giving of false weight or false measure). Its punishment is, in part, according to the customary law, in part, discretionary; and consists of fine, banishment, or corporal chastisement.56

Perjury (false witness) is the subject of especial punishment. According to the Ordinance of 1531, the death penalty is to be applied. In practice, however, a modification of this rule had come about, and the punishment was in the discretion of the court. False witness against the accused in a criminal proceeding called for a severer penalty, and was visited with the punishment to which the person falsely accused had become liable.55

Fraudulent bankruptcy is treated by Jousse as a species of theft. By the Ordinance of 10 October, 1515,  bankruptcy, when accompanied by fraud and wrong-doing ("fraudes et abusus"), was made punishable by "amende honorable", corporal chastisement, the "corcun", and the like, according to the nature of the offense. Severer measures were prescribed by the Ordinance of Orleans54 and Blois;54 and an Edict of 1609 appointed the death penalty. Although this last provision was repeated in the Ordinance of Condé (1673) and in a Declaration of 1716, it was not observed in practice; the provisions of the Ordinance of 1536, however, remained in force. Accomplices incurred a fine, in certain cases a corporal chastisement.57

Usury, i.e. "any illicit gain derived from money in virtue of a prior agreement," still remained a crime. Nevertheless, a distinction was made between usury and interest. The exacting of a lawful rate of interest was permitted; this, under the Ordinance of February, 1770, being fixed at 5 per cent ("an denier vingt").58 The various questions are dealt with by Jousse in considerable detail. By the Ordinance of Orleans, the

---

56 For the particular cases, see Jousse, op. cit., III, pp. 341-416, where they are exhaustively considered.
58 Art. 142.
59 Tit. XI, Art. 12.
61 It is interesting to note the steady decline of this legal rate. By the Ordinance of 1254, it was fixed at 4 sols on the livres 280 per cent. by that of July, 1315, at 15 per cent. It later became 10 per cent ("an denier 10"), and so remained until 1567. Its subsequent course was as follows: 6 lim. cent. ("an denier 16") by the Edict of July, 1601; 54 per cent ("an denier 16") by the Edict of March, 1654; 5 per cent ("an denier 20") by the Edict of December, 1665; and 4 per cent ("an denier 20") by the Edict of June, 1765. See Jousse, op. cit., p. 260.
62 Art. 10.
65 Art. 10.
discretion. The Ordinance of Moulins prohibited the publication of any book without permission of the Crown ("sans privilège du Roi"), punishing infractions with confiscation of property and corporal chastisement; and, by the Ordinance of 11 December, 1547, no book dealing with religious matters could be printed or sold unless first examined and authorized by the doctors of theology, the punishment in this case being confiscation of "body and estate." The Press Law proper is the Edict of August, 1586, which consolidated all the preceding enactments. Later enactments merely carry out the plan there laid down. Thus, the Regulation of 28 February, 1723, provided that any one guilty of circulating writings against religion, the King’s service, the good of the State, the purity of manners, or the honor and reputation of families or individuals should (in addition to the punishments prescribed by existing law) incur the forfeiture of all privileges, rights, and offices. So, too, the Declaration of 10 May, 1728, punished the same offense with the pillory, banishment, and severer punishments. Likewise, by a Declaration of 17 April, 1757, it was enacted that the author of any writing tending to give offense to religion, to agitate the minds of the people, to assail the authority of the King, or to disturb the peace of the State will be punished with death; further, that all who take part in its printing, publishing, or dissemination are to undergo the like punishment; and, finally, that failure to observe the formalities indicated in the Ordinances shall entail a punishment which may extend to consignment to the galleys for life. And Jousset does not hesitate to add that all who have authorized or counselled the publication must be punished in the self-same manner.

This concludes the list of crimes in the true sense of the word. There were many other offenses of a special nature such as those relating to the forests, to hunting, and to fishing, as well as an entire group of marine offenses which are dealt with in the Ordinance of the Marine. Examination of these, however, would throw but little light on the general features of the criminal law of this period, and, consequently, does not require us to prolong this survey.


290

CHAPTER XI

OTHER COUNTRIES IN THE 1500s-1700s

(SCANDINAVIA, SWITZERLAND, NETHERLANDS)

A. SCANDINAVIA

§ 59f. Scandinavia in the period 1500s-1700s. Private Revenge Prohibited; Outlawry; Penalities: Legislation during the

1600s; Capital Offenses; Extinction of Public Jurisdiction; Moral Conditions.

§ 59f. Scandinavia during the period 1600s-1700s. The legislation of the first half of the 1500s exhibits an increasing progress in penal law to the conception that the end to be sought was not the securing of private redress and damages so much as the maintenance of public order and safety. The system, however, was not essentially changed. More severe penalties were prescribed for divers offenses with a view of enforcing more effectively the duty resting upon the public authorities. The reason set forth for these drastic enactments was the lawless conditions prevailing during the internal strife and wars; and the crime especially dealt with were murder and gross personal violence, which frequently passed unpunished.

Private Vengeance Prohibited. — It is apparent, however, that the basic principles of the earlier provincial Laws remain. The system of fines, which had grown out of the ancient custom of taking the law into one's own hands, was preserved. Personal feud and vengeance, while not allowed, still served to distinguish such an act on one committed on an offenseless man, and subjected the doer to outlawry or forfeiture of life in exceptional cases only.

[The first four headings of this Section continue Newman's "History," etc., already cited in note 1 to § 59e; for this author, see the Editorial Preface. — Ed.]

291
The Laws of Christian II penalized with death all cases of deliberate homicide; if the defendant escaped, he and his companions in the act were outlawed; any one of them, if apprehended, was to be executed by the royal official; but any one could slay him with impunity; to harbor him was cause for outlawry. For the taking of life by accident or in self-defense, peace must be bought by fines to the kin and the king; the amounts were to be determined by the "Land-judge" and were exacted from the defendant himself, his kindred not being bound to contribute; attacks upon the latter by the kinsfolk of the deceased were prohibited.

These general rules were followed by succeeding kings. No new penal principle developed; the chief aim being more effectually to enforce the rules of the earlier codes. This is seen in the Ordinance of Frederick I for Fyen, of May 18, 1523, and the Decree of Christian III for Kopenhagen, of May 11, 1537, in that the frequent cases of murder to the practice of private vengeance, as well as to the custom for the slayer to obtain release by paying fines to the kin of the deceased (to which his relations contributed) without the cause reaching the law's tribunal. The chief purpose of these enactments, as well as those of 1547, 1561, and 1568, was, therefore, the abolition of the "Haevn" (or feud) the coercion of a resort to court proceedings.

These laws also prescribe death for homicide (except where done by accident or in self-defense), whether the offender was caught in the act or declared outlawed and later apprehended; his personal estate was forfeited, half to the king and the other half to the heirs of the deceased; the offender's relations being declared exempt from contribution or vengeance. Where the fugitive made good his escape, or purchase of peace by money was offered him by the king and kin, his relatives were to produce two thirds of the legal "man-fine" to the victim's heirs, as provided in earlier legislation. Vengeance on kin was prohibited in all cases, and an old rule was revived prohibiting reconciliation without legal procedure. But these provisions were limited to manslaughter committed by yeomen ("Boule") or burgheers ("Kjøpestadmand") and not applicable to the nobility. The latter preserved the right of private vindication; and charges involving the life of any of its members came only under the jurisdiction of the king and the high court of the realm (an exception being noted in the Kallundborg Decree of 1576, ch. 13, providing the death penalty for a nobleman who should deliberately kill his brothers).

Outlawry still caused for unmitigable offenses, or on failure to produce legal or promised fines. The provision in the Ordinance of Erik Gipbing of 1284, was reinaucted in the Decrees of 1547 and 1558, outlawing any one who should fail to pay a fifty-mark or other important fine or secure a bondsman therefor within six weeks after sentence. Outlawry, however, was put into practice chieflly for crimes subject (under the revised laws) to capital punishment where the felon was not caught in the act and escaped during the period of time allowed after sentence. This period, which had varied from a day and a month to three days and three nights, was now fixed at a day and a night; if caught thereafter, the death penalty was exacted. The second Ecclesiastical Law of Christian II authorized any one to kill a fugitive murderer; and while there is a decision of the House of the Lords of the 13th of May, 1537, acquitting the defendant from punishment for such an act, the Decrees are silent on the subject, and it is doubtful if outlawry operated to this extent any longer. By the Act of 1537, it behooved the royal bailiff to "mete out justice on his neck" where the murderer had not been seized in the act but was sworn to be outlawed, and he was later charged with the duty of pursuing and apprehending the fugitive. While these Decrees do not expressly authorize every person to seize the outlaw, there is recorded a judgment of the Viborg Land-Ting of 1570, according to which all present at a "Thing" where a murder was committed were in duty bound to seize the criminal; and this rule was later made general.

Where reconciliation was made and fines paid, the offended party delivered a "letter of release of feud" (like the earlier "Trygdeed," ante, § 38b) whereupon the royal official proclaimed "the peace of the king upon him." Where in particular cases there was a doubt as to the manner of punishment, or aggravating or extenuating circumstances appeared, the defendant was referred to the "king's favor or disfavor" and his case was decided directly by the ruler.

Penalties. — The ecclesiastical jurisdiction had been transferred, at the time of the Reformation, to the State; and this led to some changes in penalties. Thus, the Decree of 1537 prescribed death for a spouse guilty of adultery, and also for the paramour, this penalty being later limited by the statute of 1539 to a third offense, and later laws not mentioning the third party. For seduction, fines were imposed, payable to the offended party and the king
powerful influence in the government, as is evidenced by its issuance of "lettres de release of fool", binding the kin of the person killed, without the cognizance of public authority, during the reign of Christian IV.

A notable feature in the criminal legislation of this period, is that, as a motive for ordaining punishment for crime, in addition to securing the order of the State and preventing crime, it professes to aim at diverting the wrath of God, and his punishment of the people.

Offences penalized by capital punishment were: (1) deliberate murder, committed by those not of the nobility; (2) rape; and (3) adultery. Offences against the administration of justice were heavily penalized -- unrighteous judges, clerks forging the records of the "Thing", and perjurers. While accidental acts were no longer generally held criminal, there was nevertheless retained in the Manual Act of Frederick II the provision of the Law of Erik of Pomerania, prescribing a barbarous penalty for negligently causing a conflagration ("if damage result through the neglect of any one from fire and light, then he shall immediately be seized and thrown into the same fire, if he be caught in the act"). Imprisonment at hard labor at Bremerholm or the House of Correction became frequent punishments under Christian IV.

The jurisdiction of the State authorities now embraced that of the former ecclesiastical courts, and was extended to include many acts not involving wrongs to individuals. Among the offenses now recognized were witchcraft, vagrancy and beggary, incest, concealment of child-birth, and relapse into the Catholic creed. Moral conditions during the 1600's had been at a low ebb; the priesthood, monks, and nuns being especially depopulated. At the Council of Constance it is recorded that over seven hundred "pleasure-maidens" were present at the gathering. Even the Reformation effected little change, and improvement came only with the spread of knowledge. Guttery, drunkenness, libertinism, and gross living were common. Private feuds and self-redress were frequent. A large number of persons were executed for witchcraft, towards the close of the 1600's; and among the victims of superstitious creeds are found noble ladies, one of whom, Christine Kruckow, was charged with having instituted at the university a "Stipendium decollate virginum."

The dominant principles in the Swedish-Finnish penal codes during this period were the following:
§ 59. The Renaissance and the Reformation

The "lex talionis" is the highest justice according to the Law of God, i.e., the Mosaic Law; (2) The legislator shall endeavor to intimidate miscreants from criminal actions by the most severe penalties; (3) The legislator shall seek to soften the wrath of Deity and save the realm from his vengeance by the most severe punishments.

Regarding the first proposition, the Church rules were not only viewed as the sources of the national religion, but also, especially the principles of the Old Testament, were deemed positive legislation of Divine origin, binding on all nations in all ages.

The adherence to the second rule is amply evidenced in penal history, notable in the Manor Laws, the military law, and special ordinances. Thus, Gustavus Adolphus prescribed death for the killing of a stag or a swan.

The doctrine contained in the third principle was followed in many enactments, such as the patent regarding felonies of May 1, 1655, the royal statute regarding fines and breaches of the Sabbath (October 2, 1665), and the law of infanticide (March 1, 1681 and November 15, 1864). Likewise, it appears in the prosecutions for witchcraft during the close of the 1600s, wherein the "law of God" was enforced without mercy and the witches burned, in order to secure immunity from "the rage of Satan and his cohorts" and to divert the wrath of the Lord from the realm. Nor was this idea confined to offenses against morals and religion; it is notable in the act regarding duels (August 22, 1682).

In course of time, however, the general conscience came to disapprove of these harsh punishments, and while the provisions still lingered in the books, milder penalties were employed in actual practice. The Penal Code of Queen Cristina introduced a system more in accord with this common sense of justice and actual practice. A thorough reform is visible in the Code of 1734—the labor of a century. Nevertheless, the dominant principles remained unchanged, although the principle was now recognized that the penalty should aim to be only a just retribution. Draconic punishments still remained; capital punishment being prescribed in sixty-eight cases.

Marking an epoch in the development of penal law, is the act of the Swedish Parliament, January 20, 1779, expressing that new humane tendency which became dominant during the latter half of the 1700s. Gustavus III was well versed in the "enlightened" philosophy of the 1700s; and it had been his genuine desire to in-

Chapter XII: Other Countries in the 1500s-1700s

produce an even more thorough reform than that which was embodied in the statute of 1779.

B. Switzerland

§ 59a. Switzerland in the 1500s; the "Aufklärung" Period.

§ 59b. The 1500s and 1600s; The Reformation Period.

Whether the Carolina ever had force in Switzerland, either formally or substantially, opinions have differed widely. Most of its prohibitions dealt with procedure, and therefore would not be applicable. No doubt it was more or less used by magistrates for their guidance. In matters directly involving the peace-law, the Carolinians in Germany displaced the former rules; but in Switzerland the peace-law was little affected by it. For example, the law of self-defense and self-redress was restricted by the Carolinians to cases of life and limb, but in Switzerland preserved its larger scope. Again, the attempt as an independent offense was broadly recognized in the Carolina, but not recognized in Switzerland.

The Reformation, of course, affected the criminal law in Switzerland much as it did in Germany, even in the cantons which remained Catholic. This period of law shows a stern and even harsh spirit of repression, and is in many respects a retrogression. Religion, morality, and authority are its marked elements. Offenses against religion and creeds become numerous, as in Germany, and are harshly punished. Blasphemy, adultery, incontinence, and sinful acts generally, become prominent in criminal justice. Church and State mutually assist in the zealous task.

There were, to be sure, differences observable due to local conditions and personalities. Calvin at Geneva, Zwingli at Zurich, Luther in Germany, had dominant influence, each in his own way. Calvin introduced a terrorist ecclesiastical administration, emphatic in its puritanism. Zwingli's nature was liberal and democratic; his heart was with the common people, and he led a struggle against the privileged aristocratic families. Luther was in the confidence of the German territorial princes, and their ambitions were closely related with the success of the Protestant faith.

1These two sections are by the Editor, using Dr. Ederingen's treatise as authority; for this author and work, see the Editorial Preface, p. 67.
Germany, but not in Switzerland, the Roman law was introduced bodily (partly by legislation, partly through the professionally educated judiciary). With it came the doctrine of the ruler's authority as the all-sufficient basis of law. This culminated in the exaltation of judicial discretion as the measure of crimes and penalties, and of governmental absolutism as representing divine authority in the repression of crime and sin. From the excesses of these doctrines the Swiss cantons were relatively exempt.

Nevertheless, Swiss criminal law exhibited the general features of the times,—a harshness and cruelty in the penalties,—an emphasis on the sinfulness of crime, the wrath of God for a people's offenses, and the God-commanded duty of obedience to authority. In Geneva, Calvin's cenotaph, the Draconian in their strictness and arbitrariness, were so harshly enforced that at last the town rose and expelled him. But his spirit still dominated. Not until the all-European reaction of Rousseau's time did that community tear itself free from its intellectual slavery and recover its old Swiss spirit of freedom. In his "Lettres de la Montagne," Rousseau describes the abnormal authority of the Geneva Council in criminal matters: "Its power is absolute in every respect. It is prosecutor and judge. It sentences and it executes. It summons, arrests, imprisons, tries, judges, and punishes,—itself alone does all."

And yet this stern and intolerant system had its due place in the history of progress. It led in a great movement of regeneration in morals and the building up of State authority in criminal law. After the political anarchy and the riotous pleasure-loving excesses of the Middle Ages, it signaled a natural reaction towards orderly government and benevolent asceticism and self-castigation. One of the historians of Bern's laws thus sums up the period: "It was not a mere matter of new religious dogmas, but of the renovation of the moral life, personal and national."

§ 594. The 1500 s, the "Aufklärung" Period—To reconstruct a picture of the criminal law of the 1700 s is not easy. The sources were multifarious: Roman law, Canon law, and the Carolinian; practice-books, judiciary acts, local customs; all these were found more or less in every canton. Much of the civil law persisted, in name at least. The Territorial Law-Book of Glarus, as late as the issues of 1807 and 1835, still preserved parts of the peace-law dating back to the 1400 s. In Schwyz as late as 1700 was found the custom of delivering over the homicide's body to the victim's family. In Glarus the last wage of battle and the last witch-trial took place only in 1707.

But the cruelest of the old penalties had fallen into disuse. In Zürich, compounding and immuring had not been inflicted since the 1400 s, nor drowning since 1615; and by the 1700 s beheading had become the usual mode of execution. The figures of executions in Zürich and Schwyz show plainly the diminishing harshness: in the 1500 s, 528 executions; in the 1600 s, 336; in the 1700 s, 149. The modes of execution are equally significant: in the 1500 s, by fire 61, by gallows 55, by drowning 53; in the 1600 s, by fire 14, by gallows 10, by drowning 9; in the 1700 s, by fire 2, by gallows 16, by the wheel 1, by the sword (beheading) 106.

Most of the changes towards progress came about by judicial practice; express legislation is found for only the extremest defects; in the Bern Law-Book revisions from 1753 to 1765 is almost nothing of importance. But though legislation was not active, public opinion, as reflected in the literature of the period, was fully responsive to the new thought of the times. The "Aufklärung" period, here as in Germany—that movement of the leaders of educated thought to banish popular error and superstition and to introduce liberal thinking and "enlightenment"—showed its influence in criminal justice. The all-European agitation against torture received a welcome here and showed early and suitable results. Montesquieu's influence was widely felt. The beneficent possibilities of education found some of their leading apostles in Switzerland.

And as the new period of the 1800 s arrived, ushered in by the French Revolution, what were some of the principal features in which the survival of the traditional ideas of Swiss criminal law must still be seen?

1. The old peace-law still preserved its rules for the citizen's duty to intervene by parting the combatants and giving information to the court. The principle of honor in word and act was still a living one. Stealing and fraud were still more heavily penalized than wounding or even manslaughter; in Schwyz two men were hung for stealing and fraud as late as 1832. The abasing death was regarded as a theft. Gambling, the squandering of family property, shirking of labor, and the like, were strictly repressed. The modern point of view, which condones or adores smart dealing, tricky business methods, and clever evasion of obligations, so long as one keeps out of jail, was as yet nowhere
accepted in Switzerland. The primitive notions still prevailed that one's word should be as good as gold,—"honor with the word and with the sword." The Territorial Law-Book of Glarus declared that he who fails to pay his debts shall no longer be trusted in his word; the bankrupt was "honor-less"; and in this canton, it is recorded, so firm was the sense of honor that ordinarily neither note nor receipt was given when money passed.

2. In some of the cantons a mildness of penalties, remarkable for this period, is observable. In Uri, the death penalty was restricted to murder and arson. The wrongdoer is often described in the judgments as only a misguided man; the intercession of his family is given weight; the sentence is modified "in view of the circumstances of the case." No doubt this lenity may be attributed to the (nowadays often criticized) tendency of lay judges to undue weakness in imposing extreme penalties; and in these primitive cantons the tribunals were composed sometimes of as many as 200 or more citizens. But there is a general atmosphere of primitive patriarchalism,—benevolent, and yet crude in its methods. Flogging remained long in use as a judicial penalty; a notorious case of excess, in Uri, as late as 1865, aroused national resentment, and evoked even foreign comments on "the barbarous justice of Swiss democracy." Other penalties also served to illustrate the simplicity of a primitive community,—confession, church-penance, listening to an appointed sermon, pilgrimage. And equally suggestive were the sentences to be imprisoned by one's father, to be watched over by one's friends, or to abstain from wine or social company.

3. Nevertheless, the path was already prepared in many ways for accepting the new ideas of Napoleon's and Feuerbach's criminal codes in the next century. The old classical Swiss principle of individual manhood as its own defense, "honor and the sword," had in many cantons gradually become an anarchism. Habitual weapon-bearing, as a general custom, had long disappeared. The traditional right of self-defense and self-redress was strictly limited. The individual had become overshadowed by official authority. The peace-law system was antiquated and inefficient; and with it would disappear the kernel of the old law. A killing while under a special peace might still be legally murder; but the community was ready to accept a new point of view as soon as the law should formally sweep away the relics of the old system. For most of its details were plainly relics of the past. Chiefly in form

Chapter XI | Other countries in the 1500s-1700s

only was the criminal law in contrast with the coming ideas; the community was substantially ready for them.

C. NETHERLANDS

§ 59a. Sources of Criminal Law in the Netherlands before the 1500s.

§ 59b. General Features of the Criminal Law from Later Medieval Times to the 1700s.

§ 59c. Sources of Criminal Law in the Netherlands before the 1800s. After the fall of the Carolingian monarchy, there succeeded an epoch about which little is known. In all probability, the common law together with the King's law, in altered and perfected form, still prevailed in every-day usage, and became predominant as active law through its administration by the justices' courts. With the exception of the written sources of law, in which the common law found sanction, the most important sources of the common law in the 1500s were the collected customs and usages.

The written law began developing in some sections of Netherland in the 1000s, in others later, in the shape of charters, privileges, liberties, patents granted by the counts or other territorial lords, as well as municipal and rural laws, decisions, ordinances, court regulations, market privileges, etc. In the field of criminal law, these written sources originally included, as a rule, the assessments of fines; furthermore, they corroborated the common law as regard the ordinary crimes, or they fixed penalties for newly defined offenses, e.g., the clipping of money, begging, cattle-stealing, etc. Some of these rural and municipal laws for that period even contain fairly complete codifications of criminal law. For information regarding the law in earlier or later times, the investigator should not overlook the law books, explanations, or compilations such as the invaluable "Law-book of Briel" by Jan Matthissen, of about 1400, and the "Rural Law of Overijssel" by Melchior Wynhoff in 1539.

The Canon criminal law, although it did not prevail directly in the civil courts, became powerful in more ways than one. It influenced the people to regard crime as a sin (along with the "defecta ecclesiastica," the "defecta civilia" and especially the

1. The ensuing three sections are translated (with a few omissions) from §§ 3-11 of Professor J. A. Van Hamburgh's "Netherlands Criminal Law. For this author and work, see the Editorial Preface. — Ep.)
“mixta”), against which the Church threatened its penalties (“penitentiae”, “pene medicamentae”, “pene vindicativo”). It colored the views of the law-givers, and especially of the writers of standing, who frequently cited ecclesiastical decisions: while judgments of courts were influenced, partly by the Canon law in a narrow sense, partly by the authority of Christianity, in general, — based upon biblical passages, particularly the Mosaic law. Meanwhile, however, with the coming of the Reformation, the Canon law proper gradually ceased to be of importance in the development of the law of crimes in these sections of the country.

§ 89: The Roman Law and the Carolins. — The great event in the history of the law, known as the Reception of Roman Law, exercised in the Netherlands as elsewhere its powerful influence in the field of criminal law. An acquaintance with the Roman law undoubtedly began as early as the 1100’s and 1200’s, when the young men of the Netherlands began to visit the Italian law schools. The Roman law became further known through the development of legal procedure under the influence of those learned jurists who had already begun to exercise control over the government in the cities, but whose direct authority in the matter of the administration of justice assumed a decisive character during the rule of the Burgundian princes. The courts were then being composed of professionally trained jurists, and the Great Council had just been created (1473-1882) and permanently established at Mechelen in 1503.

Roman law had acquired, in the meantime, a positive legal status. The Instruction of Charles the Bold to the Council (1462) is the oldest known authority in which it is ordered “proceed after the contents and the form of written laws”; while in Plessen, which first acknowledged the authority of the Roman law, the “imperial laws” were definitely adopted by the confirmation letter of Charles V, in 1524. Whether the Roman law carried equal weight in all the provinces depended very naturally upon whether the written criminal law was equally complete in all localities.

That division of classic Roman practice relating to criminal law was, without a doubt, very slow in developing as compared with private law, for no systematic treatment of the law of crimes is to be found in the Roman law-sources. Because of the imperfections and defects of the national criminal law, and the growing need of a system of public law, the Roman criminal law

303

found a fertile soil prepared for its growth and development. The criminal law of which we are speaking is that of the Corpus Juris (mostly contained in “Libri terribiles” XLI and XLVIII of Digest, and Liber IX of the Code). It had developed, (a) from the old law of the “delicta privata”, (b) from the continually expanding “leges publicorum judiciorum” (“crimina publica”), “penne legitima”, “ordinaria”), (c) from the penalizing by means of “Acta” and “Constitutiones” of various acts (more serious forms of the “delicta privata”, or acts which could not be classified under any “lex publicorum judiciorum”), to which, as “crimina extraordinaria”, with the “extraordinaria cognition” of the imperial judges, a “penne extraordinaria” or “arbitaria” was applied. An especially wide choice of penalties under the public law was given in this latter Roman law, e.g., capital punishments of every description; corporal punishments which maimed the victim, and those which did not; confinement at hard labor; confiscation of property, etc. The various crimes were not clearly defined and distinguished, and there was no systematic development of general principles in the early sources. For instance, the definition of the several crimes was not sharply made; and though the “idoli” was expressly required, attempt or participation was also included in the general idea of each crime. But the Roman law, including criminal law, as accepted in the 1500’s, was not the pure law of the classic sources. The Roman source law in its original form had been worked over by the Glossators and Post-glossators; and the criminal law in particular had been to a certain degree systematized and scientifically treated by such Italian criminalists of the Middle Ages as Albertus Gandinlus, Angulus Arctinus, and others. This legal system acquired an ever-increasing influence, as later writers, in the course of time, gradually worked out and applied its principles.1

It will thus be seen that there existed in the Netherlands provinces, since approximately the 1500’s, a system of public criminal law which continued in practice until the epoch of the first general codification of the 1800’s, and which, according to the writers of this epoch, was derived from the following sources: the common law, written law in general (imperial, provincial, and local enact-
cause of its own worth and the additional value which it acquired through use by authoritative writers, it remained the foundation of the general law of crimes in Germany. In certain German States it continued to prevail until 1871, when the code of criminal law for the North German Union was introduced.

It was a debatable question, even in the latter part of the 1700s, whether this ordinance, intended for and prevailing in the Emperor’s German States, had any effect in the Netherlands, particularly in the province of Holland. It is pretty generally understood, however, that not only was it never formally introduced, but that no attempt was made to do so. Nevertheless, it had considerable influence, partly because some courts acknowledged its authority, and partly because some of the criminalists of the 1700s (particularly J. F. P. Becker, author of the "Meditationes ad C. C. C." 1770), who took it as the basis of their views, influenced the administration of justice in this country.

A similar controversy had been waged over the binding authority of the Criminal Ordinances of Philip II, of the 5th and 9th of July, 1570, the former treating of the measure, the latter of the method, of Criminal Justice, and both extensively commented on by the Dutch writer Wigele Van Ayttt. The basis of the dispute, however, was not the same in the two cases. For these ordinances were instituted by the king as lord of the Netherlands, while they were also proclaimed in some provinces, particularly in Holland and Gelderland. By the Pacification of Ghent (Art. 5), they were "suspended", entirely, according to certain authorities, while according to others, only in regard to the provision concerning herey; and the Union of Utrecht did not rescind from this resolution. Moreover, as the ordinances came from Philip and the Duke of Alva, and were considered to be contrary to the old privileges and customs, their introduction met with continuous opposition on all sides; but they were nevertheless followed in very many provisions, particularly by the law courts of Holland. During the period of the Republic, the ordinances retained a certain formal value, but they had no binding authority" (R. Fuin). Meanwhile, it should be noted that but few provisions of substantive criminal law are contained in these Ordinances, and these are found almost exclusively in the first-named Ordinance; among them being provisions in regard to crimes affecting the administration of justice, the prohibiting of private composition for offenses, principles according uniform rules of punishment, with cer-


Chapter XI

Other Countries in the 1500s to 1700s

came Antonius Mattheus (1601–1654), professor at Hardewyck and Utrecht, who in his work "De Criminibus" (which also includes a treatise on the Utrecht municipal law) went back to the sources of the Roman law, as distinct from Germanic and Canon law acquiring, for this reason, a wide influence abroad in the field of scientific law. Belonging also in this century were Hugo Groenius, who wrote the "Introduction to Dutch Law"; S. van Groenwegen; Joh. Voet (1719), author of "Commentarii ad Pandectas"; F. Zypscus; Pieter Bort, counsel for the courts of Holland and West Friesland, author of a "Treatise on Criminal Matters"; and Simon van Leeuwen, whose writings in the field of criminal law are indispensable guides to the administration of justice and the conceptions of law of this period. In the 1700s, the principal writers were E. van Zurec, on the law of Holland, J. Schraepenbroeken on the law of Gelderland, J. Moorman, and J. J. van Hasselt, J. L. Kersteman, and Prof. B. Voorda; and (during the latter part of the 1700s and the early 1800s) J. van der Linden, and others.

The writers outside the Netherlands, who were quoted as authoritative, include first, the great masters among the Glossators and Post-glossators who dealt with Roman law in general, particularly Bartholus (1557) and his pupil Baldus (1460); second, the writers on Italian criminal practice of the 1300s and 1400s (developed from Roman principles) such as Albertus Gandinus; Jacobus de Belisio (died 1335); and Angelo Aretinus. The Italian criminalists of the 1500s exerted still a strong influence: Hippolytus de Marsiliis (Bologna, died 1529), Aegidius Bossius (died 1546); and most important of all, Julius Clarius (member of the Supreme Court at Milan; died 1609), and Prosper Farciasius (Attorney-General at Rome; died 1635). Jurists of other countries were also cited, among them being the Frenchman Antonius Faber (died 1624); the Spaniard Antonio de Gomez, professor at Salamanca (1st half of the 1500s); several German writers as Andreas Gail, "the German Papianian" (Chancellor of the Elector of Cologne; died 1587), and particularly the Saxons, Matthias Berchius (professor at Leipzig; died 1638), and his still more famous and influential successor, the learned Benedictus Carpovius (member of the Supreme Court and professor at Leipzig; died 1666). The most important work of Carpovius was the "Practica nova Imperialis Saxonica rerum criminalium"; a Dutch translation of it, which was fraudulently obtained, — stolen from its lawful owner, Wielant of Ghent."
made with some abridgments by Dr. Didirik van Hogendorf, a judge of Rotterdam, remained authoritative in the Netherlands even longer than in Germany, because of its intrinsic worth and the method of its presentation, which was both systematic and adapted to the needs of the practice. Finally, toward the end of the 1700s, are to be noted as less authoritative the "Meditations ad Constitutionem Criminalis Carolinae" already mentioned, by J. S. F. Becker (1704–1772); the notes on the work of Carpio-vius, by the same writer; the manuals of Boehner and Meinder, recommended by van der Linden for university studies; and the work of Quistorp, and others, quoted by Meister, and after him referred to as authority in preference to his own work.

It must not be forgotten, with regard to this enumeration, that, with the growth of less drastic principles, and more reasonable scientific conceptions, many of the older writers were abandoned as authorities, and there arose representatives of the new order, who will be later mentioned.

Character of Criminal Law of This Period. — The character of the substantive criminal law (which, as derived from the various above-mentioned sources, prevailed until the first general codification) naturally resembled in many particulars the criminal law of other countries. Viewed from the standpoint of form, the variety of sources and the independence of the numerous courts resulted in numerous striking inequalities in the law, which could be obviated only by a general codification. A phenomenon of much greater significance, and one which tended to become even more widespread, is the fact that, owing partly to the instability, incompleteness, and confusion of the sources, there was an ever-increasing arbitrariness in the administration of the criminal law, by virtue of which many decisive questions could be decided "at the discretion of the judge." This power of the court was exercised in changing and alleviating the ordinary fixed penalties of the common law, or written law, whenever there appeared "great and notable reasons." In some cases the judge might alter the method of capital punishment and increase its severity; in others, the written law or practice left the judge the choice of an exceptional penalty, i.e., fine, imprisonment, lighter corporal punishment, or exile, in cases where the offense was not serious or "full proof" of the offense was lacking. In many instances, even the determination of an act's criminality was lodged in the court, when the act done was one for which no penalty had been provided in the written law. Now and then, contrary to the old but well-acknowledged rule, the infliction of capital punishment for acts never before expressly so penalized by any law, was left to the discretion of the judge. And besides this domination of the judge's discretion, another abuse of authority was not uncommon, in that parties accused of certain crimes either less serious in nature or difficult of proof (for instance, adultery) often compromised with the bailiffs and justices, by buying off the prosecution.

The main feature of the substantive criminal law of this period was its almost exclusive domination by the passion to deter from crime by severity and cruelty. Capital punishment was employed on a large scale and for all kinds of crime; and this penalty was inflicted in various cruel ways, — hanging, beheading, breaking on the wheel, drowning, burning, even quartering, — sometimes prescribed by written law, sometimes left to the judge's discretion. Corporal punishment — sometimes in the form simply of torture, though frequently carried to the extent of maiming members of the body or destroying the organs of senses — was frequently employed, either by way of increasing the severity of capital punishment or of accompanying the penalty of exile or of infamy. The complete or partial confiscation of property was also a frequent penalty. Confinement in prisons played a minor part; the rule ran that "the dungeon exists for detention, and not for punishment;", but one who suffered detention in the dungeon was often exposed to everything from which even a cruel man would protect his beasts (Dr. Schorer). In addition to all these penalties were the exquisitely cruel treatments of the rack, i.e., "the more thorough examination", the practice of questioning prisoners (in the so-called "extraordinary" procedure) for the purpose of inducing their confession. Through a misunderstanding (due to a printer's error in one of Philip's Ordinances), the rack was employed for this purpose, not only in cases of overwhelming evidence, but also (contrary to the original rule) in cases where the evidence was altogether insufficient. — Prosecutions for witchcraft, and the burning and banishing of witches, were another feature of the times — a terrible demonstration of the effect of superstition. And this entire system of cruelty and ignorance was upheld in subtle essays, supported by the most learned authorities, and administered by the most venerable and conscientious men.

Yet it must never be forgotten that in comparison with other
countries the Netherlands led in the hope for better things. The first authoritative voice raised against proceedings for witchcraft was that of the physician, Johannes Wier (1563) of Arnhem. The medical faculty of Leyden also took its stand against the practice. Although witches were burned in German towns until the middle of the 1700s, the last one executed in the Netherlands was in 1597, the last one exiled in 1610. Shortly afterwards S. van Leeuwen publicly denounced prosecutions for witchcraft as a mark of superstition. The rack, it is true, was not formally abolished until 1728, and the authorities continued to maintain it; but by that time the institution was already thoroughly discredited. Confiscation of property was abolished in Holland in 1732, in Zealand in 1735, and in Gelderland. As early as the end of the 1700s and the early part of the 1600s punishment by imprisonment was introduced; these "ramp-houses" and houses of correction, originally designed for youthful criminals, were later on used for adults also; and "steady labor" was made a part of the penalty, "as a means of bettering their lives." In general, however, the Netherlands during this period made a very poor showing in the field of criminal law.

The Reform Movement of the Later 1700s. In the second half of the 1700s, a strong movement for reform developed throughout Europe. Before long, it led to the diminution of the worst abuses, and toward the end of the century, destroyed them altogether. But its effect on criminal law and procedure was not completed until well on in the 1800s. This reform movement started from below, in a suddenly-awakened popular opinion, and was directed against the unfair methods and the subtle learning of the authorities in the administration of criminal justice. It soon gained a foothold in all circles of thought and among all nationalities. Its origin may be ascribed primarily to two events, which made an overwhelming impression on public opinion. The first was the conviction and execution of Jean Calas, in the criminal court of Toulouse; falsely accused of the murder of his son, he was condemned to death and broken on the wheel; Voltaire, in 1732, expounded this case to the world in all its injustice. The second event was the publication of Beccaria's treatise, "Dei delitti e delle pene," which protested against the death penalty, corporal punishments, the rack, and other iniquities of the old system of criminal justice. This work, though scientifically not well thought out, won a hearing by the fervor of its style. It demanded were immediately echoed on all sides. It was "a cry of distress uttered from the conscience of mankind," and it was read in almost every European language.

This reform movement, however, was merely one of the phenomena of the so-called era of "Enlightenment" ("Aufklärung"), when the contest between freedom of thought, on the one hand, and tradition on the other, was being waged along so many different lines. The protest against cruelty of the criminal law found support in the spirit of the times. The reform movement was largely instituted and guided by the representatives of the philosophical school, then becoming active in the entire field of natural law. Chr. Thomasius (1655-1728), in particular, by his doctrine of discrimination between law and morality, and his dissertations against the practices of witchcraft, the rack, and degrading punishments, may be considered the direct forerunner of this entire period. In the second half of the 1700s its leaders were Rousseau, Montesquieu, Voltaire, and their sympathizers, the encyclopedists, and the humanists, in France, Panslow and the school of Wolff (Engelhard, 1750) in Germany, Filangieri in Italy. They arranged the antiquated criminal law at the bar of Reason. Voltaire took personal interest in obtaining freedom for numerous innocent victims of the law, and his example was imitated. Criminal justice became a prominent topic of discussion in scientific and literary circles. A society of economists at Bern offered a prize for the best essay on the great subject (1782); the essay by Glogier and Hunter was the successful one among forty-four competitors. Enlightened princes, advised by wise statesmen, sought to embody the new ideas in laws and ordinances—Catherine II of Russia, in her Instruction to the Commission on a Draft Penal Code (1768); Leopold II of Tuscany, in a Penal Code abolishing the death penalty (1780); Frederick II of Prussia, in several ordinances reforming criminal procedure (1780); Maria Theresa of Austria, whose efforts (advised by Rumfeld) resulted, however, only in a new code (the Theresiana, 1788) imbued with the old spirit, and her son Joseph II, in a Penal Code (1787) which became the basis for future advances. But much of all this effort was only transi-
tory and inadequate in its effects. Not until the tremendous political shock of the French Revolution was felt did the old criminal system begin really to crumble away.

The new thought penetrated but slowly in the Netherlands. It had its supporters (such as Schorer) and its prudent but sympathetic advocates (such as Calhoen). It had also its opponents (such as Barels and Voerda), warning all against "the errors of the new-fashioned philanthropy." But the spirit of the times had rendered the philosophy of the law attractive. Particularly after the rise of new scientific methods in law in Germany, criminal authorities of a very different quality from those of former times had become available. As J. M. Kemper expresses it, "the appeal to philosophical German and French writers was already being voiced before the courts almost as often as one had heard exclusively, in former years, the names of Danckouder, Matheus, and Carpovius."

At first, the manuals by Quisdorp, Boehmer, and others, before mentioned, were cited. Later, the works of Klein, Kleinschrod, Gullman, and Feuerbach, the founders of the new German science of criminal law, replaced the former philosophers. But legislation and unity of legislation were chiefly necessary for the administration of justice and the advancement of legal science. These were made possible by the Dutch revolution of 1795.

TITLE IV. THE FRENCH REVOLUTIONARY PERIOD

CHAPTER XII. THE FRENCH REVOLUTIONARY REFORMS.

CHAPTER XIII. THE GERMAN REFORMS OF THE FRENCH REVOLUTIONARY PERIOD.
Chapter XII

THE FRENCH REVOLUTIONARY REFORMS

§ 60a. Reform Movements on the Eve of the Revolution. —

It does indeed seem, when we study our criminal law of the Old Régime, and compare it with that of the last centuries of the Roman Empire and the first centuries of the Middle Ages, that civilisation had made no progress on the subject of penal law, — had in fact remained stationary. Throughout it was marked by the same defects, in each of these epochs. Punishments are unequal; they vary according to the status or rank of the offenders rather than the nature of the crime. Punishments are also cruel and barbarous in their method — the base of the system is the death penalty, and a prodigal use of bodily mutilations. Furthermore, punishments are variable in discretion; crimes are loosely defined; and the individual has no security against excess of severity in the State’s repression of crime. Finally, ignorance, prejudice, and emotional violence breed imaginary crimes; and the scope of penal law extends beyond the regulation of social relations and trespasses even upon the domain of conscience.

It is well to recall these shortcomings, so that we may better understand the progress which has taken place and the benefits for which we are here indebted to the French Revolution. In fact, though it is not incorrect to say that the whole of the old French civil law persisted (with some modifications) in the present civil Code; it can be affirmed, nevertheless, that the modern penal law

3§ 60a, 90b — §§ 67, 69-74, pp. 118, 122-131, of Vol. I of Professor R. Garaude’s “Traité théorique et pratique du droit pénal français” (2nd ed. 1868). For this author and work, see the Editorial Preface. These sections replace § 60 of Professor von Linn’s text. — Ed.

second half of the 1700s, and rested on two new ideas: reason and humanity. As early as 1721, Montesquieu, in the “Lettres persanes”, had discoursed on the nature and the efficacy of punishments; then, in book 6, chap. 12, of the “Esprit des lois”, he expounded the true principles of a penal law. But it was reserved for Beccaria, a disciple of Montesquieu, to give to Italy the glory of taking the initiative in the movement of reform. In all epochs Italy has been the classical land of criminal law. Of the works which contributed to make her famous in this period, none has influenced the ideas and usages of Europe to an extent comparable with Beccaria’s “Treatise on Crimes and Penalties”, which appeared in 1764. Beccaria was the first to formulate precisely the criticisms of the old system and to propose a plan of reform. He drew up, as it were, a charter of humanity’s claims against the criminal law.

Beccaria’s doctrines were immediately commented upon and developed in France. Rousseau, to be sure, busy mainly with questions of morals and of politics, gave little attention to criminal law: he devoted it, in passing, a word or two in his “Contrat social”; but even this much was destined to have a great influence on penal legislation. Villemain has pointed out, “a characteristic trait of the years just preceding the Revolution, philosophy’s invention of business, of government, of law,—speculative innovation transformed into active and real innovation.” At the head of this movement we find Voltaire; he writes “that he is doing nothing but read trials”; and he published a commentary on the “Traité des délits et des peines.” The learned

1 Beccaria, “Dei delitti e delle pene”, Munich, 1766, in octavo. No treatise on criminal law has been reprinted so often. A French ed. of this work was published under the title: “Des délits et des peines” in 1808, with an introduction and a commentary by Faustin-Hélie, supplemented, annotated, and preceded by a preface and an introduction by Jules-Léonard and C. Delpech (1866, Paris, Firmin-Désail). This treatise on crimes and punishment coincides or discusses the most important questions of criminal law, but particularly it opposes the death penalty and the use of torture to secure proper limitations for the operation of the penal system by the principle of reducing punishments to the severity necessary for maintaining public safety. It may be said that the nominal semblance of criminal law in the 1500s was the product of this small book of Beccaria. Has this school finished its historical cycle, as some now maintain, or is penal crime, as Tocqueville says, “an evil event, that has not yet vanished and that seems to me to be the origin of the whole system of penal law? It is being transformed, and that the ideas of Beccaria are being abandoned on many points to-day.

2 See what is said by REMSCHEID, “History of Continental Criminal Procedure”, p. 392. Of this treatise on the ideas and works of the three men who did most amongst the philosophers for the reform of criminal law, Montesquieu, Beccaria, and Voltaire.
Academies interested themselves in the subject; they assigned for prize-essay competitions "this important subject", as Boucher d'Argis called it; among the prize-winners in these competitions were men who later played an important rôle in the Revolution, and we note among these names, not without some surprise, Robespierre and Marat. The movement spread to the bench and the bar. Attorney-General Servan reproached the idea of Beccaria in his address of 1766 on the "Administration de la justice criminelle", which caused such a great stir. The penal institutions of the time found defenders only among a few jurists who were behind the times.


Robespierre, advocate at, was the author of a "Mémoire sur le préjugé qui étoit à la famille du coupable-la bonne des peines infamantes", an essay awarded a prize by the Academy of Motifs in 1782. Merit was the author of a "Plan de législation criminelle" (1st ed., 1789; 2nd ed., 1790).

"This address is to be found in Volume IV, p. 332, of the first series of "Journal des débats", published by Clair and Clapière. One eloquent and courageous passage in that beautiful address has become classical: "Lift your eyes", said he to his colleagues, and see above your heads the image of our Lord, himself once an innocent man on trial. You are men, the human. You are judges — be just. You are Christians — be merciful. They are the two leading characteristics of the epoch, opposed the proposed reforms. The latter of the two texts, "Traité des délits et des peines de Beccaria, the title; "Lettre contre la réputation des crimes, sous le nom du traité des délits et des peines", Geneva, 1767. To the publicist of this work reveals a strange state of mind in the most distinguished criminals of his time. Muyart de Voungans obviously does not understand Beccaria. He regards him as a bandit (p. 22). What astonishes Muyart most is to find a work on criminal legislation which is not primarily a technical book devoted to positive law (p. 25). As for the proposals which he discovers in the traffic of Beccaria and which he points out with indignation to public opinion as so many social horrors (pp. 9 to 17), they are very truths which serve to become the death-blow to class equality before the law, exemption of the accused from compulsory oath, and the abolition of torture.

Joasse, in the preface of his "Traité de la justice criminelle", p. 64, expressed himself thus: "The 'Traité des délits et des peines' tends to establish a system of the most disgraceful kind. It reveals novel ideas which, if they were to be adopted, would do nothing less than overthrow the laws hitherto accepted by the most civilized nations; they would impugn religion, morals, and the sacred maxims of the government." In such terms, however, men have always defended existing institutions, which they considered fundamental, and fought the reform of them.

On this point: Epstein, op. cit., p. 370.

But none of these defenses found favor in public opinion. The legal system, even before the end of the Old Régime, itself had begun to feel the need of reform. In Russia, Catherine II had shown encouragement to the philosophers, and gave instructions for drafting a criminal code. In Germany, Frederick II and Joseph II, influenced by the ideas of the Encyclopedists, had introduced some radical reforms in the cruel system then prevailing; the former had begun his reign by the abolition of torture; the latter promulgated a penal Code in which the death penalty was omitted, save for military crimes. In Tuscany, also, the Grand Duke Leopold suppressed the death penalty. In France itself, under the same influence, partial and gradual mitigations were introduced into the criminal law. A royal declaration of August 24, 1780 abolished the preliminary torture. Of the eve of the Revolution (May 5, 1789) an edict was issued, announcing a general reform in criminal procedure, and, in the meantime, repealing "several abuses" which pressed for a remedy: 1st, the use of the culprit's kneeling-stool was forbidden; 3rd, judgments of conviction must state the reasons therefor; 5th, the abolition of the preliminary torture was confirmed; 9th, sentences involving capital punishment were to be executed, as a rule, only after a month; 5th, persons acquitted were given the right to reprieve for injury to reputation. This edict indeed was not carried into effect; but it showed that the reforms were ripening, and that it remained only for the will of the nation to achieve them. Public opinion revealed a unanimity of this sort on no others of the many questions agitated at this period. In the reports made from the various provinces to the States-General, we find already a demand for the reforms which the Constitution of the philosophers of the 1700's: 1st, equality, individuality, and mitigation of the penal system; 2nd, suppression of discretionary powers of the judge; both in the definition of criminal acts and of the determination of punishment; 3rd, abolition of crimes against religion and morals; 4th, publicity of procedure; 5th, assistance of counsel; 6th, abolition of the accused's compulsory oath; 7th, duty to state the grounds for judgment, and to declare them publicly; 8th, the institution of the jury. Such,
in their main outlines, were the ideas which were to serve as a basis for the new criminal law. 6

§ 908. The Code of 1791, and the Code of Brunnaire. — The work done by the Constitutional Assembly in the domain of penal law was of a double sort. In the first place, it determined to place on record the new principles formulated for the penal system by the philosophy of the 1790s. In the next place, it set about realizing these principles in the administration of justice, and codifying the law.

The principles were contained in the Declaration of the Rights of Man, of August 26, 1789, and in a few other enactments, especially the decrees of January 21, 1790, and of August 16 to 24, 1790. According to the terms of Art. 2 of the Declaration of Rights, the aim of every political society is "the preservation of the natural and inalienable rights of man." This was a principle borrowed from the theories of the "contrat social"; its corollary was that the State power ought and can concern itself only in maintaining "good order" in the relations of men among themselves. Hence, the two following consequences: 1st, As to crimes: "The law has the right to prohibit only actions harmful to society." Moreover, no person is to be interfered with on account of his opinions, even on the subject of religion, provided their expression does not in any way disturb public order. With the recognition of this sacred principle of liberty of conscience there disappeared all the prosecutions which our early lawyers called "crimes of lèse majesté against God," such as blasphemy, heresy, sorcery, etc. 2d, As to penalties: "The law shall inflict only such punishments as are strictly and clearly necessary.

To harmonize the penal system with that of the principles, the Constitutions Assembly strove to remove all the inconsistent features of our old criminal system. Punishments had been determined according to the judge's discretion; so the Assembly laid down, in Art. 8 of the Declaration, that "no person shall be punished except by virtue of a law enacted and promulgated previous to the crime and applicable according to its terms." Penalties had been unequal; so the Assembly decreed, in Art. 1 of the law of January 21, 1790, "that offenses of the same nature shall be punished by the same kind of penalties, whatever be the rank and the station of the offender"; and Title I of the Constitution of September 3, 1790, gave to this principle the status of a constitutional law. Punishments had not always been personal (i.e. confined to the offender himself); so the law of January 21, 1790, declared that "neither the death penalty nor any infamous punishment whatever shall carry with it an imputation upon the offender's family," since "the honor of those who belong to his family is in no wise tarnished," and by the same Article, the relatives of the offender "shall continue to be eligible to all kinds of professions, employments, and offices." The penalty of general confiscation of property was abolished. Punishment was not to outlive the offender's death; not only were there to be no more proceedings against offenders dying before trial, but the corpse of an executed man was to be given back to his family on request. The record of his death was in no wise to mention the mode of death.

Having thus proclaimed the basic principles of penal law, it remained to give effect to them. The ensuing legislation for the system of prosecution and detection was divided into three parts: general (or, municipal), correctional, and detective; corresponding to the three classes of offenses, general (or, municipal) offenses, correctional offenses, and offenses against public security. To maintain this distinction, the Constitutional Assembly enacted two separate Codes, one for crimes in general, the other for misdemeanors; the Penal Code of October 6, 1791, was for crimes; the law of July 22, 1791, for misdemeanors. This system has some disadvantages, to which we shall return.

The Code of October 6, 1791, is exclusively a penal code. It is in two parts, each subdivided into titles and sections. The first part, entitled "Sentences," includes the general penal law and is divided into seven titles. These titles deal with: 1st, criminal punishments (tit. 1), which are death, labor in chains, reclusion (in a penitentiary), confinement (shutting up the offender in a lighted place without chains or bonds), detention, transportation, civic degradation and the "caenar"; 2d, aggravation of penalties, applicable to second offenders (tit. 2) (the recidivist first suffers the ordinary punishment inflicted for the new crime who has been committed, and is then transferred, for the rest of his life to a place appointed for the transportation of criminals); 3d, the manner of enforcing sentences against those who fail to appear for trial (tit. 3); 4th, the legal consequences of sentences (tit. 4); 6th, the manner of substituting the death penalty for other punishments (tit. 6).
two sittings only, the Convention accepted it, with little question. This Code, which is the first to contain a system of Articles in an uninterrupted series (1 to 646), was primarily a code of criminal procedure; penal substantive law occupies only a limited place. Book II, entitled "Administration of justice," contains several provisions for offenses of disrespect to constituted authority (Arts. 555 to 559). In Book III, entitled "Punishments," the only topics are: 1st, a more precise classification of the various kinds of punishments into ordinary police, correctional, afflicting, and infamous punishments (Arts. 599 to 604); 2d, an enumeration of the offenses liable to ordinary police punishments (Arts. 605 to 608); 3d, definition of certain crimes against the internal safety of the State and against the constitution (Arts. 612 to 646). It ends with a confirmation of the law of July 19, 1791, and of the Penal Code of September 25, 1791 (Arts. 609 and 610).

The general system of penal law resulting from this body of legislation had substantial defects, notably in these three respects:

1st, The executive power of pardon and of commutation of sentence were abolished for all offenses tried by juries (P. C. of 1791, tit. VI, Art. 13). This measure was due to the spirit of reaction against the abuses of Letters of pardon, so frequent under the Old Régime. None the less, it was a mistake; for the power of pardon must have a place in any rational system as the necessary complement of social justice.

2d, This blunder resulted in a second, still more serious: the abolition of penalties involving perpetual loss of liberty. Labor in chains, which was the next highest after the death penalty, was no longer a term of twenty-four years. Indeed, in a penal system which does not recognize the power of pardon, there is no place for life penalties, for we take away all hope from the convict; and the most powerful motive for repentance disappears if he is not allowed to feel the possibility of liberation.

3d, This text runs thus: "The issuance of any document tending to hinder or suspend the exercise of criminal justice by any Letter of pardon, of discharge, of abrogation, of amnesty, or of commutation of sentence is abolished for all crimes tried by juries."
3d. Finally (and this is the chief defect of this legislation), in the case of offenses punishable with afflicting or infamous punishments, the punishment for each offense was fixed specifically and unalterably, without naming a maximum or minimum, between which the judge might have at least some slight choice.

"The Constitutional Assembly," says Treillhard, in the commentary of the Commission accompanying the penal Code of 1810, "was convinced that it could not enclose within too narrow boundaries the powers given to the magistracy: it regulated, therefore, with great precision the duration of the punishment to be applied to each individual case; its aim was that, after the verdict of the jury, the judge's function should be limited to the mechanical application of the text of the law." Thus, through hatred of the discretionary powers which the judges under the old system had so abused, the Assembly went to the other extreme: they abolished the power of pardon, and took from the judge the power of adjusting the punishment to the personal and variable culpability of the offender. The result was that the penalty was frequently disproportioned to the deed which it aimed to repress; and that juries, making a compromise with their consciences, preferred to acquit the offender rather than to bring upon him a punishment which they regarded as exaggerated.

The Code of 1791 held sway over France until it was replaced, in 1810, by the Penal Code still in force to-day.

CHAPTER XIII

THE GERMAN REFORMS OF THE FRENCH REVOLUTIONARY PERIOD

§ 61. The New Direction to German Criminal Theory in the Late 1700s. — The problem of reformation was tackled by the German jurists in the late 1700s with the aim of improving the penal code and making it more humane. This was in response to the harshness of the Code of 1791, which was applied with great severity, often resulting in unjust or disproportionate sentences.

§ 62. Fennelbach as Legislator for Bavaria. — The Bavarian Draft of 1812 and the Code of 1813 reflect the new direction in German criminal theory, emphasizing the importance of individual responsibility and the moral basis of punishment. This shift was a reaction to the excesses of the revolutionary period and a move towards a more just and humane penal system.

chapter XIII THE FRENCH REVOLUTIONARY REFORMS

murt", forecast the destruction of the rubbish which at that time served as authority and the reassurance of a constructive system of law. And the turning-point in legal science was further marked by Feuerbach's "Revision of the Criminal Law" (1799), by the vigorous attack of Großen and especially of Feuerbach on Klein and others; and ultimately by the learned controversy between these two friendly antagonists themselves, Großen and Feuerbach. Once more the distinction was insisted on between general philosophic ideas and a practical system of law. The value of a constructive system of legislation again came to be realized, and with it the possibilities of the judicial administration of such a law. Criminal law and criminal procedure were now cultivated in journals devoted to that field. In 1797, Großen, Feuerbach, and von Almendingen began the publication of the "Bibliothek für polnische Rechtswissenschaft und Gesetzgebung," Klein and Kleinshofer (of Würzburg) in 1798 founded the "Archiv für das Criminalrecht", which was for many years the central publication of German criminal law. The false relation between criminal justice and the police authority (embodied in the oft controverted "punishment on suspicion") was completely overthrown by Feuerbach, and the distinction between criminal justice and police measures was clearly demonstrated.

The Movement towards Prison Reform. — During this same period the movement started by the Englishman Howard, for the improvement of prisons and criminal institutions, showed its effects in Germany. The conditions in many of the great

5 Klein's essay, "Ueber Natur und Zweck der Strafe," in the "Archiv des Criminalrechts," Vol. 2 (1900), from the historical viewpoint is far more accurate than Feuerbach's "Revision." Cf. also Klein as to Großen's "Lehrbuch" in the "Archiv des Criminalrechts," Vol. 1, P. 1, pt. 4, pp. 125, etc.

6 John Howard, "The State of the Prisons in England and Wales" (1777); translated in part into German, with notes and additions, by Ketteler (Leipzig, 1790).


8 "Grundzüge der Criminalwissenschaft der deutschen Staaten," (Leipzig, 1800).
criminal institutions in Germany were indeed not so revolting as in most of the English prisons. In many principalities, as a result of reformatories and careful supervision by the local authorities, prison administration observed (at least towards those prisoners not serving the severest sentences) methods of treatment which were based on humanity and even on principles of education. Yet there was no well thought out and systematic scheme of prison penalties, and even the institutions then regarded as the best were used also as asylum for the insane, the poor, and even the orphans. Ideas of progress, which even yet have not reached their full fruition, were at that time struggling against opinions and conditions which to us to-day are inconceivable.11

§ 62. Feuerbach as Legislator for Bavaria. — It was natural that a State like Bavaria, which as a result of external circumstances had (for the time) attained such a prominent position and which at the same time inclined so much to follow France, should enter upon a thoroughgoing reform in the province of criminal law as well as in the other branches of governmental activity. This was furthered by the fact that in Maximilian Joseph it possessed an enlightened and liberal-minded ruler. The task of preparing a draft for a penal code was assigned to Kleinschrod, professor at Wurzburg. His draft, published in 1802, was in many portions exceedingly ambiguous in its construction and its underlying purposes. Its general spirit was that of the criminal portion of the "General Prussian Landrecht." It met with an able criticism at the hands of Feuerbach, who was himself a master of style; and the principles he invoked were absolutely correct. Imperfection in a code, he observed, may well consist in the very fact of its excessive detail.12 "Not only must a code deal with all subjects within its sphere, but it must also govern these subjects by precise exhaustive definitions and by broad rules of universal application. No code can comprise all cases and examples.... If legislation thinks that detail in dealing with the several possible cases and multiplicity of special provisions can make amends for the lack of general definitions and principles, it will be defective and imperfect by the very reason of its prolixity." "The (wise) legislator does not speak in syllogisms, and does not use philosophical and technical words of expression. He displays his philosophical spirit in the depth and breadth of his conceptions and in the figures of his art. He speaks the language of the people with the clear and lofty spirit of wisdom. His simplicity is in harmony with the correctness and precision of his ideas. Capable of being understood by all, his principles furnish the thoughtful with a rich fund of ideas." Feuerbach also justly insisted upon system in a code.13 "To be sure, a code is not a compendium; it can never aspire to the scholastic artifice and precisely articulated form of a system. But its principles should coordinate in a plain, simple arrangement determined by their association and relationship. Moreover, there are certain negative principles of a system which the legislator should follow. Nothing should be in the wrong place. Laws dealing with extraneous subjects should not be introduced into other laws to the confusion and destruction of their coherence; and laws should not be exposed to mistakes and confusion because of their position or the heading under which they are included or the connection in which... they are used. While the work of the legislator is not scientific jurisprudence, yet it is for science and from it science should ensue." All this, to be sure, is but little in harmony with that set conception which many, in their desire to banish all arbitrariness and discretion from the courts, form of the relation of legislation and jurisprudence. Quistorp, for example, in his "Draft of a Code for Penal and Criminal Cases,"4 had proposed to forbid comments on the criminal law by jurists in printed publications.5

The result of this criticism of the Bavarian draft was that

---

11 Cf. the observation of Wagnitz (II, pp. 67 and sqq.) concerning the "Zuchthaus" in Code.
12 In many institutions of this character (e.g. in Leipzig, Frankfurt a. M., Augsburg, cf. Wagnitz, I, pp. 207 and sqq., II, pp. 50, 91, 92, II, p. 11) the state of things was bad enough. Brutal treatment — e.g. frequent use of wine-braised whips — deadened all sense of honor. An illustration of this brutal treatment was the custom of flogging upon admission to the "Blau."
14 In Mattei, op. cit., those who were confined in the fortresses were obliged to procure their clothing by begging. Katzenhuber, p. 243.
Feuerbach himself received a commission to prepare a new draft of a code for Bavaria. In 1805 he was appointed Minister of Justice of Bavaria (of which he was a subject), a State which at that time occupied a position of considerable power and was quite disposed towards thoroughgoing reforms in all branches of law.

The Bavarian Code of 1813. — The Bavarian Criminal Code of May 16, 1813, though by no means entirely in accord with Feuerbach's views, was based substantially upon his draft, and was emphatically an epoch-making work in German criminal legislation. It is remarkable for its clearness of expression, worthy in every respect of a legislator, for a completeness in its General Portion and a precision in its definitions that hitherto unknown in German law. Naturally, in a work by Feuerbach, nothing is to be found of the doctrine of unlimited judicial discretion; but (as with the French Code Penal and most of the subsequent legislation) the Code gives the judge the right of fixing the punishment within a certain maximum and minimum. A decided improvement lay in the fact that the rules for aggravation and mitigation of punishment were sharply distinguished from the judicial right to fix the penalty within the customary field for discretion. Like the French Code, the Bavarian Code assumed itself to be complete; and, according to Article 1, the resort to analogy, for the purpose of thereby imputing criminality to an act, is forbidden. "For it is upon this principle," says the official Annotation to the Code, "that the security of the State and of every individual depends." It follows the French Code in adopting the triple classification of "Crimes", "Misdemeanors", and "Transgressions." The last mentioned are entrusted to a special Code for Offenses against Police Supervision, and "crimes" are allotted to the "criminal" courts, while "misdemeanors" are allotted to the jurisdiction of the "civic penal" courts, and "transgressions" are left to the jurisdiction of the police officials. The provisions of the General Portion, however, apply both to

Feuerbach did not accomplish his purpose of abolishing flogging, Cf. supra, p. 15. Moreover, tortures yielded in 1806 to Feuerbach's attacks. "Upon the soundness and completeness of these the fate of all special criminal provisions depends." ("Official Annotations," 1, p. 46).

"Official Annotations," 5, p. 222 et seq.

I. e., "Verbrechen", "Vorwürfe", and "Uebertretungen.

Art. 9.

Under "crimes" are comprehended all punishable actions which, on account of their nature and the extent of their evil are threatened with the death penalty, whereas of chains, imprisonment in a penitentiary,

Chapter XIII: The French Revolutionary Reforms

"Misdemeanors" and to "crimes." A well-calculated system of punishment should adjust itself to the character of the individual criminal act, and as stated in the "Annotations" it is the quality and not the quantity of the punishment which should be determined by the character of the act.

Defects. — In contrast to these meritorious features of the Bavarian Code, there were some considerable defects, which for a long time continued to exercise no slight detrimental influence on the legislation of the other German States. Feuerbach certainly was conscious of the distinction between the task of the legislator and that of the scientific jurist. But, as a dialectician, he relied too much upon his own discernment and believed that the fundamental problems of science could receive final solution in definite formulas. For this reason the General Portion of his work contains a long list of perversely unsuitable provisions and definitions. Article 65 and those following, dealing with negligence, are out of place in a code; and the provisions relative to unlawful intent are in large part completely erroneous, and reach their climax in his famous or rather notorious "presumption of malicious intent." This Code of his also originated those unfortunate and subtle provisions as to conspiracy ("Complot"), which infected like disease-gums most of the later German Codes, and were but slowly eliminated. Moreover, at the theory of deterrence, which he sought to follow, required that the greatest possible restrictions be placed upon the exercise of judicial discretion, the Code's details as to penalties lost themselves in trivial provisions which in many cases were inevitably either incorrect or open to doubt. Another defect, due to the deterrence theory, was the harsh penalties for second
offenses; and since the deterrent theory assumes that a penalty which has been announced by way of threat is always justifiable, the Code authorized infliction of severe punishments for acts which only presumably, or even possibly constituted a crime. Moreover, since Feuerbach aimed to separate absolutely law and morality, the Code would in no case regard as crimes grave breaches of morality which did not violate subjective rights. Adultery, for example, is treated, very superficially, merely as the intentional failure to perform a contract and is dealt with in the same division as violation of powers of attorney. It is also peculiar that Article 106 permits of certain species of "punishment on suspicion" ("Verdachtstrafe"), although this is not recognized by the Annotations.

Corporal chastisement appears in the Code only as aggravating the punishment of imprisonment; the legislator, however, forbade its infliction at the end of the period of punishment. Confiscation of property was abolished by the Bavarian constitution of 1808, and this was confirmed by Art. 33 of the Code. But in accordance with Art. 7, the artificial and unnatural institution of civic death continued in Bavaria until the statute of Nov. 19, 1849. The only aggravation of the death penalty recognized by the Code was preliminary exposure on a pillory.

Soon after the publication of the Code were promulgated the official "Annotations to the Code of the Kingdom of Bavaria according to the Decrees of the Royal Privy Council." But it is worthy of note that the royal patent for its publication forbade the publication of further commentaries on the Code (although it could itself very properly be designated as a work of scientific jurisprudence); and even the lecturers in the Universities cited exclusively to the text of the law and these official "Annotations", although the latter were often at variance with the clear text of the law.

of the authorities in cases where the authorities lack jurisdiction or their order is improper (Annotations, 111, p. 25). Even more than the Code, the Bavarian statute of Aug. 9, 1806 concerning the punishment of possessing ashes to the theory of deterrence, Arnold (comp. p. 400) gives a good description of the effect of this "deterrence" in actual practice.

"Arts. 113 et seq."

"Annot. 111, p. 25.

"Arts. 149, 160.

"Arts. 401, 402, 41, p. 59.

"As to the somewhat disproportionate punishment of adultery, cf. Arnold, pp. 373 et seq.

"Anmerkungen zum Strafgesetzbuch für das Königreich Bayern nach den Protokollen des königl. geheimen Rates" (3 vols., München, 1813).
CHAPTER XIV

THE FRENCH CODE OF 1810, AND FRANCE IN THE 1830s

§ 62a. The Penal Code of 1810. | § 62b. Principal Changes during the 1830s.

§ 62a. The Penal Code of 1810.—French criminal law includes (1) the general law, i.e. the Penal Code, the Code of Criminal Procedure, and their appurtenants and amending statutes, and (2) the special law, i.e. special laws covering special offenses and special procedures.

The general criminal law has been several times codified, reformed, and revised since the Revolution of 1789. In fact, we may distinguish, in what concerns criminal and civil law alike, three different legislative processes: codification, which builds on a new plan the whole of a legislation; reform, which modifies the Codes and gives them new life; and revision, which perfects them without altering the fundamental regulations. The provisions of the general criminal law are today embraced in two Codes: the Penal Code and the Code of Criminal Procedure, which replace the laws of the intermediary epoch. The history of the original enactment and later changes of these two Codes is as follows:

A commission, appointed under the Consulate (by a decree of 27th Germinal, year IX), and composed of MM. Visillard, Target, Oudard, Treibhard, and Blondel, had been charged with the drafting of a single Code, to cover both general principles and details. This draft, submitted by this commission and composed of 1100 Articles, was prefaced by some general comments; those prepared by Target dealt with punishments; those of Oudard, with organic provisions and with procedure. This work was immediately


236
The Penal Code of 1810 was at once reactionary and reconstructive. It took as its basis the principles of the utilitarian school. In essence, it aimed to secure the defense of society, by means of intimidation. The philosophy of penal justice does not seem to have concerned the mind of the legislators any further than a certain attention to the judge’s apportionment of the punishment to the offense. The Penal Code was divided under three heads—crimes, punishments, and jurisdiction. In its definitions of crime it is notably famer for its excessive severity; it also went too far in many points, as in making criminal a failure to reveal a plot and in clashing the attempt with the consummated crime, and of the accomplice with the principal. In its system of penalties, the Penal Code concerned itself exclusively with punishment; the idea of reforming the offender through the law was foreign to it. We find the death penalty and life punishments freely applied, excessive chastisements, barbarous mutilations, and penalties unjust in their effects, such as general confiscation and civil death. It inflicted upon the paricide the mutilation of his hand before putting him to death; it employed the brand (for certain convicts) and the “carcan.” Its system of imprisonments was only a fiction, for there were no penal institutions suitable for the various punishments. Such were the chief defects of this legislation. But from other points of view the Penal Code of 1810 did institute or preserve some important advances. First, as a work of codification, it is drawn with much simplicity, clearness, and order.

Upon the philosophical principles which inspired the framers of the Penal Code, we find the following in the “Observations of Tarcent, placed at the beginning of the draft: “Punitory punishment is not vengeance; this wretched satisfaction, the reach of a low and cruel mind, has no place in the theory of the law. The necessity of punishment is shown by the very nature of a law. It is not the crime aimed at the law that the offender should suffer; the thing of chief importance is that crimes be prevented. If a man, in a most desperate case, after committing a crime he had been committed, we could be sure that no further crime were to be feared, the punishment of this final offence would be useless barbarity; some would hesitate to assert that it would exceed the power of the law. The gravity of crimes is measured, therefore, not so much by the perversity which they reveal as by the danger which they entail. The efficacy of punishment is measured less by its harshness than by the fear which it inspires. Lear, Vol. XXIX, p. 18. These remarks express with the greatest clearness the doctrines of Bentham; and his doctrines undoubtedly formed the basis of the provisions of the Penal Code of 1810. Beccaria’s treatise on civil and penal legislation had been translated and published in 1802 by Duvergier. The influence of Kant had not yet made itself felt in France, at least in his sphere.

1 Upon its penal system, definitive though it may be, does not, however, deserve the objections which have properly been made upon its system of punishments. Cf. Chauveau and Helle, Vol. I, no. 11.
The chief reforms, which our penal law has undergone since 1810 may be grouped under the following general principles: mitigation of penalty; the development of the principle of extenuating circumstances; the extension of the application of the Penal Code; the reform of the offender through punishment; the principle of social defense, as involving the distinction between first offenders and recidivists.

(a) The mitigation of the penal system inspired three kinds of reforms.

(1) A certain number of punishments have been suppressed or lightened. Among other legal provisions having this aim and effect may be cited: Art. 66 of the Constitution of 1814, abolishing general confiscation; the act of April 28, 1832, suppressing branding and amputation of the hand, for a paricide, before his execution; the Constitution of November 4, 1848, abolishing the death penalty for political offenses, and the act of June 8, 1860, substituting for it transportation to a fortress; the act of April 12, 1848, suppressing public exhibition; the act of May 31, 1854, abolishing civic death; the numerous acts modifying the regulations for surveillance by the State police, and the act of May 23, 1885, replacing that method by domiciliary restriction. (2) Some classes of crimes, for which punishment is unjust or useless have been abolished, especially the offense of non-disclosure of plots made or crimes planned against the safety of the State, and of non-disclosure of crimes of counterfeiting, abolished in 1834. (3) A certain number of acts have been taken from the category of crimes and classed as misdemeanors. This legal reclassification began with the act of June 25, 1824, which brought down into the class of misdemeanors thefts committed either in an inn or in a hoselry, by others than the inn-keeper, the landlord, or a manager, or committed in the fields or at sales—thieves which Arts. 386 and 388 punished by imprisonment; the transfer was completed by the act of April 28, 1832, and that of May 13, 1883. But in this changing of crimes into misdemeanors, the act of 1863 showed more liberality than that of 1832.

(b) The extension of the doctrine of extenuating circumstances, began cautiously by the act of June 25, 1824, and completed by the act of April 28, 1832, changed the entire system of the Penal Code. This radical reform gave to the trial tribunal the power to determine, with some discretion, the legal morality of the offense under investigation, and thus to cast a more exact balance between the punishment and the gravity of the particular offense. This power
of the judge is almost unlimited for misdemeanors or police offenses, but is limited in the matter of crimes.

(c) Penal law has become more and more extensive; it has tried to foresee, by new provisions, all anti-social acts, and thus to fill up the gaps which judicial experience had pointed out in the arsenal of social defense. The general scope of the Penal Code, especially of its provisions as to swindling, breach of trust, and theft have been gradually developed since 1810. From this point of view, the act of May 13, 1863 gave to the text of the Penal Code a general and careful revision. For example, the offense of extortion of hush-money (Art. 406, § 2) was then foreseen and penalized. Before that, the law of April 28, 1832, had defined as crimes or misdemeanors: in Arts. 317 and 318, the act of administering substances injurious to health; in Art. 184, § 2, a violation of the domicile by a private individual; in Art. 400, the embezzlement or destruction of confiscated objects; in Art. 408, the conversion of personal property by a gratuitous bailee who was to bestow work upon it. Apart from the Penal Code, important acts have extended the domain of criminal law to public drunkenness (July 26, 1873), and to professional gambling and pandering in the public street (May 27, 1885, Art. 17).

(d) The reformation of the prisoner through punishment, to which the Code of 1810 gave no thought, has since then become one of the chief objects of penal law. To this end, the legislator has employed two methods: 1st, the method of transportation to penal colonies, regulated by the acts of June 8, 1850 (on deportation), and of May 30, 1854 (on hard labor); 2d, the peni-tentiary method, of which some interesting applications are found in the acts of August 6, 1890, on the education and the protection of juvenile offenders, in the act of June 8, 1875, of the reform of departmental prisons, and in the act of August 14, 1885, on the means of preventing recidivism.

(e) The increasing number of recidivists proved, in spite of these efforts, the inadequacy of the penal and penitentiary régime; and it was concluded that the problem of criminality could be solved only by distinguishing radically between first offenders and recidivists. To avoid prison sentences for the former, and to remove the latter from a social environment where they cannot live without relapsing into their criminal activities, — such seems to have been the attempted program of the act of March 26, 1891, which introduced the suspension of sentence, and of the act of May 27, 1885, on the relegation of recidivists.

To sum up: In appraising the evolution of penal law in France since 1810, it may be said that our legislation has proceeded spontaneously — unconsciously, indeed — towards a realization of the threefold aim above assigned to its efforts: namely to remove from incorrigible offenders the means of doing harm, to improve those who are capable of returning to rectitude, and to intimidate the occasional offender.

As our modern penal law makes its appearance on the stage, the third of these is its feature, viz. intimidation. In the Code of 1810, the penalties seem to have no other purpose. To check the offender, it was thought sufficient to counteract the occasion that tempted him with the threat of the punishment that must fall upon him. Both the prohibitions and the penalties are marked, on the whole, by an excessive severity. But it was soon perceived that this system defeated its own end. The numbers of recidivists showed that the places of detention became hot-beds of mutual corruption. So the second aim, that of improving the offender through punishment (an aim theretofore foreign to the Penal Code) began to attract attention. This idea had its strong partisans, — some of them even fanatics. The law then started timidly on the penitentiary path. We can observe it experimenting and groping for results; we notice first, the favor and then the distaste accorded to the cellular system. Next, the law progressed to the first theory above noted; in the face of the rising wave of recidivism, it resolved to eliminate the incorrigibles by energetic methods. The permanent seclusion of recidivists seemed to be the last goal of this evolution.

But the recidivist (it was perceived) is a direct product of all punishment by imprisonment, as practised in France. So the plan evolved was to avoid sending to prison those who had never entered it. Then a distinction took shape and developed, — the attempt to provide a system for first offenders different from that for recidivists. All this, however, was not well reasoned out; no general plan of reform was conceived and executed. From hand to mouth, under the sway of the needs and the ideas of the moment, sundry laws have been drafted and voted. The modern legislator has never squarely faced this problem which is the only one of the worst problems of modern penal law, namely: Given the various classes of criminals, to systematize the punishments adapted to each of them.

After all, can he solve it? Unquestionably. The true aim should be to provide repressive measures for the occasional of-
CHAPTER XV

GERMANY SINCE 1833


§ 64. Influence of the Prussian Code; The Bavarian Code of 1861.

§ 65. Progress towards Greater Legal Unity in Germany.


§ 63.1 The Criminal Codes of the First Half of the 1800s. — The conflict of the various theories of criminal law, aroused by Feuerbach and Großmann, did not subsist throughout the century; but it came to exercise a considerable influence upon the development of even the positive law itself. Alongside this philosophical tendency, there came into play also an historical tendency, originating (in one of its phases) in the researches into Roman law, led by Hugo and Savigny, and (in another) in the researches into Germanic law inspired by Eichhorn and Grimm. In this period, also, the science of criminal law came to be the common field of study for all civilized nations. For in spite of certain national peculiarities, which may be easily accounted for, it is founded upon human and psychological conditions common to all. Comparative criminal law, and also the science of pedology (which owes much of its stimulus to the so-called "theory of reformation"), received a lasting service from the numberless essays and minor writings of the indelible Mittermaier, an ever-constant and intrepid champion of the cause of freedom and humanity.

Influence of Feuerbach's Bavarian Code. — Feuerbach's advanced Bavarian Code immediately served as a model and as a

[The first paragraph of this section is transferred from § 69, which formed the closing section of Part I in the treatise of von Baak. — Ed.]
foundation for that series of criminal legislation which was undertaken in most of the German States after the passing of French supremacy. The Oldenburg Criminal Code of September 10, 1814, imitated almost exactly that of Bavaria. The Hanoverian Code of August 8, 1840, although a long time was spent in preliminary drafts and investigation, used the Bavarian Code as its foundation.

The legislation of this period, and the special statutes dealing with criminal procedure which in part preceded it, eliminated a condition of uncertainty and anarchy in the criminal law which to us now seems intolerable, and also abolished a large number of anachronisms which still maintained at least a technical legal existence. In these ways they conferred a genuine benefit upon the people and the courts. As compared with the Bavarian Code many improvements were introduced in particular details, and there was more and more of a tendency to depart from the biased attitude of Feuerbach. A greater field was conceded to judicial discretion; and there was a simplification of definitions and distinctions in the "General" as well as the "Special" portions. Even at the present time one can utilize as a not unprofitable source of instruction the often quite thoroughgoing debates of the legislative assemblies of the various States, as they are preserved in the better commentaries upon the several Codes. Little by little, greater attention came to be given to political offenses (which had theretofore been neglected by jurists), and especially to the question of possible excuses for resistance to the executive power of the State.


3 Stenglein, "Commenaria über das Criminalgesetzbuch für das Königreich Hannover" (2 vols. 1846, 1851). "Magazin für hannoversches Recht" (1850 and 1851).

4 In Hannoversch. Torture was not abolished legally until March 25, 1872.

5 For example, according to the law obtaining in the Kingdom of Saxony, for every theft of a value of more than 12 florins the thief must be subjected to a sentence of eight and ten years' penal servitude respectively. For every starting of a fire, by even the slightest negligence, the sentence of death by burning was imposed (this according to a "Mandat" of 1741). Concerning these and other anachronisms in the Kingdom of Saxony, cf. von Wächter, "Das Königl. sächsische und thüringische Strafrecht" (1837), pp. 22, 23; he says: "These penalties had always been employed by the Saxon courts, even in modern times, until the publication of the Criminal Code, and in such cases it was only by the exercise of pardon that the law could be reconciled with justice.

On the other hand, however, there is a marked absence of that bold legislative spirit by which the end of the 1700s and even the beginning of the 1800s were distinguished. There is often manifested a certain timidity, and this is by no means limited to the governing bodies. The punishment of flogging found energetic and effective adherents; and for a long time we encounter examples of useless torment attached in graver cases to the punishment of imprisonment (chains and wooden hobbles on the legs). This phase of development is especially exemplified in the Criminal Code of the Kingdom of Saxony of March 30, 1838, and in the Württemberg Criminal Code of March 1, 1839. The latter was a more original work than the former and even more dominated by the deterrent theory. With only a few changes the Saxon Code went into effect also in Saxe-Altenburg, in Saxe-Meiningen, and in Schwarzburg-Sondershausen. A quite original and meritorious code of this period in the Criminal Code of Brunswick of 1840, which is remarkable for its comparative brevity and for its preservation of greater freedom of judicial discretion. No provision is made for corporal punishments as part of a judicial sentence; and § 13 contains the following important principles:

All convicts are to be placed at such work as will be fitted as nearly as possible to their physical capacity and their previous civic position. As far as compatible with this principle, harder labor is to be assigned to those sentenced to severe punishment.

No one sentenced to imprisonment can be employed against his will either in public work or in work the performance of which 6 "Cf. Königl. stes. Criminalgesetzbuch", Art. 8, 22. "Commen- taries" by Weitz (2 Parts, 3d ed. 1848) and Held and Böhrst (1848). Cf. note 14 (previous note), pp. 25, 26.


8 v. Härtermann, "Zur Beurtheilung des Entwurfs eines Criminal- gesetzbuches für das Königreich Sachsen" (1836).

9 § 62 confers upon the courts an apparently extensive right of leniency where there is a coincidence of several mitigating circumstances. However, if the restrictions upon this right of leniency in respect to high treason and most cases of murder, in §§ 81, 145.

344
would by virtue of his civic status entail for him an aggravation of the sentence.

"Convicts . . . who themselves defray the cost of the execution of the penalty may choose for themselves work compatible with the prison system and may retain the profit." 18

The Criminal Code of the Grandduchy of Hesse 19 was prepared with greater originality as to individual details. It is upon the whole an excellent work, similar in character to the Brunswick Code, although rather prolix, and, especially in its "General Portion," allowing little range for judicial practice and legal science. This code recognizes three varieties of imprisonment, the penitentiary, the reformatory, and the jail. 19 Imprisonment in a fortress 20 is prescribed for the offense of dwelling and also as an alternative to the reformatory.

A marked resemblance 21 to this latter code is shown by the Code of Baden of March 6, 1845. This was similar in length, quite prolix, somewhat minute in all directions and often much given to detail. 21 The so-called Thuringian Code which by agreement went into effect in 1850 in Saxe-Weimar, Saxe-Meiningen, Coburg-Gotha, Schwarzburg-Rudolstadt, and Anhalt-Dessau, may be regarded as a development of the Saxon Criminal Code, although with variations for the respective countries. It laid claim to progress in that it abolished the death penalty, 22 but in other respects it was below the standard of the Hessian Code.

The introduction of railroads and telegraphs led also to the enactment at this time of special statutes for the protection of those important institutions against injury and danger. In the latter cycles the offenses in question were included under the classification: offenses dangerous to the public in general. 23

The Brunswick Code almost without change was published for Lippe-Detmold on July 18, 1848. 24

Brederode, "Commentar über das Grossherzoglische Hessische Strafgesetzbuch," 1st vol., 2d edition, 1850, 486 pages (including the general portion only).


Art. 11: "The court may, after a careful investigation of the private position and temperament of the offender assign the carrying out of the punishment of the reformatory to a more suitable institution." Cf. similar provisions in the Code of Baden, §§ 52, 61.

The Code of Bavaria of April 14, 1849, was merely a modification of that of Hesse.

As to the Code of Baden, cf. the commentaries of Thiel, Braun, Pacelli, and Jacobson. Also Bärner, "Staatsrechtshandbuch," p. 327. 27

The Code of Bavaria of April 14, 1849, was merely a modification of that of Hesse.

As to the Code of Baden, cf. the commentaries of Thiel, Braun, Pacelli, and Jacobson. Also Bärner, "Staatsrechtshandbuch," p. 192. 27

Cf. the Prussian Ordinance of Nov. 30, 1840, concerning injury to railroad.
§ 64. Legislation in Prussia.—There was a peculiar course of development in Prussia, which at the end of the 1700's began to be the center of reactionary principles in matters of criminal law. Offenses against property, which at that time were increasing in frequency (a thing readily explainable by the disturbed condition of the times), occasioned the "Circularverordnung" of February 26, 1799, dealing with theft and other crimes against the security of property. This was so ambiguously expressed that there was room to doubt whether it really represented a more vigorous repression of the offenses in question, or whether (as viewed by some courts) it introduced milder punishments. Since the Prussian penal institutions were for a large part in a state of utter neglect, the remedy was for a time sought in the expedient of flogging, which was specially recommended and employed (especially for suspects, who were in this way brought to a confession). At the same time, that fear of demagogues and revolutionists so long entertained in Prussia began to bear fruit in provisions against students, secret societies, and acts tending to public disorder. Together with the law of 1799, above mentioned, a number of new ordinances (some of them most extraordinary) directed against libels and insults (in which the legislator met with much difficulty in handling the distinction between civil and military persons) so increased the general confusion that as early as 1800 a project to publish a new code was even proposed by the legislative power.

1Cf. e.g. § 2: "He who for the first time is convicted of an ordinary theft shall undergo corporal chastisement, or, if such punishment is not inflicted (2) or should be deemed insufficient, shall be sentenced to imprisonment in a reformatory institution, to solitary confinement, or to penal labor." § 7: "More severe (7) chastisement shall be inflicted (cf. etc.)." (The amount of ordinary chastisement was not fixed.) § 15 ordered imprisonment until pardon, for repeated thefts accompanied with violence. § 42 in addition to life imprisonment also provided branding and public flogging for repetition of the crime of robbery.

As to the horrible existing conditions of many institutions, in which cleanliness was absolutely impossible and the prisoners were consumed by vermin, cf. the work of the Prussian Minister of Justice Von Arnim, "Die Kriminalistik über Verbrechen und Strafen" (2 vols. 1800), in which the harmful condition of the Prussian system of criminal justice was portrayed with great candor. Cf. especially II. p. 189 et seq. Concerning the pitiful treatment of sick prisoners, cf. II. p. 58. But cf. also I. p. 525.

The diligence, cf. 224 et seq., with which the Prussian authorities did with prisoners led even to a revised order of Dec. 28, 1801, which under certain conditions contemplated deportation to Siberia. This was actually done. Cf. Wapinski, "Ideen und Pläne zur Verbesserung der Polizei- und Criminalinstaaten" (Halle, 1801), I. pp. 17, 43.

As to the repugnant effects of this flogging in a famous (or rather notorious) trial, cf. Von Arnim, I. p. 38 et seq. 348
respects) a most important progress in German legal development. It revealed a step in advance, to which (apart from the Carolina, in its day) perhaps only that made by the Bavarian Code of 1815 may be compared. 18 All this was substantially due to the far-reaching influence of the French Code, which until 1851 had been in effect in the Prussian Rhine Provinces. Like the French Code, the Prussian is remarkable for a brevity of composition, avoiding superfluity and the rejection of all pedantic vagaries, and therefore by the greater freedom which it allows for the scientific regulation of the provisions of the "General Portion." It also resembles the French Code in that (more perhaps than any other of the earlier German Codes) it is adaptable to use under the jury system. It bears a further similarity to the French Code in being free from moralizing and theological tenacities, and generally (but not equally) free from that mediocrity which we encounter in so many provisions of the earlier local legislation. It adopts the triple classification of punishable acts as "Verbrechen," "Vergehen," and "Ubertretungen," and in its "Special Portion" completely separated the last class of offenses from the two other. In an appendix it deals with only some of the offenses against police regulation. On the other hand, while it places limits upon private prosecution of "Ubertretungen," it extends to them a number of the most important provisions of the "General Portion." The Code possesses considerable advantages over the French Code. The "General Portion" was conceived in a comprehensive spirit, under the influence of German jurists. The various

18 Cf. Goldammer, "Materialien zum Strafgesetzbuch für die preussischen Staaten" (1851, 1852); Boecker, "Commentar" (1851); Oppen- hoef, "Das Strafgesetzbuch für die preussischen Staaten, erläutert aus den Materialien, der Rechtslehrer und den Entscheidungen des Obertribunals" (Berlin, 1851); Tiefenauer, "Lerhsbuch des preussischen Strafprozesses" (Hildesheim, "System" (2 Parts, 1855, 1860; not completed; Part I contains the "General Portion"); Oppenhoef, "Die Rechtsumordnung des königl. Obertribunals in Straßenfarten" (1861 et seq.). "Archiv für preussisches Strafrecht," established by Goldammer in 1832, in 1871 changed to "Archiv für deutsche und preussische Strafrecht," and still appearing, ed. Kohler, a volume annually.


20 This recalls the well-known "Hated and Contempt" paragraph (§ 101): "Anyone who through public assertion or written expression of fact, or through public abuse or denunciation, exposes the institutions of the State or the regulations of the authorities, is to be punished by a fine not exceeding 200 Thaler or by imprisonment, not exceeding two months." (Cf. also § 101) § 101 of Part II, Tit. 30 of the "General Landrecht." This provision is, approximately "crimes" "misdeeds," and violations of law not amounting to a misdemeanor.

§ 64 | MODERN TIMES | [PART I, TITLE V]

Chapter XV | GERMANY SINCE 1813 | 184

offenses are more carefully and precisely defined and the Code is uniformly milder than the "Code Penal" as it appeared originally in 1810. No mention is made of corporal punishment, and imprisonment is simply divided into two kinds: 19 imprisonment in a penitentiary and in a jail. 20 There is also, for certain offenses, confinement in a fortress, which, while very mild in character, might possibly be of long duration. Apart from murder and high treason, the death penalty is provided for grave cases of manslaughter and for crimes endangering the general public; but it is to be inflicted within the prison walls.

In many respects and especially in regard to its theories of participation and attempt, this Code too closely followed the French. Those provisions copied from the French law (in many respects commendable), which permitted the consideration of mitigating circumstances in many cases (but by no means in all), manifested good reason for this very inconsistency, and subjected the necessary severity and logic of the law to the sentiment of the individual jury. Many of the separate provisions are quite severe, and a punctilious interpretation of the courts, following too much the letter of the law, has rendered certain features the more intolerable. 21 It may be added that the provisions concerning the mode of carrying out imprisonment are inadequate, and in actual practice, apart from the fact that enforced labor of those confined for "Ubertretungen" fell into disuse, the treatment of convicts depended upon the unfettered discretion of the prison authorities, even to the infliction of solitary confinement. 22 The disciplinary treatment of prisoners was covered neither by the Code itself, nor by any supplementary statutes; and as to a legal protection of, for example, persons of the educated class condemned not for disciplinary offenses but merely for offenses against the press laws

21 E. Zuchthausstrafe and Gefängnismisstrafe.

22 This divided into two classes, for "Vergehen" and for "Ubertretungen".

23 Thus, for example, § 89 dealing with insubordination was frequently so interpreted that opposition to acts of an official which were of doubtful legality, provided there was no malicious on the part of the official, was regarded as punishable. Certain supplementary statutes made this in some respects less severe.

24 The memorial to the "Landtag" by the Minister of Interior (March 28, 1863) made this assertion. On the contrary, see Von Habsburg, "Geht es der Verschwörung, rechtliche Bedenken gegen die preussische Denkschrift betr. Einrichtung" (1861). The view of the Prussian government was defended by Eckardt, "Die Einrichtung in Preussen," Concerning certain tendencies of Prussian prison authorities of this period, cf. also Von Habsburg, "Der Briefercodex des römischen Rechts und sein Werken in den Strafanstalten" (1863).
or offenses of a purely political nature, against a treatment in the prisons which in the circumstances in question was absolutely improper, none can be found in this Code.

§ 65. Influence of the Prussian Code. — The practical usefulness of the Prussian Criminal Code caused a number of smaller States to take it as a foundation for their own criminal legislation. With minor changes, it was enacted as law in Waldeck and Pym-ount (1855). The Criminal Code of Lubbecke, except for a few really significant changes, corresponded almost verbatim with that of Prussia. The Oldenburg Code of January 31, 1858, however, differed from the Prussian in not retaining the death penalty and in substituting imprisonment for life; in a few other cases, the amount of punishment was changed; except in cases of life imprisonment, loss of rights as a citizen was only temporary.

The Bavarian Criminal Code of November 10, 1861, which like the Prussian Code was a result of long years of preparation and was the last of the more important local codes, was in many respects similar to the Prussian Code. It resembled the Prussian Code in respect to punishments affecting honor, and in many cases retained the death penalty (although not always the same as in the Prussian Code). It was defective, however, in having a confused and indefinite system of punishment by imprisonment; and it is difficult to make any distinction between its jail and prison punishments. In Article 19, it accepts the system of parallel punishments (instead of imprisonment in jail or prison) under certain conditions for persons of the educated classes. In its treatment of attempts and participation, the code assumes a middle position between the French and German law. It differs from the Prussian Code in its “General Penalty,” especially in its rejection of a system of extenuating circumstances. However, Article 68 recognized limited mental capacity as an extenuating circumstance; and Article 74 sanctioned voluntary repARATION as an extenuating circumstance in certain cases.

Thus, also, in Anhalt (by the statute of Feb. 5, 1839). Here we will not stop to consider, in “Archiv für process. Strafrecht.” (1899), pp. 14 et seq.

§ 66. Progress towards Greater Legal Unity in Germany. — The political events of the year 1866 necessarily gave a new and now more effectual incentive to endeavors to establish a general law for Germany. Since the year 1880 this had been especially advocated by the German Bar Association. As a matter of fact, the Prussian government apparently was not planning for the immediate formation of a common North German Code; instead, its first measure was (by Ordinance of June 25th, 1876) to introduce the Prussian Code into its newly created territories of Hanover, Electoral Hesse, Schleswig-Holstein, Nassau, Hesse-Homburg, and Frankfurt-on-Main, as well as in the ceded districts of Bavaria.

1 For literature, see Berner, p. 311 et seq. Special mention may be made of the comments by Buchholz (1862, not finished, only the first volume); Stengel (2 vols. 1861, 1862); Weiss (2 vols. 1860, 1865); Dellmann, (1862, not finished); Stücker, “Stücker, Zeitschrift für die bayerische Staatspolizei” (5 vols. 1859–63); later “Zeitschrift für Gewerbepolizei und Rechtspflege in Bayern” (1866 et seq.); Stengel, “Zeitschrift für Verkehrsrecht und Rechtswissenschaft in Bayern” (1862); after 1875 appearing as “Zeitschrift f. deutsche Verkehrsrecht und Rechtswissenschaft”; discontinued in 1880.

2 Published in Kehl, with only a few changes (the so-called “Philippin”). As to Kehl, cf. H. Kersauz, “Das Strafrecht in Kehl.”

3 In the two Grand duchies of Mecklenburg the following were especially important: a comprehensive ordinance concerning theft of 1833, an ordinance of 1843 concerning offenses against public order, and an ordinance of 1854 as to incendiaries. As to the condition of the law in the above-mentioned countries, cf. “Motive an dem Entwurfe eines Strafgesetzbuches für den norddeutschen Bund,” pp. 6 et seq.


6 In Hanover, which was not really absorbed by the Prussian State until 1876, the common law in the meantime continued in force.

352

353
But the Constitution of the North German Confederation of June 26th placed criminal law and criminal procedure among those subjects over which the scope of the legislative power of the North German Confederation should extend. And, in pursuance of a decree of the Reichstag, there was published by the Prussian Minister of Justice towards the end of July, 1869, at the request of the Chancellor of the Confederation, a draft of a Criminal Code for the North German Confederation.

The Draft of 1869 of a Criminal Code for North Germany. — This draft was substantially the work of Friedberg, who at that time was Supreme Counsellor of Justice, and later Prussian Minister of Justice. As declared in its accompanying Report, and as the conditions of the times indeed demanded, it took the Prussian Code as its foundation. It was, however, considerably less severe; e.g. it limited capital punishment to a very few cases, and reduced the minimum duration of imprisonment to fifteen years. In numerous points it endeavored to comply with the demands of legal science; particularly in its paragraphs dealing with attempts and the criminal capacity of children, it sought to bring itself more into accord with the principles of the German common law instead of the French principles adopted by the Prussian Code. It retained, however, the system of extenuating circumstances, and at the same time considerably expanded its scope. Its important change was: the release on parole of prisoners after they had undergone part of their sentence — a measure which (following the English model) has been made use of since 1862 in the kingdom of Saxony, by the pardoning of the ruler (but practised in accordance with certain generally received principles). An endeavor was also made to establish a rational rule for the effect of punishable acts upon capacity for holding offices of honor or trust — a rule looking to the concrete case and having regard not so much to the kind of punishment as to the character of the individual crime.

The authority of the several States to enact criminal laws was obviously not thereby revoked; and so in the Kingdom of Saxony, on October 1st, 1868, a revision of the criminal code was published and Hamburg even published a new criminal code in 1869.

A very serviceable private draft was prepared by John. ("Entwurf eines Strafgesetzbuches für das norddeutsche Bund", 1868).

In addition to the Report there accompanied this draft commentaries on the death penalty and the maximum duration of punishment by imprisonment, and also discussions of problems of criminal law in the province of medical jurisprudence and a comparative collection of criminal provisions from German and foreign legislation.

354

The draft adopted the only correct and practical attitude in treating in matters of criminal law the entire territory of the Confederation as a single territory, notwithstanding the fact that the Confederation did not constitute a homogeneous State. For as a matter of fact criminal statutes are chiefly influenced by the degree of the civilization of the people and in part by their greater or lesser amount of political freedom, and are but comparatively little influenced by the differences of the civil law. It was recognized, however, that it was possible that both treason and high treason could be committed against the individual States of the Confederation as well as against the Confederation itself — even where this crime was committed with a view of helping some other one of the federated States. Obviously, a code complete in the sense that the application of all other criminal statutes was to be precluded was not even to be contemplated. None of the codes of even the larger States were complete in this sense. It was necessary that a certain field of legislation be left to the individual States. Care was to be taken only that the unity of the law should not thereby be destroyed, that the individual States adopt lofty principles of punishment, and that no penalty should be imposed for acts which would be deemed unpunishable under the sense and spirit of the Code of the Confederation by virtue of its silence or the limitations of its definitions.

The draft was quite deficient in respect to imprisonment. There were only a few general provisions which enlarged or restricted the field of local legislation, or (where this was insufficient) of the regulatory discretion (especially in Prussia) of administrative boards. However, a uniform and thorough-going regulation was not practicable without providing for numerous incidental details, and particularly for the undertaking of costly and permanent buildings; and this would have meant the postponement of the entire statute.

§ 67. The Code of the North German Confederation. — There is perhaps no other example of a code of the importance of the "Norddeutsches Strafgesetzbuch" being prepared in a large State in so short a time. The preliminary draft entrusted to a commission appointed by the Bundesrat on October 1st, 1869, was on the
31st day of December, 1869, submitted to the Chancellor. This commission was under the chairmanship of Leopold, who at that time was the Prussian Minister of Justice, and among its more prominent members the above-mentioned Friedberg, and Schwarz, the Attorney-General of Saxeony. The Bundesrat also promptly gave its approval, and on February 14th, 1870, there was presented to the Reichtag a draft of the law with a draft of its enacting statute ("Einführungsgesetz").

Its Character. — It is not to be expected that, where so great haste was shown, a careful consideration of principles and their application could even be contemplated. The leading political party was dominated by one thought, viz., to produce something, — to show that the newly formed Confederation was in a position to produce a new legislative work of general application, and to present quickly the national unity by means of the criminal law. However, there were numerous and important changes from the first draft, both in matter and form. Thus the provisions of the "General Portion", recommended by the committee of the Bundesrat to be applicable to minor offenses ("Uebertragungen"), were made applicable generally. Offenses (personal) against the princes of the Confederation or members of their families were treated in a different manner, according as there was involved the ruler of the offender or the offense against territory where the act was committed. § 47 of the "General Portion", placing limitations upon capacity for responsibility, was given wider application; and the requirement that a complaint lodged by the injured party precede a prosecution was extended to a larger number of cases. A new treatment was accorded sentences to prison ("Zuchthaus") "ipsa facto" affording the right to hold positions of trust and honor, in that by § 28 a sentence of this character had as its immediate consequence loss of capacity to serve in the army or navy of the Confederation and permanent loss of capacity for holding public office. This provision of the Code, although chiefly due to the influence of the military element in the Bundesrat, was more in accord with popular opinion than the too idealistic treatment of this subject found in the first draft.

Opposition in the Reichtag. — In the Reichtag the draft was also dealt with in an extremely summary manner. A motion to debate the principal questions separately was rejected. The "General Portion", and the first seven chapters of the "Special Portion" dealing chiefly with political offenses, were given immediate discussion in open session. Chapters 9-23 were referred to a committee of twenty-one members. The question of capital punishment nearly brought about the failure of the entire work. At the second debate in open session, on March 1st, 1870, the Reichtag, by a majority of 118 votes to 81, voted for the abolition of the death penalty. (It had in the meantime been abolished in the Kingdom of Saxeony.) The Bundesrat, however, by an overwhelming majority, voted to retain the death penalty for murder and for heinous cases of high treason. On the third reading, after the Chancellor, Count von Bismarck, had cast the weight of his authority in favor of the retention of the death penalty, the Reichtag, both in this matter and in a matter touching the procedure for certain political offenses, acceded to the view of the Bundesrat. The Bundesrat was thus enabled, at its session of March 25th, 1870, to give the Code its unanimous approval; and the Code, together with its enacting law, received, on May 31st, the assent of the head of the Confederation, and on June 8th, 1870, was published in Number 16 of the "Bundesgesetzblatt."

Changes made by the Reichtag. — The draft, however, underwent considerable alteration of the offender's nationality or the offense against territory where the act was committed. § 47 of the "General Portion", placing limitations upon capacity for responsibility, was given wider application; and the requirement that a complaint lodged by the injured party precede a prosecution was extended to a larger number of cases. A new treatment was accorded sentences to prison ("Zuchthaus") "ipsa facto" affording the right to hold positions of trust and honor, in that by § 28 a sentence of this character had as its immediate consequence loss of capacity to serve in the army or navy of the Confederation and permanent loss of capacity for holding public office. This provision of the Code, although chiefly due to the influence of the military element in the Bundesrat, was more in accord with popular opinion than the too idealistic treatment of this subject found in the first draft.

1 Consequently offenses ("Uebertragungen") were no longer dealt with in a third part but were treated in a single (the last) chapter of the "Special Portion" (second) of the Code.
tion should also be made of the supplement to § 113 of the Criminal Code, which in fact should be regarded as a guarantee of the freedom of the citizens of the States, and by which punishment for resistance to the acts of an official is limited to cases where the official is acting within his lawful authority.

Criticism of the Code. — The "Norddeutsche Strafgesetzbuch" was not a far-reaching code in the matter of reforms. Its essential merit, and one which must not be too lightly esteemed, consists in laying the foundation for uniformity of criminal legislation in the region included within the Confederation. Moreover, it must be admitted that for a majority of the confederated States, notably e.g. for Prussia and Saxony, it entailed a very material step in advance. It must be conceded further that in all of the confederated States, while it uniformly gave better expression to the prior law, in many important respects it produced better results in practice:

That the Code had faults and defects is a circumstance which it shares with every other statute. Much could have been given more careful deliberation, and after such deliberation could have been improved. But apart from these faults, the reproach that the Code can be justly criticized for being too mild, or that juristic theory is responsible for its shortcomings, has nothing to substantiate it. A charge made by many who have scanty acquaintance with the Code or the history of criminal law. There was not sufficient time for the jurists to make a thorough-going and comprehensive criticism of the draft of the Code; and mere theorists, in the narrow sense of the word, had no share in the drafts. The criticism from outside, moreover, was very limited in scope, and no time was given for careful discussion of more than a few individual features.

The Code of the North German Confederation as the Code of the Empire. — Even before the Code went into effect (January 1st, 1871) as that of the North German Confederation, the treaty concluded in 1870 with the Grandduchies of Hesse and Baden and the

1 Of. also the supplement to § 110 whereby the punishment incidental to summonses for contempt is limited to the case where the order is legally valid or the action is within the jurisdiction of the official.

2 For the history of its origin, cf. the brief but excellent exposition in Rüffer, "Commentar.

3 As to the course of events, cf. particularly Von Brödner, "Berlag zur Geschichte und Kritik der Entwürfe eines Strafgesetzbuches für den nord-deutschen Bund", 1859.

4 For list of works and articles dealing with the criticism of the drafts, see Von Weechter, p. 18; Von Hatzfeldt, "Handbuch", I, pp. 131 et seq.

§ 68. The Criminal Law Amendment Act of 1876. — A defect of the Code, which in some of its aspects has been previously criticized and which even at the present time often leads to decisions contrary to the sense of justice, lay in the treatment of extenuating circumstances, for which the only criterion is the attitude of the individual judge. Another obvious defect was in the status which the charge at times might assume, the rule of the so-called "Antragrite", i.e. offenses whose prosecution is based only upon private initiative. The unfortunate features of the last-mentioned principle and the urgent need of their remedy soon became apparent both to the courts and the public. On the one hand, the requirement that a complaint be lodged by the injured person was extended to too large a number of offenses. On the other hand, the right to withdraw the criminal complaint and thereby effect a new revision of the enacting law was not considered necessary. Here the profession relied upon § 2, Abs. 2 of the Statute of April 16th, 1871: "The . . . laws referred to are laws of the Empire. Where in the same there is mention of the North German Confederation, its constitution, territory, members, or states, rights of nations, institutions of government, officers, officials, flag, etc., the same shall be construed as the German Empire and its corresponding attributes."
a "nulla poeaequi" at the arbitrary discretion of the party injured (or his legal representative, as the case might be), had been given too wide a range in criminal procedure (extending even to the time of the final judgment or sentence). The bill for a statute amending the Criminal Code (i.e., "Strafgesetzenvuelle") which the Burschenschaft, in November, 1875, submitted to the Reichstag, went far beyond the elimination of this defect. A case arising in Belgium, involving a frequently uttered threat against the life of Prince Bismarck, led to the proposal that an ineffectual incitement to crime in its widest sense should be subjected to punishment. A special penal provision was also proposed in order to ensure the obedience and fidelity of officials of the Foreign Office. There were also proposed a number of more subordinate special provisions, in part suitable to their purpose and later accepted by the Reichstag. In addition to all this there was proposed a complete alteration of fundamental provisions of the "General Portion" (punishment of offenses committed in foreign countries, punishment of the so-called "completed attempts"). It was furthermore sought by means of broader phrasing and severer penalties to bring about a stricter suppression of the public utterance and circulation of doctrines that seemed dangerous politically.

By the Criminal Law Amendment Act of February 26th, 1876, enacted after a warm debate, a part only of these proposals were enacted. The so-called "ineffectual incitement to crime" in § 49a (the Duchesse case) was made liable to punishment only under certain special conditions, and § 353a (the Arnim case) corresponded to the original proposal in part only. The proposed changes in the method of dealing with attempts, and in the fundamentally different treatment of offenses committed abroad, were totally rejected, as were also these for the extension of certain political offenses. On the other hand, the treatment of the so-called "Antragesdelikte" was subjected to a radical change. In a number of offenses the requirement of a complaint by the party injured was completely eliminated; and the rule was adopted that a complaint once lodged could not be withdrawn. This rule, however, was subject to numerous exceptions (as so virtually, in some cases, to amount to a privilege of relationship between the injured party and the offender); and the excessive time limit within which the complaint may be withdrawn was not changed.

Other Criminal Laws.—Previously, by virtue of the statute of December 10th, 1871, and as a result of the controversy with the Church of Rome, the Code had received an additional paragraph (§ 130a) which was directed against inflammatory speeches by the Clergy. The Criminal Law Amendment Act extended this § 130a so as to cover written utterances of the Clergy in the exercise of their vocation or in connection with the exercise of their vocation. Code § 287 had already been supplemented by § 14 of the Statute of November 30th, 1874, for the protection of trademarks; and § 337 had been supplemented by § 67 of the Statute of February 6th, 1875, for the verification of legal status and marriage. With the taking effect of the comprehensive Imperial Justice Act (October 1st, 1879) §§ 251-283 of the Criminal Code, dealing with criminal bankruptcy, were supplemented by §§ 209-214 of the Insolvency Regulations of February 10th, 1877.

That the new institutions of the German Empire and the needs of business rendered necessary a considerable number of special penal provisions in the nature of police regulations is quite obvious. It is also apparent that laws of this character are subject to frequent change. Of a more fundamental and permanent significance (and difficult, moreover, to square with the theory of criminal law) are the statute of May 7th, 1874, dealing with the Press; the statute of May 14th, 1879, dealing with traffic in food supplies, etc., and the statute of May 24th, 1880, dealing with usury. The last-mentioned law gave to the judge (subject however to numerous precautions) a very extensive discretion in respect to the determination of the elements of the offense. And this may also become a starting point for further indefinite statutes according to which the judge a large amount of discretion in respect to morals; which would harmonize, however, with a socialist tendency of the State.
§ 69. The Draft Code of 1899.1 — The history of Germany’s legislation since 1880 is the reflex of legal science in Germany and its various proposals of reform, and belongs rather in the field of contemporary legal theory. The chief leader, both in science and in proposals for Code revision, has long been Franz von Liszt, professor in the University of Berlin. Among those who entered the arena to support or to oppose his views were notably Birkmeyer, Van Culler, Scuffert, Waack, Kohler, Siehart, Mayer.2 By 1902 the movement had so far advanced that a so-called “Scientific Commission” was appointed by the government to prepare a draft; it comprised forty-nine members, representing every shade of thought. A first task of this Commission was to prepare and publish the materials for a comparative study of the world’s criminal law. This superb undertaking, the “Comparative Exposition of German and Foreign Criminal Law,”3 is a mine of information on the criminal laws of all countries.

In November, 1909, appeared the Commission’s Preliminary Draft, with commentary.4 The preface to the Commission’s commentary pointed out that this preliminary draft had no official status as a government measure, and was not to be laid before Parliament. It was meant as a basis for constructive criticism from all quarters.

From the time of its appearance, the Preliminary Draft has been

1 This section was prepared by the Editor, from material furnished by Dr. L. von Trier. The original § 69 of Von Trier’s text is in part omitted and in part transferred to § 66, ante — Ed.
2 Some of his proposals are set forth in the following places: “XXVI Deutschen Juristentag, Verhandlungen” and “Festschrift,” Berlin, 1902.
3 “Münchener Juristentag, Verhandlungen,” Munich, 1904.
5 “Zur Beweis- und Strafverfahrensreform” (Deutsche Staatszeitschrift für Strafrechtsreform, 1900-06; Karl Liss, editor).
6 “Verträge zu einem Deutschen Strafgesetzbuch, bearbeitet von der hierzu bestellten Vorsitzenden-Kommission,” Berlin, 1908-09; with commentary, “Begründung, Allgemeines Thcil” (pp. 1–419) and “Besonderes Thcil” (pp. 419–600).
7 “Counter-draft,” proposed by jurists not satisfied with the official draft, has also been published: “Gegenentwurf zum Vertrage zu einem Deutschen Strafgesetzbuch, bearbeitet von der hierzu bestellten Vorsitzenden-Kommission,” by Karl, Liss, Lissenh., and Godek Schmidt (Berlin, 1910).
A. Austria

§ 69a. Austrian Legislation since 1848.

§ 69a. Austrian Legislation since 1848. — Von Schmerling, Minister of Justice in 1851, planned for a new criminal code. But his plan did not mature. The Criminal Code promulgated May 27, 1852, was merely a revision of the Code of 1803. The system of penalties was improved; but the Code could not still be termed in any respect a mild one. Like most of the other newer Codes, it substituted for “serious police-misdemeanor” the term “offense” (“Vergehren”); so that the triple classification became: Crimes (“Verbrechen”), offenses (“Vergehren”), misdemeanors (“Uebertretungen”).

The efforts to obtain a really reformed code continued meanwhile; and in 1861–63 a draft was prepared by Hye von Glunek; but it was never enacted. In November, 1867, a supplementary

1 This section — except the first paragraph, which is from § 68 of Von Bar’s treatise — is compiled by Dr. L. von Traor for this volume; for this author, see the Editorial Preface. — Ed.

2 There were two grades of imprisonment, — ordinary, and severe. The former signifies close confinement, without chains; no conversation with a visitor except in the presence of a prison officer. The latter signifies solitary confinement, with iron shackles; visitors allowed only on extraordinary occasions, and relatives never. Special features for increasing the severity of treatment were: limited food, hard bed, dark cell, flogging.

3 In Silvio Pellico’s “Le Mio Prigionio” will be found a realistic account of the severe kind of imprisonment, as practised in Austria in the 1820’s.

4 A liberal leader, one of Austria’s most celebrated criminologists, then about 55 years of age and professor in the University; afterwards Minister of Justice, member of the House of Lords, and Justice of the Imperial Supreme Court.

B. Netherlands and Belgium

§ 699. Netherlands. — The Revolution saw two early but fruitless attempts to reform and codify the criminal law; the work of the Commissions both of 1795 and of 1798 did not obtain legislative sanction. A new Commission — Reuvers, Elout, and Van Musschenbroek — appointed in 1807, produced a draft which was enacted and went into force February 1, 1809. King Louis Bonaparte’s ordinance styled it a “masterpiece of humanity”; its system was, indeed, relatively mild; it gave wide discretion to the judge in applying penalties; and it emphasized the mitigation of sentences for good behavior.

But this Code did not remain long in operation. One of the radical changes resulting from the French annexation of the Netherlands was that by ordinance of December 11, 1813, the French Code went into effect in the Netherlands, — although provisionally only. The Code was published in French; there was also a translation in Dutch, but this was not an exact translation, and a royal ordinance provided that in case of doubt the French text should be the guide. Moreover, the reception of the French

4 [Glaser began his professional career in 1848, with an essay on “Englische-Schottische Criminal Procedure.” He became a professor at the University in 1855, and with the assistance of a person of high position, and took a most act and leading part for the reform of criminal law and procedure. His writings on the subject are extensive.

5 In 1812 a new draft was again prepared: “Regierungs-Einschaff eines Oesterreichischen Strafgesetzbuches.” The text and commentary are officially published as a Supplement to the Proceedings of the House of Peers, in 1812, No. 58, black letter No. 107; the House Commission’s Report on the bills, in 1813, as Supplement Nos. 48–83, black letter No. 107. The text and commentary have also been published by Gutteling, Berlin, as Supplement No. 29 to Vol. XV of the “Mittelländer der Internationalen Kriminalwissenschaften Veredigung.”

6 [These sections were prepared by Dr. L. von Traor; for this author, see the Editorial Preface. — Ed.]
Criminal Code was not affected without some changes. Thus, the penalties of general confiscation of property, police oversight, compulsory hard labor, and death upon the scaffold were abolished. The death penalty was inflicted by strangulation or by the sword.

A royal ordinance of April 18, 1814, again appointed a commission to prepare a reformed legislation. This commission was ready on January 17, 1815, with a revision of the Code, and its draft was again revised by a sub-committee, Kemper and Philips; but it failed of enactment. In 1827, the government again laid a revision before the Senate, this draft corresponded in its general part with the Criminal Code of 1809, but in its special part (specific crimes) with the French Code. But as it was still based upon the old-fashioned deterrent theory, and its penalties were exceedingly severe, the government was obliged to withdraw it.

The next revision was not proposed until October, 1839; meanwhile caused a long controversy among the jurists in regard to the abolition of capital punishment and the system of punishments generally. This draft, covering the first or general part of the Code, became a law on June 10, 1840. Successive drafts of the second part in 1842 and 1843, in 1846, in 1847, and in 1859, failed of enactment. Nevertheless, the "provisional" domination of the new antiquated French Code had made various modifications indispensable; and these were accomplished by the statute of June 29, 1864; this law abolished death upon the scaffold and marking with the branding-iron, extended the penalty of solitary confinement, and modified the provisions as to recidivists, and revised the definition of attempts and of specific crimes. Later modifications were effected by the statutes of April 10, 1869, and July 14, 1871.

A royal ordinance of September 28, 1870, again appointed a commission to revise the Code; the members were De Wal, L. Francois, J. Loke, A. De Pinto, M. S. Pols, A. J. Modderman, and Th. Beehers Van Blokland. The commission submitted their draft on May 13, 1874; but it was not enacted. In 1878 (under Minister of Justice Smith) and again in 1880 (under Minister of Justice Modderman) new drafts were submitted to Parliament; this last draft was enacted on March 3, 1881, to go into effect on Dec. 1, 1886; and, with various subsequent amendments, remains the Code in force.

This Code, the fruit of independent labor of Dutch jurists, has distinctively a national character. Its notable features are its division of criminal acts into two parts; the simplicity of its penal system; the abolition of humiliating penalties; the important part played by solitary confinement; the careful definition of the acts liable to punishment in respect to their subjective elements; and the abolition of special rules of mitigation.

§ 69c. Belgium became a separate kingdom in 1830-33. The history of Belgian criminal legislation, until the time of its independence and its separation from the Netherlands, is identical with that of the Netherlands. After that date, until 1867, the French Code Pénal was put in force in Belgium. Preparations for a reform of the Criminal law began as early as 1834, when a commission was appointed for the revision of the Code Pénal. In 1848, a new commission was appointed, which submitted the result of their labors to the Parliament in 1855, and this became a law in 1867. This Code is in substance a remodelling of the French Criminal Code. With various amendments, it remains the Code in force.

C. SCANDINAVIA

§ 69d. Denmark.

§ 69e. Norway.

§ 69f. Sweden.

§ 69g. Finland.

[603]
tantal later modifying statutes are: the statute of May 11, 1887, dealing with the punishment of acts of violence committed against innocent persons, and the statute of April 1, 1894, dealing with explosives.1

§ 89. Norway.—In Norway the first movement toward modern criminal codification is found in the criminal statute of 1814, which specified, in its 96th Article, in accordance with the act of the French Declaration of the Rights of Man, that "no one should be convicted or punished except by virtue of a criminal statute." This notable law (Art. 96) further prescribed the immediate preparation of a criminal code, to take the place of the antiquated Code of the King Christian V. A provisional ordinance of 1815 abolished the barbarous methods of punishment in the Code of Christian; and State Councilor Chr. Suhr was intrusted with the preparation of the draft for a new code. On his death in 1828, a new commission was appointed (under J. H. Vogt as president); their draft and commentary appeared in 1832-1835. The Storting (i.e. Parliament) accepted the draft in 1839, and the King approved the statute on August 20, 1842.

This first systematic codification of Norway’s criminal law was based upon the revised Hanoverian Code, although influenced by the French Code Pénal.

In January, 1885, a general revision was once more undertaken; the State Council, with Bernhard Gotz at its head, was commissioned to prepare a draft. This draft, first, published in 1887,1 became a law and went into effect on January 1, 1905. Its distinguished author unfortunately did not live to see the fruition of his labors; he died in 1901. The new Code was a notable embodiment in legislation of the most advanced ideas of reform. It contains no death penalty, nor short periods of imprisonment, and it provides for indeterminate sentences of dangerous offenders likely to relapse into crime.

§ 89f. Sweden.—In 1899, Parliament appointed a commission, under the presidency of Professor Holmbergnsso, to prepare a system of complete codification, both private and criminal. The majority of the commission concluded that an entirely new draft of the criminal code should be worked out, on the foundation of science and of foreign legislation; in consequence of this, Professor Rabenius (to whom the criminal code had been assigned) and also certain of his colleagues, quit the commission. Of the remaining members, Staaff, Richert, and Afsellius prepared the draft of 1815, and laid it before Parliament. The commission busied itself, for the next ten years, exclusively with the codification of private law, and did not return to the preparation of the criminal code until 1826. At that time the commission was working in cooperation with the Norwegian commission. The revision of the whole code was ready in 1832, and was based upon the Bavarian, Hanoverian, and Austrian codes, and their respective revisions. After considerable criticism by numerous jurists (Boehmst, Rabenius, Grube, Atterbor, Holmbergsson, Ceder- schiöld), a new commission published in 1839 a revised draft. In the year 1844 the commission (now enlarged by adding Schlyter, Bergfalk and Richert) published its draft and commentary. This revision took the advanced step of recognizing only one kind of punishment, namely, simple imprisonment in seven grades, and was not accepted by Parliament.

For twenty years more, reform took the shape of special separate statutes.—abolition of the death penalty; abolition of whipping and church penance (for theft, pillaging and robbery); punishment of forgery and fraud; punishment of murder, manslaughter, and personal injuries; method of solitary confinement. In 1862 the government presented a new draft code, which was accepted with few changes and went into effect on February 16, 1864.1

§ 89g. Finland.—After the union of Finland with Russia, in 1809, penal legislation there was at a standstill for fifty years. The subject was resumed in 1863, and a bill was introduced in the "Stands," or Estates, declaring the principles on which a new Code should be prepared; the desire being to obtain their assent to the dominant principles before proceeding with the great task. Insanach as the Code of 1734 contained penal provisions in conflict with the spirit of the age, and did not prescribe sufficiently severe punishment for many offenses, partial reforms were made in the interim. A provisional code was also prepared.

1 A new draft criminal code is again before Parliament.
to operate until the new Code should be completed; but it failed to receive the sanction of the government, because it abolished capital punishment. Another provisional law was thereupon enacted in 1887, but its promulgation was postponed because of the defective conditions of the prisons, and by the time this had been remedied, the new Code was almost ready for enactment and hence the law of 1867 was never put in force.

A committee had been appointed in 1865 to draft a code in accord with the principles ratified by the Estates in the Assembly of 1863. This draft was introduced in 1875, was subjected to the criticisms of judges and jurists, and was then recommitted to another commission in 1881. After various vicissitudes, this draft became a law and was finally promulgated on April 14, 1894.

D. Switzerland

§ 694. First Period: to 1820.  
§ 695. Second Period: 1830 to 1848.  
§ 696. Third Period: since 1848.

§ 694. First Period: To 1820. — With the new epoch in Switzerland came great legislative activity. Numerous codes and drafts of codes were produced, in one Canton after another. But on the whole they exhibited in their tenor a cautious conservatism. The legislators realized that neither the French Code of 1810 nor Feuerbach's Bavarian Code of 1813, would be exactly suited in their original form to the genius and traditions of the Swiss people.

In the first place, Switzerland had never possessed a single common law of crimes; nor had it a professionally educated judiciary capable of administering a new and borrowed code. In the second place, the philosophic construction, the abstract principles and generalizations, of the new-style Codes were alien to the traditions of Swiss legislation, — concreteness and simplicity. And in the third place, the rigorous, unbending, and elaborate precision of penalties in these new scientific Codes, and their plenteous use of the prison-penalty, were two features that barred their direct adoption in Switzerland, where there were not many prisons, and the judge's liberal discretion in penalties was a car-

[These three sections are by the Editor; their authority is the treatise of Dr. E. Preussmann; for this writer and work, see the Editorial Preface. — Ed.]
codes; namely, over-generalization, over-systematization, and the passion for fixing into law the logical consequences of abstract principles in all their details, regardless of practical needs or historic traditions.

§ 69. Second Period: 1830-1848. — In this period ten Cantons adopted criminal codes. Most of them were enacted before 1838, when the long-delayed legislation came to pass in the German States (seven codes within a few years). The July Revolution of 1830 at Paris had found a quick response in Switzerland; within six years of that European event sixteen Cantons had adopted new constitutions. The new spirit showed itself, however, most notably in the field of procedure rather than of substantive law; for Mittermaier and his school of jurists were now emphasizing measures of reform of criminal procedure throughout Europe.

Basel’s Code was based on its own earlier one; it was the simplest and clearest of all; giving wide discretion to the judge, it still preserved its local tradition of severity. Zürich’s Code was its first, and followed German models, but was marked by lenity of rule and by simplicity and brevity of expression. Vaud’s Code combined German and French features, while avoiding the severity of the former; it was a mildest of all in its spirit, and broadest in the discretion given to the judge. Luzern followed German models, but without accepting their severity. Thurgau kept closest of all to the German type.

Common characteristics of all the Swiss Codes, in relative contrast to the other European legislation, were simplicity, lenity, and judicial discretion. The topics of criminal intent, negligence, attempt, accomplices, conspiracy, etc., notably absent this. Offences against public law were not so emphasized as in the German codes. Treason received the death penalty in Zürich and Thurgau only; the whole subject was a minor one in the Swiss legislation, while in Germany it received elaborate attention.

§ 69. Third Period: since 1848. — From 1848 to 1870 there were sixteen codes (new or revised) enacted in the Swiss Cantons; and since that time a dozen more. Some still looked to France as a model; some looked to Germany; a few sought independently to adapt their own traditions to their own needs. As in other countries, the political events of Europe in 1848 showed their influence here. Political offenses were handed over in part to the Federal Government in 1853. Another no-

Other countries since 1800
citizen might now come into the grasp of the law for acts and utterances which a suspicious government and a facile judiciary chose to interpret as offenses under the new definitions. As late as 1866, Professor Holzendorf's "Journal of Criminal Law" reported the case of Zacharias, an eminent professor, who came in danger of criminal proceedings for contempt, because of a critical comment on a Supreme Court decision. — In this field the Swiss Codes showed a thoroughly different attitude.

And, lastly, the traditional simplicity of the Swiss legislation is again in this period notable, in contrast with the German elaborate particularity. The length alone of the codes suffices to show; for the four chief German Codes ranged between three hundred and fifty and five hundred and thirty sections, while the Swiss Codes ranged between one hundred and fifteen and two hundred and ninety sections, except for three which reached three hundred and fifty.

Meanwhile, unification of law was becoming a principal problem. The German political unification of 1870, and the consequent movement there towards unification and centralization of law, gave an impetus to a similar movement in Switzerland, as well as a tendency to imitate the German imperial legislation in cantonal law. Ten new or revised cantonal codes were enacted between 1870 and 1889. A general feature was the elaboration of the definitions of offenses and the severity of the penalties. The Federal Constitution of 1874 abolished the death-penalty and flogging; and though the Amendment of 1879 restored liberty of cantonal action, only a few Cantons took advantage of it, and capital punishment has never since been inflicted. Imprisonment and fines became the principal penalties. Reformation as the avowed objective led to many changes in the method of applying penalties. In form, the newer Codes (in spite of German influence) preserved the traditional Swiss traits of simplicity, concreteness, and avoidance of theorizing.

The tendency towards unification gradually matured. Since the early intercantonal treaty of 1291 (which concerned murder, arson, robbery, and wrongful distress) there had been no efforts of the kind until the short-lived Helvetic Criminal Code of 1797. Then the question slumbered again, while the new ideas were being assimilated in cantonal experiments, until 1855. In that year a notorious case of the flogging penalty moved national feeling to shame. From then onwards the subject was steadily

before the public. The draft Constitution of 1872 contained an Article granting the Federal Government legislative power over criminal law and procedure; but this Constitution was rejected at the polls, and the new draft, accepted by the people in 1874, lacked that Article. In 1887, the Swiss National Bar Association declared in favor of exclusive Federal jurisdiction and unification. The Federal Council authorized the preparation of an exhaustive report on the cantonal criminal law; this report, by Carl Stooss, professor at Bern, took the form of his well-known treatise on Swiss Criminal Law. In 1888, with other leaders, he founded the "Swiss Journal of Criminal Law," which has since been the useful organ for the historical and critical discussion of the subject. Since that time, three drafts have been prepared by Professor Stooss; but thus far, none has had the fortune to be enacted."
PART II

HISTORY OF THE THEORIES OF CRIMINAL LAW

CHAPTER I. ANCIENT GREECE AND ROME.
CHAPTER II. THE MIDDLE AGES.
CHAPTER III. FROM GROTIIUS TO ROUSSEAU.
CHAPTER IV. FROM BECCARIA TO FEUERBACH.
CHAPTER V. FROM BENTHAM TO JERBART.
CHAPTER VI. GERMANY FROM HEGEL TO BINDING.
CHAPTER I

ANCIENT GREECE AND ROME

§ 70. Practical Importance of Theories of Criminal Law.

§ 71. The Beginnings of Speculation. The Sophists.


§ 73. Aristotle.


§ 70. Practical Importance of Theories of Criminal Law. — Indubitably from time immemorial, the criminal law has been found an absolute necessity for the public order and for human society in general. Among the multitude of questions concerning

1 Concerning the matter contained in this Part the following writers may be consulted: Renke, "Handbuch des Strafrechts und der Strafverfolgung". I (1823), pp. 82-123; Becker, "Die Wahrheitsgründe nebst einer Darstellung und Bearbeitung äußerlichen Strafrechts" (1830); Hegel, "Ueber die Gesetzeslehren und Verwaltungs- theoren des Auslandes und des Werth einer Philosophie des Strafrechts" (1834); Hegel, "Darstellung und Bearbeitung der deutschen Strafrechts- systeme". 2d Part. (2d ed. 1844, 1844); A. Freytag, "Das Concessional- gerechteinschaffungsthese des Strafrechts, nebst einer kurzen Darstellung und Bearbeitung der absoluten Theorien des Strafrechts" (1844); Kuhl, "Nouveau Revision der Grundbegriffe des Criminalrechts" (1845), pp. 764-880; A. Frenz, "Philosophie des rechts penalty" (1854); Elster, "Die herabgezogene Grundzüge von Verbrechen und Strafen in ihren innern Widerspruchen" (1857); Renke, in Von Holzendorff's "Hand- buch des deutschen Strafrechts", I (1871), pp. 229-244; Loizmann, "Das Recht in der Strafe" (1872); Wharton, "Philosophy of Criminal Law" in the eighth edition of his "Criminal Law of the United States" (Philadelphia), pp. 1-29. — The works marked with an asterisk [*] contain the most complete presentation of the subject as a whole. Hegel pays the most attention to the jurists and Loizmann deals more with the philosophers. Cf. also P. Janet, "Histoire de la philosophie morale et politique" (2 vols., Paris, 1868).

2 The theories of criminal law are usually classified as "Absolute" and "Relative." By the former it is maintained that punishment is something inherent in the very nature of the crime, — a necessary consequence of the crime. The latter seek to justify punishment by showing that it has an effect which is in harmony with some purpose whose attainment is, on other grounds, desirable. Since this purpose can be found only in the conditions imposed by the social life of human beings, these relative theories regard punishment as coming into existence only with the State which governs these conditions. The absolute theories, however, regard punishment as possible without the State, and as having

379
the right to inflict punishment, there is one which constantly arises: How is it possible that the public power enforcing morality (and as such must criminal law after all be regarded) may require an injury of the wrongdoer, while in private morals, rules such as:

"Love your enemies", "Do good to them which hate you",

"Pray for them which despitefully use you" find (not always practically, but at least theoretically) absolute acceptance? Even the purely practical individual, who is not affected by doubts of this character, will at times be confronted with the question whether the State, when it punishes one act and not another, or remodels its legislation in accordance with this or that tendency, is pursuing the proper course. He will have occasion to consider whether the axe and guillotine should be regarded as relics of former barbarism and persistent error, or as exemplifications of the extreme and ultimate law of human or even divine Right.

Now these questions are of immediate practical importance, at least for the legislator, and their determination will also be indirectly reflected in the practice of the courts. For example, have been adopted by the State for the sake of accomplishing certain purposes. The so-called "mixed" theories ("Coalitionsthought") seek to reconcile the various theories of criminal law, and especially the absolute and the relative theories of the foundation of punishment. A recognition of the kind last mentioned is conceivable in various ways. Thus, for example, one may give punishment but not in such a way as to limit its exercise in accordance with purposes of expediency in attaining certain results. It may also be undertaken to prove that the absolute foundation of criminal law is not prohibitive of a requisite for attaining certain purposes (i.e. beneficial purposes), but rather that it contemplates such. Those classifications are of a more superficial character which make a distinction between theories of right and theories of utility (interest), according as the theories taken up assume a special legal right on the part of the punishing State (e.g. acceptance of a constitutional sub-

mission of the crime to punishment, outlawry of the criminal as result of the crime), or are simply satisfied with reasons of utility or the empirical indispensability of things. The same can be said of the "Centrallist" theories ("Vertrethintheorien"), the "Compensation" theories ("Verlustrtheorien"), and the "Restitution" theories ("Erstattungstheorien") which found punishment upon a requisite restoration or removal of the social injury caused by the crime, etc. Hence (p. 240) would insert an intermediate stage between the division of theories into "Absolute" and "Relatives", i.e. those absolute theories which, without regarding punishment as of absolute necessity, yet find the legal justification of punishment solely in the crime that has been committed, and which treat punishments as an absolute right and not as an absolute duty of the State, and also as a genus of which none possibly can be made. However, it is difficult to definitely fix the limits of this intermediate division, and Laistner (p. 180) has therefore declared himself opposed to it. More detailed and minutely classified surveys may be found in Rauen, "Abhandlungen aus dem Strafrecht und Strafrechtsgesetzen", I (1844), pp. 26 et seq.; Wieg, "Geschichte des Strafrechts", pp. 308 et seq. They have the fault however of presenting the theory only in part or strained to suit their methods of classification.
imperfect reflection. This ideal of a divine regulation thus becomes of prime importance. To this divine regulation, there were attached, as some of its individual features, those institutions which by philosophy were customarily regarded as necessary and by the world at large as sacred. Such was the case with the institution of punishment. It was contemplated as being, in an ideal and perfect manner, in unison with the divine regulation of things. In this conception it was not something which disturbed the harmony of the universe, but rather something by which this harmony, which had been disturbed by the crime, was restored, i.e. internally for the criminal himself, as well as externally. The criminal, in undergoing the punishment, renders to the order of the universe that which is called the "good" (i.e. the just, customary, proper, or due) and at the same time receives it. He receives a benefit, since justice itself is something of a benefit. He is restored to a right condition. Thus the judge is likened to the physician, to whose knives and cauterizing irons one submits and endures the pain. The criminal who fears punishment is likened to the foolish boy who out of fear of the knives and irons would remain ill.

As a matter of fact, Plato does not enter into a discussion of those individual details which are so important in practical life. He goes no farther than to show the divine background of things, or, speaking more correctly, to paint it with artistic lights. He meets the argument drawn from actual life, in the case of a cruel execution, with the brief words: "You paint a terrifying picture, but you refute nothing." The questions concerning the death penalty are never carefully discussed. Capital punishment is merely mentioned incidentally along with the other punishments. It is taken up in such a way as to lead one to infer that the philosopher felt that it also had to do with the restoration of the universal harmony of things, that it could be deserved, and that it was a great evil if anyone, especially great wrongdoers such as kings and tyrants, escaped the punishment deserved in this life, i.e., avoided the restoration of harmony in this life.

As a matter of fact (as Laistner, differing from others, very correctly infers), this is an absolute foundation for punishment derived from that universal harmony of things which with irresistible power renders itself complete in this or the future life. The foundation of punishment is not, though this in certain pas-

---

**References:**

1. "Gorgias", 472e.
sages appears to be of prime importance, its curing and beneficial effect upon the individual. It is even conceived as possible that the individual may be permanently sacrificed for the sake of this harmony. While the effect of punishment in reaching out to and deterring others is not ignored, yet this deterrence is not a principle from which a human legislator may derive conclusions. It is merely an incident of punishment, and while it may, in accordance with the laws of harmony, come about spontaneously, it is not an object for human calculation.8

Plato's "Politics" and "Republic" take us from the realm of the general harmony of the universe into that of the harmony of the State. As against this latter no more than the former is the individual ascribed an independent position. If he disturbs this harmony of the State, he can be eliminated and destroyed, and the State may be purified by the death or banishment of those who do not conform to its requirements. While upon the whole the idea of paternalism prevails, yet the individual can make no complaint; for suffering, as such, even if it is not deserved, is regarded as having in it for every one something of a curative nature. Here again there is certainly reference to a transcendental divine background which should be a solace to the individual in case he falls a victim to the State. In the uncertain outcomes in which punishment here appears as an extreme and artificial agency not used in the ideal State,9 the philosopher loses sight of that contradiction which upon a more careful treatment is bound to appear between the employment of punishment for mere purposes of expediency (and often such as are merely temporary) and the idea of harmony, as well as the idea of retaliation which shimmers through from the background.

In the "Laws" this concession, made by Plato in his old age to the imperfect visible world, recedes into the background, and the viewpoints of security and deterrence assume importance. The "Laws" take human imperfection as a basis for calculation. With deep insight Plato realized that what form of legislation is best which, through the punishment, also tends to arouse in the criminal himself inclinations in harmony with the law. Consequently the effect of imprisonment in a reformatory ("τραπεζομαντία") is first tried upon those who cherish and disseminate principles destructive of belief in the gods. But if other punishments prove to be of no avail, the "Laws", in pursuance of the purposes of security and deterrence, justify the infliction of the death penalty. They make the comment (which later was frequently repeated by others) that it is better for the inscrutable himself to die than to live.10 This practical attitude of the State, which may not arrogate to administer divine justice, explains his abandonment of the principle of retaliation. It constantly recurred in the ideal State of the "Republic", and in the "world harmony" of the "Gorgias" it made the punishment appear as a good deed, whereby the effect of the wrong, reversing itself, falls upon the wrong itself 11 and its author. But it is expressly repudiated in the "Laws".12 The practical State has no right to retaliate, but merely the right to strive to attain rational results in the future. That which is done cannot be undone.

Thus Plato's philosophy of criminal law ends in obvious contradictions. While, in the earlier works, the reader believes that an absolute foundation must be found for punishment, yet the dialogue of the "Laws" leaves no doubt that this attitude has been abandoned. And yet this contradiction is more apparent than real. The State, contemplated in the "Laws", is merely the State contemplated by the modern jurist, and one in which a well-considered law should erect a barrier against wrong and suffering. The State of the "Republic" was an ideal one having no practical existence. Here, not as in a real State, Plato might maintain a kind of retaliatory justice in the place of the divine justice, and, in the universal "world harmony", regard every punishment as either a benefit or a retaliation.

---

8 Cf. p. 909.
9 "Laws", II. 495a, b.
10 "Republic", II. 405a.
11 In addition there are other means mentioned (e.g. by giving of privileges). "Whether the end is to be attained by word or action, with pleasure or pain, by giving or taking away of privileges, by means of penalties or gifts, or in whatsoever way the law shall make a man lose injustice and love or not base the nature of the just, this is the noblest work of law." ("Laws", II. 862). (Jowett's rendering substituted for German rendering.—Transl.)
12 The passage in the "Laws", V. 728, which designates association with the named as the greatest of penalties does not, as Leitner (p. 97) has it, refer to punishment inflicted by the State.
based, is also manifest in his conception of punishment. It is often difficult to ascertain whether the discussion has to do with real and existing conditions, or whether it has as its basis an ideal that is never to be attained. Plato offered absolutely no solution to the question concerning relation of the ideal and the actual. Consequently a reconciliation by him of the relative and absolute foundations of punishment is not to be expected.

§ 73. Aristotle.—Aristotle’s theory of criminal law is unique; it stands quite by itself in ancient times. All other ancient philosophy vouchsafed no independent rights to the individual as against the State, and rather, when necessary, allowed the individual to be absolutely sacrificed to the harmony of the whole without further thought or justification. But Aristotle regarded criminal law not only from the viewpoint of the State inflicting the punishment, but also from the viewpoint of the criminal who has to suffer the punishment. He does not arbitrarily adopt the position (of which Plato availed himself in his discussion of ideals) that punishment is a benefit to the criminal.

Aristotle makes a distinction between justification in punishing and obligation to punish. He bases the former upon contract entered into by the offender. The offender has encroached too far, since justice consists in no one having too much and no one having too little. The offender, by the commission of the crime, makes an involuntary contract whereby his undue proportion shall be reduced by the judge. This undue proportion, however, which he has taken, does not consist in the advantage which he has obtained, but rather in the encroachment which he has made upon justice; and so the punishment must often be greater than the (external) injury caused by the crime. Accordingly, Aristotle derives punishment not from a justice equalizing matters in accordance with a geometric proportion, but rather from a justice equalizing matters in accordance with an arithmetic proportion. In other words, criminal justice is merely a lateral branch of civil justice and has to do with the reparation of injury. But as the example used by Aristotle—an insult to a magistrate—shows, it is an ideal injury which is contemplated. While the question, whence the State receives the right of criminally punishing, is not directly answered by Aristotle, yet from his treatment of suicide, we perceive that he regarded the injury suffered by the

individual as also suffered by the State, and from this must have been inclined to derive the right of the State to inflict punishment.

The relation between justification in punishing and obligation to punish is not clearly marked by Aristotle. When he considers punishment from the latter viewpoint, it has for him an entirely different significance. Here in Aristotle, as in Plato, punishment signifies a healing of the offender. So sharply marked is this meaning that, in his opinion, vengeance is regarded as the best method of punishment, because of the special satisfaction of the party exercising vengeance. However, this idea is later not uniformly adhered to. It becomes associated with the idea of deterrence.

Punishment counteracts the prevalent desire of the masses for profit at the expense of others, and opposes the prospect of pleasure with one of unhappiness and sorrow. It is not clear whether the mere deterrent of the party punished is contemplated, a thing reconcilable with the idea of his reformation,—or whether the deterrence of others is meant—a thing which, at least in its intended results, is not reconcilable with the idea of the offender’s reformation. The banishment of incorrigibles as a last resort is merely advanced as a viewpoint favored by others, and Aristotle himself does not express an opinion.

§ 74. Influence of Aristotle.—Aristotle had certainly obtained a deeper comprehension of the problems of criminal law than any of the other philosophers of antiquity. For the theory of responsibility, which even to-day is considered meritorious, we are indebted to his opinion (found in the Nicomachean Ethics) that the right to punish is derived from the will of the party punished. This view, however, is imperfectly set forth in the theory of an involuntary contract. In this respect, Aristotle attained no following in ancient times, and the manner in which he sought to solve the problem strikes us as being artificial and unsatisfactory. An open mind will regard punishment (in its ordinary sense) and reward as correlative, and both are derived from a distributive justice, and not from an equalizing justice governing the field of private rights.

An important factor was that, with Greece’s decline, Grecian philosophy gave less and less attention to the regulation of the
State, and found the principle of ethics in the individual and his self-sufficiency,—either (as with the Epicureans) in an unbroken rest and cheerfulness of spirit, or (as with the Stoics) in the lonely and rugged virtue of the wise.

The Stoics.—To the Stoic philosophy punishment and criminal law could be nothing more than matters of secondary importance, the ascertaining of whose basis was not worth the necessary trouble. The wicked were simply left to be dealt with by the world, in whatever way it might happen. The legislator, in inflicting punishment (of whatever sort he pleased) upon the wicked, did them no injustice. As a matter of fact he always treated them too gently and never “πάρα τό γέλασμα.” Folly for the wrongdoer is only weakness. This in fact was based upon the idea of the non-reality of all evil, i.e., the fact that evil merited destruction. The author of evil was directly identified with evil itself, insofar as the evil and the god were regarded as diametrically opposite. The power of punishment as a means of better training (illustrated by Protagoras by the gradual bending straight of crooked sticks) was discarded, with the remark that between the good and the evil there is no middle ground, and consequently no transition from one to the other.

The Epicureans.—While the Stoic abandoned crimes and punishment to the course of events, since his firm and positive attitude assumed the worthlessness of the offender without further thought the Epicurean relegated the entire regulation of the state and arrangement of laws to maxims of convenience and expediency. If the Epicurean conceded the existence of guilt, it was not so much the crime he regarded as an evil but rather the being punished and the fear of the consequences of the crime. Accordingly it was self-evident that punishment could be merely an inconvenience in the lawgiver for the discipline or deterrence or perhaps the reformation of the individual, in order to make him serve the purposes of the lawgiver. According to this conception there is no need of a basis for punishment which shall justify it from the viewpoint of the party punished. To undergo punishment is merely a species of misfortune. And the most that can be said against him whose actions entail punishment is

3 Cf. the collection of passages from the writings of the Stoics in Lactantius, pp. 34 et seq.

Chapter I: Ancient Greece and Rome

that he, in his attitude and inclinations, did not happen to be in harmony with the law, or that he was not clever enough to avoid the evil resulting from his act.

Scepticism.—The Sceptic philosophy (the school of Pyrrho), while it renounces all explanation, substitutes authority and that which exists positively for the conventional ideals. It regarded theoretic certainty as impossible, but since there must be some compass by which to guide practical existence, it acknowledged as such simply tradition and that which exists.

Roman Philosophy.—The Roman philosophy, while it did not attain to a system of its own, rested essentially upon the foundation of Stoicism. But (as was in keeping with its tendency to Eclecticism and a characteristically practical bent) it softened the harsher conclusions of Stoicism through broad humanitarian ideas, which were then paving the way for Christianity. Thus Cicero 4 is solicitous that punishment shall not exceed its proper degree. He would have punishment fall upon only a few, but fear hold all in check. 5 Seneca 6 repeats with approval the words of Plato concerning the healing power of punishment, and even with rhetorical pathos justifies capital punishment as a benefit which, in extreme cases, must be conferred upon the criminal. While, by the Roman jurists, the purposes of deterrence, or security against the individual offender, and sometimes also of retaliation with no ulterior motives, were introduced merely for the justification of individual practical observations and decisions, there is an almost Christian sound to their words. According to Epictetus, the wise man should regard even the greatest criminal as one unfortunate and confused, and should not be angry with
Him; furthermore, he enjoins every one to work for the improvement of others. If we may draw conclusions from other utterances of that estimable philosopher and pupil of Epicurus, Marcus Aurelius, who sat upon the imperial throne, he may have regarded the cardinal idea of punishment as merely the reformation of the individual, since he considered it a mandate of morals to love and assist those who have fallen and who do wrong.

Hieroideas. — In spite of numerous artificial expressions, Stoicism really devoted to the province of ethics only a superficial attention. There was, however, in ancient times, an adherent of the Neoplatonic philosophy, who had a deeper comprehension of the problem of criminal law than was shown in these last outcroppings of Stoicism. Neoplatonism sought to bring the subjective tendency of Stoicism into alliance with the objective general idea of the universe of Plato; as a result, it brings part Plato's views regarding punishment. Hieroideas' explanation of punishment was to the effect that the law, which did not want evil to be done, maintained itself by means of punishment. The good could not be indifferent to a breach of the law, and respect for the law must be restored in the offender himself. In accordance with this opinion, punishment was aimed at the act. The person of the offender was unimportant, for, as observed by Hieroideas, the object was to save the Deity from the reproach that it was inflicting punishment upon the individual, and, on the other hand, to preserve the idea of human freedom, without resorting to a fictitious contract made by the criminal in respect to his own punishment. But how, then, does the punishment come to attach itself to the person of the wrongdoer and impose upon him an evil? This, said Hieroideas, might appear to human notions as being a mere coincidental result. But, in truth, the offender thus satisfies the conditions of the law, and the purpose of the Deity can be nothing other than to improve the offender through suffering, which in its true nature is not suffering but something which ultimately shows itself as a good, since its origin is in God. Hieroideas, like Plato, believed that it was better to be punished than to remain unpunished, and that the offender, by having undergone punishment, attains a kind of restoration. After having undergone punishment, he should be regarded as having again attained a certain average of worthiness and virtue.

2 Concerning Hieroideas, especially Laistner, pp. 45 et seq.

Since Hieroideas believed that the only purpose that could be ascribed to the Deity was that of reformation, and appears to reject those ideas of retaliation allied with the prominence given to the freedom of the will in Neoplatonism, it can be said that his theory failed to demonstrate the justice of punishment from the human viewpoint. Mankind, since it must live and act in accordance with divine will, thus has the right to repudiate the deed as a thing not to be condoned; but (we ask) how does it come about that it can lay hands on its author? The appeal here made by Hieroideas to divine law is merely a confession that the philosopher has failed to find the truth which to us seems so evident. There is a very mystical sound (which reminds one of the modern "Soirées de St. Petersburg" of Count J. de Denaistre) in Hieroideas' observation that the peculiar benefit (the ultimate purpose) of the law is the practical shaping of the criminal and the judge inflicting the penalty. As Laistner properly points out, it sounds almost as if the crime were a thing to be desired, in order to display the majority of the law in offering up the offender as a victim. In reality, like Plato, he avoids the entire problem. Since the philosopher proceeds upon the basis that punishment, in accordance with its very nature, cannot be an evil, and it is only the wickedness within the individual that is an evil, there yet remains the problem of how the civil community can be justified in inflicting an evil, in the form of punishment, upon any one. In other words, it amounts to nothing other than the fallacy already committed by Plato — a confusing of an absolute, divine, and mystical viewpoint with that human viewpoint which is the only one of which we can conceive and which alone is practical.

All these theoretical dissertations had no effect in ancient times upon the practical shaping of the criminal law. The most influence it could have had was when a philosopher such as Marcus Aurelius was emperor and judge. To be sure, it did render less harsh a number of criminal sentences. Yet the stress and the confusion of the times were too great to have been influenced by mere contemplative study. As has already been pointed out in Part I of this work (the history of criminal law), a remarkable influence was exercised by Christianity. It still remains for us to ascertain how Christianity theoretically adjusted itself to criminal law.

* Σαν μου εις αυτον οινοι τοις τοποις σεμπορον επειδο και τοις τοποις αναμνησται την αυτον της εκλεκτης διεργασιας ημερες... * Muller, p. 75.
CHAPTER II

THE PHILOSOPHY OF CRIMINAL LAW IN THE MIDDLE AGES

§ 75. Attitude of the Early Christians towards the Law. — In the beginning, the Christians were merely a sect, at best only tolerated and often persecuted. In their doctrine such institutions as the State and the legal system found no part. Christianity at first recognized only a Christian system of morality and knew nothing of a Christian system of law. Law was regarded as superfluous, — brotherly love alone was sufficient. If all obey the precepts of Christian love, no one would fear injury from another, nor would any compel another to give redress. Since too high a degree of self-denial will seldom be found, Christian morality could afford to lay down the precept: "Whosoever shall smite thee on thy right cheek, turn to him the other also." The heathen might have his State and its legal system; but between Christians brotherly love was all in all.

The Christian doctrine, the doctrine of a sect at first oppressed, concerned itself with the State only in so far as it enjoined its own followers not to come into conflict with the laws of the State. "Render therefore unto Caesar the things which are Caesar's." are the words of Christ himself. With this end in view, and for no other purpose, and certainly not in the sense of giving divine sanction to institutions at the time existing, Christ also said: "Put up again thy sword into his place: for all they that take the sword shall perish with the sword." In a doctrine based upon

1 C.F. Hettel, "Die Todesstrafe in ihrer culturorechtlichen Entwicklung" (1870), pp. 43 et seq.
2 The passage referred to is: Romana, xiii, 1-6. "Let every soul be subject to the higher powers; for there is no power but of God: the powers that be are ordained of God. Rit.
3 B. 1162 (7) d. 1274. The best modern edition of his works is that prepared at the expense of Leo XIII (Rome, 1888-1902). Most of the passages referred to in this chapter can be found in English translation in Ricketty, "Aquinas Ethicus" (London, 1896).
central figure in the philosophy of the Middle Ages, did not disguise from himself the fact that the penalties inflicted by human agencies went far beyond the ‘medicina’ (as required by Christian morality) of the offender. But he satisfied himself with the reflection that the same could be said of the eternal damnation ordained by God. Thus there appeared to be divine authority for the maxim: ‘Pestilente flagello stultus sapiens fortuit,’ especially if the ‘videlicet’ (as distinguished from the ‘medicina’) was justified on the ground that it was directed towards a ‘coercitio malorum’ (deterrence). He, however, was not of the opinion that, since deterrence is the purpose of punishment, the basis of punishment is the wickedness of those whose deterrence is intended, rather than the wickedness of the offender. Moreover, he was far from believing that such a principle, laid down in so positive a manner, was in harmony with the principles of divine justice. On the contrary, he clearly announced, as Augustine had done before him, that temporal justice should be merely an imitation of divine justice.

However, this brilliant and exact philosopher did not overlook a distinction which Plato had allowed to pass unnoticed. The ‘lex humana’ — the human reason — is part of the divine reason, and has the mission of searching out the ‘lex aeterna,’ i.e. that ultimate destiny of all beings, ordained of God. It has the duty of deducing from the ‘lex aeterna’ definite conclusions, but it cannot punish each and every sin in accordance with divine justice, — ‘quia sunt afferre vellet omnis maxia sequiuet quod etiam multa bona tollentur et impendium.’This was the first attempt, founded on a correct basis, to distinguish between law and morality, in which he merely suggests as a working hypothesis of morality was comprehended by the term ‘divine justice.’ As a result of this idea his entire discussion is based upon consideration of utility; and it comes to appear as if the principle of retaliation, which together with ‘medicina’ and ‘coercitio malorum’

1 Summa Theologica, II, 1, qu. 87. a. 3. 4. Old Testament, Proverbs, xii, 25. (‘Smile a sufferer, and the simple will beware.’)

2 Summa Theologica, II, 2, qu. 106. a. 3. 5. Deipnion quod sit hoc Augustinum diaiet judicium humanum debet imitari divinum judicium in manifesta Dei iudicium, quinum homines spiritualiter possit suo proposito poscunt. Ocella vero Dei judicium quibus temperatil aliquo penit peccati calis (e.g. the children for the sins of the father) non posse hominum iudicium imitationi, quia hominum non posset comprehenderi hominum iudicere rationem.

3 Aquinas, like Aristotle, treats of man according to his ‘vitas.’

4 ‘L. theol.’, II, 1, qu. 90, 91, 95 a. 1.

394

Chapter II THE MIDDLE AGES

(deterrence) was regarded as an imitation of divine justice, is completely abandoned.

It must not be forgotten, however, that it is characteristic of the philosophy of the Middle Ages, with all its freedom of discussion, to adhere to the belief in authority, and it is in accord with that belief that Thomas Aquinas suggested that the ‘lex humana’ needs to be supplemented. ‘Peytly divine (i.e. revealed) law.’ Consequently, it came about that since the Mosaic law was also regarded as revealed law, the principle of retaliation in its widest sense was justified, — even if one should overlook the fact that the maxim borrowed from Aristotle: ‘Per poenam reparatam equalitas,’ which Thomas Aquinas advances in another passage, is an invocation of this same principle. But, with a more searching view than many of the modern writers, this philosopher of the Middle Ages saw that, although he made a distinction between law and morality, he was regarding law as merely a modified and limited form of morality; thus e.g. he saw that the rule: ‘Thou shalt not kill’ is merely a single consequence of the general principle: ‘Do harm to no one.’ Are there not many much-argued modern questions in which we discuss whether a criminal law (or perhaps a police regulation) concerns a violation of this or that principle, — whether it involves an independent or subordinate, a compound or simple principle — that savors more of scholasticism than this simple but comprehensive observation of the great scholastic of the Middle Ages?

The Lack of Interest of the Medieval Philosophers in Criminal Law. — Since the greatest of the medieval philosophers devotes only a meager and cursory discussion to the question of the temporal power of punishment, in which he merely suggests as a working hypothesis of morality, it is to be wondered that the rest of the philosophy of the Middle Ages (apart from the real controversy as to the relation of the spiritual and the temporal powers) passes over, as it were with closed eyes, social conditions of the worst evil character. One need not be surprised to find that it loses itself in vain disputes of definitions, or in mysticism touching upon the relation of man and God. It has no sense of those vagaries of criminal justice which are the shame of the later Middle Ages; and it

4 II, 2, qu. 106, a. 3. 5.
5 II, 2, qu. 95, a. 2.
6 II, 2, qu. 95, a. 2.

395
received from them no inspiration to investigate the doctrinal problems of criminal law.

It was certainly possible to have made progress, if there had been a development of the line of thought suggested by the "Doctor Universalis" as to the bearing of the "lex humana" upon the criminal law. But nothing of this sort was done. Those supporting the worldly power of the Pope had no greater interest than the champions of the independence of the temporal power, in discussing or criticizing criminal justice as it then existed. The former were satisfied with the criminal law, since it granted (at least in theory) the greatest possible protection to the Church, and treated those of another faith as criminals. The latter also, since they argued that the independence of the temporal power was ordained of God, were obliged to uphold the divine origin of criminal law in its existing condition. At any rate, they had no special motive to subject it to criticism and examination. Casual observations as to the application of punishment can interest us little, when they consist solely of repetitions of passages from the Bible, from Aristotle, and from the Corpus Juris.

The question naturally suggests itself: Whether, if the power of the Papacy had been undisputed and the prosecution of heresy had not been necessary, the philosophy of the Middle Ages might not have attained to a critical examination of the fundamental elements of criminal law? The origin of the theory of the Law of Nature is to be sought in the darkness of the Middle Ages. This, together with the theory of the sovereignty of the people, which based the power of the ruler upon the consent of the governed and was not unknown to medieval Europe, constituted a sufficient foundation upon which the fundamentals of criminal law could be developed through the operations of the human will seeking to attain rational purposes. Immediately after the Reformation, the Catholic philosophers, in their discussion of the State and the legal system, exercised the utmost freedom. This is especially true of Molina and Suarez. But at this point we encounter the narrowing and retrogressive influence of the Reforma-

---

footnotes:
1 This is especially noticeable in, e.g., Dante, "De Monarchia." (English translation by A. Henry, Houghton, Mifflin and Co., 1904), where in a peculiar manner it is argued that the temporal power is given divine sanction through the fact that Christ underwent punishment for all the sins of humanity, by means of the temporal power.
3 Cf. Giereke, p. 65.
CHAPTER III
CRIMINAL THEORIES FROM GROTIUS TO ROUSSEAU

§ 77. Grotius. — Hugo Grotius (while not felicitous in his conception of the right of war as the right of the offended or injured State to punish) undertakes, in the 20th chapter of the second volume of his famous work "De Jure Belli et Pacis," a complete discussion of the principle, scope, and enforcement of criminal law. In that comprehensive and profound spirit, which is characteristic of his work, he takes up the problem in such breadth and thoroughness, that his theory (which in certain aspects even attempts to portray the historical development of the subject) remained for a long time essentially undisturbed by his successors, although they may have surpassed him in their treatment of some particulars.

It is still the idea of retribution which forms the foundation of Grotius' theory, and this idea is left without further support.

The most there is to say for it is that it does not conflict with that ideal of fairness ("equitas") which was to Grotius the essential element of the positive law.

In other words, this idea of retribution does not conflict with those conditions which, for the affairs of man, are to be inferred from his nature and his inherent social instinct ("appetitus socialis"). Punishment is something which results directly from the nature of crime: "Crimen grave non potest ex esse punitum." As the ascension of this retribution was forced upon Grotius by his empirical (to say the least) definition of punishment: "Malum posse est quod infestat omnes homines," a definition often repeated but more appropriate to his time than now.

§ 78. Hobbes. — Leibniz; Coerci; Thomas; Wolf; Rousseau.

§ 80. Pelandoni.

§ 81. Other Writers. Locke; Leibniz; Coerci; Thomas; Wolf; Rousseau.

But retribution was by Grotius conceived in a sense different from that previously prevailing. The question whether punishment must necessarily consist in some evil for the party punished had not yet been raised. In the Middle Ages and in ancient times, retribution was deemed both a duty and a right, to Grotius it was a privilege. Just as every right as Grotius asserted 1 is to be exercised only in pursuance of some rational purpose, so it was with criminal law. 2 Therefore, says Grotius, even vengeance is not to be repudiated, provided it has a rational purpose, e.g., the purpose of preventing, in the future, injuries similar to those received. Grotius, indeed, correctly recognized vengeance as the historic root of criminal law. He posited the right to take vengeance as originally belonging to every one; it was only for reasons of expediency, notably because vengeance is so apt to transgress the limits imposed by reason, that the criminal law was placed in the hands of the judge (the State). 3

Range of Punishable Acts. — The question as to what crimes should be punished was left as completely untouched by Grotius as were the questions concerning the amount of punishment. In this regard, since he considers law and morality to be in their very essence identical, he proceeds upon the principle that sin ("peccatum") and punishable acts (in their essence and apart from the requirements of a concrete system of law) are likewise identical. Thus, it was e.g., with the ancient Greeks, who recognized no principal distinction in this respect and regarded extra-legal or illegal acts and acts and attitudes possibly amenable to criminal punishment. The principle that punishment is merely a right and not a duty made it possible for him to reach the correct conclusion that the range of punishable acts is narrower than that of immoral acts. No punishment should be inflicted for acts which neither directly nor indirectly touch human society (acts the injurious effects of which do not extend to others). Since the State is not bound to punish but is merely entitled to punish, there also, according to Grotius, exists the possibility of foregoing punishment by pardon, and as reasons for

---

1 II, 20, § 2, n. 3.
2 II, 20, § 1.
3 II, 20, § 3.
this pardon, considerations of utility are acknowledged as sufficient.

Amount of Punishment. — In respect to the amount of punishment, we indeed find in Grotius considerable uncertainty and inconsistency. On one hand, regarded punishment as an adjustment of the injury (although surpassing the exact amount). Yet, in another passage, in the discussion of self-defense, he reaches the correct ideas that logically speaking there is no such thing as commensurability of guilt and punishment, and that it is merely a conscientious obligation ("cartitas") on the part of legislation to exercise moderate in the wounding off of wrong. In connection herewith it is well if the legislator be given a free hand in fixing the punishment in accordance with reasons of utility, although there must be no punishment "ultra meritum"; but how define "meritum"?

Justification of Punishment from the Standpoint of the Criminal.

The punishment was also justified from the standpoint of the criminal by a reference to his own will, to a voluntary acquiescence: "qui deligit sua voluntate se videtur obligasse ponere, quia crimen grave non potest esse non punibile, ut qui directe vult pecare per consequentiam et penam mereri voluerit." However, this standpoint of voluntary acquiescence does not lead him to give to the statute law such preminent importance as later is found in Feuerbach. It does not appear in Grotius as a foundation but rather a limitation of the criminal power. This is apparent in the sense that he considered it ill-advised not to give full enforcement to any statute that has once been enacted, since, in any case, an act which is in violation of a special criminal statute through this alone is dangerous and deserving of punishment: "Lex prohibit omnibus pecuata geminat; non enim sin-

pless est peccatum sed etiam vetimum committere," as Augustine had previously stated.

Defects and Merits of Grotius. — The weakness of this famous legal philosopher's theory of criminal law consisted chiefly in his having, from the outset, held punishment as an evil. Punishment as reaction against immorality and relatively as reaction against wrong permits of an ethical and logical foundation; but as an evil it can only be founded empirically. Thus the idea of retribution has to be invoked as an aid, and presumed without proof. But the idea of retribution necessarily implies that its exercise is not primarily a right but is essentially a duty and only incidentally a right. It has also the consequence that whatever punishment is required by retribution, nothing can be deducted from it for considerations of utility and humanity. Yet Grotius with accurate insight perceived that in the hands of the State punishment in every case is not an unconditional duty.

But, apart from all this, the criminal theory of Hugo Grotius is remarkably superior to the attempts which, for almost two hundred years thereafter, were made by others towards solving the problem. The possibility that historic development may be justified, a point which is indisputable in the view of Grotius, but which is utterly repellent to dull and narrow minds, prevented its general acceptance. It often happens that one-sided theories have the greater following, if the consequences imported in the theories serve definite temporary needs or are capable of easier comprehension. The successors of Hugo Grotius are especially illustrative of this phenomenon.

Hobbes. — While Grotius derived the legal system and the State from a compact of individuals, yet the impulse which led to this compact was a moral one based upon the general arrangement of the universe. He regarded (not always consistently, however) the State as bound by this general moral arrangement, just as the individual. The adherents of the doctrine of the Law of Nature little by little allowed the element of arbitrary or discretionary power to appear in this compact. Influenced by the turmoil and confusion of the English Revolution, Thomas Hobbes...

2. "Nec enim equum est, ut par sit peccatores multos et inclementes."
3. II, 20, 32, n. 2. Cf. in regard to this Lieb, "Das Recht in der Strafe" (1872), p. 64. On these grounds Grotius under some circumstances approved also of the modified death penalties.
4. II, 20, § 38.
5. II, 20, § 34. Here indeed Grotius has in mind a new criminal statute.
founded the State and the legal system upon a pessimistic view of human nature. The evil natural attributes of individuals should be held in check by the State and the law. Unlimited selfishness, or to speak more accurately, desire to injure others, appears to him to be the fundamental characteristic of human nature. The State, accordingly, is merely an institution for coercion calculated to put an end to "war of all on all" arising from such selfishness and to the general insecurity therewith connected. Before everything else in law, punishment is necessary. A mere contract would soon be broken by passion, "ut aperte magis sit pendulum facisce quam non facisce. Omnes crimina homines necessitate naturae ei eligunt quod sibi nomen apparentur bona est." Punishment has no purpose other than that of deterrence by the threat contained in the statute.

Since Hobbes was not capable of any deep historical comprehension he failed to discover the relation between revenge and punishment, and he considered that punishment did not originate or become possible until the existence of the State. He thus stands primarily upon a purely relative theory to which the later theory of Feuerbach exhibits a marked kinship, although Feuerbach, as is well known, wrote in opposition to Hobbes. The relation of a punishmentable wrong and a civil wrong on one hand and, on the other the relation between criminal law and morality, is almost completely abandoned. To Hobbes, torts and the payment of damages have nothing in common with crime and punishment. While he also recognizes that, for example, theft, adultery, and manslaughter are forbidden by the "Lex naturalis", and that the power of the State can not be at variance with the "Lex naturalis", yet in Hobbes this observation of the "Lex naturalis" is explained away by the statement that the power of the State is obliged to create the regulation and to maintain a regulation that has once been prepared, but the kind and the manner of the form of this regulation should depend entirely upon the pleasure of the holder of the sovereign power: "Furtum homicidium adulterium atque injuria omnes legibus nature"

1 "De Cive", c. 6, § 4. Cf. also "Leviathan", c. 28: "Punum malum est transgressoris legis auctoritate publicis inflicta, eum, ut terrae ejus voluntatem civilum ad obedientiam conformerat." "De Cive" was first published in 1646.


3 "De Cive", c. 3, § 4.

prohibentur, ceterum quid in cive furtum, quid homicidium, quid adulterium, quid denique injurias appellandum sit, id non naturali, sed civilii lege determinandum est." 4

From which it follows further, that the amount of punishment absolutely depends upon the discretion of the "summa potestas" in the State, acting in pursuance of the "utilitas publica." The reference of the punishment to something that is past is expressly repudiated as absurd. 5 A penalty fixed by statute must not be exceeded, although it is not at all necessary that there be a special threat of punishment, a mere prohibition being sufficient for the punishment of its transgressor. For that would be nothing other than to allow another to make amends for a fault committed by the legislator. 6

Justification of Punishment from Standpoint of Criminal. — The justification of punishment from the standpoint of the party punished is not entirely disregarded by Hobbes, but his argument is almost inconceivably weak. Hobbes, to be sure, realized the inadequacy of the fiction that the offender in the commission of the crime voluntarily acquiesced in the punishment. As the later more detailed arguments of Pufendorf have shown, this recognition is not entirely unimportant in the appraisement of acts based upon the natural impulse of self-preservation, and is also in contrast with the extreme consequences of the inquisitorial principle in criminal procedure. Hobbes, however, believed that he had done enough in this respect, since as part of the contents of the contract (upon which according to his theory the State was based) he had adopted the principle that no one should render assistance to those whom the holder of the "summa potestas" deemed it well to punish. 7 But the right to punish, he believed, did not need to be specially transferred to the highest power in the State. It was originally possessed by "all against all." Hereby Hobbes (uncoscious of the contradiction) comes back to an absolute basis for criminal law. It is not a basis resting upon an ethical idea, but merely upon a reference to that general position of warfare which is allowed to each against every one else. It is thus a founding of criminal law upon a power not controlled

4 "De Cive", 6, § 16. Here moreover Hobbes confuses the civil law question as to how ownership, etc., arises with the criminal law question as to what violations of once existing property constitutes theft, etc.

5 Ibid, 6, § 16.

6 Ibid, 6, § 5; "Leviathan", c. 26, init.
by an ethical regulation. In the case of those crimes whose essence consists in an attack upon the authority of the State as such, and in crimes of "ile majesté", Hobbes believed this pure condition of warfare to exist. This principle justified such abnormal rules as the extension of certain punishments to the descendants of those guilty of high treason. Yet, as a principle, it is illuminated by an correct idea, viz., that (as later maintained by Fichte) the criminal law and penal statutes may to a certain extent be conceived as limitations upon vengeance and the right of war.

§ 79. Spinoza. — It is a peculiar phenomenon, to which Ahrens has properly called attention, that opinions, such as those emanating from Hobbes — the unrestrained power of the individual uncurbed by ethical motives — and Pantheism — ascribing no independence to personality and rather regarding it merely as a transitory manifestation of the whole — are in accord in many of their results. This is especially the case, we may add, in respect to criminal law. Thus we find in the famous "Tractatus theologico-politicus" of Spinoza, the founder of modern Pantheism, almost the same foundation of criminal law as in Hobbes. According to Spinoza, law in its origin and essential nature is nothing other than force, — and naturally so, since ethical ideals presuppose freedom. But if the activities of the individual being are of necessity determined by the universe of the philosopher's life, then the activities are incapable of any value in pursuance of an idea which presupposes a "should" and not an absolute "must." The large fish have the right to swallow the small fish; and in the condition of nature every one has the right to take and do that to which his desire prompts him. He acts in accordance with his nature, in accordance with the law of the universe in him obtained. With Spinoza, as with Hobbes, it is only the consequent general insecurity which leads to the compact of the State and therewith to criminal law (i.e. that criminal law imposed by the State). This latter, properly speaking, did not come into existence until the State. In nature, every one has all that his power is sufficient to obtain; in the State, the power of the State acts only because individuals have irrevocably acquiesced therein. The aim of the punishment is to secure obedience, as disobedience constitutes the essence of crime. Therefore, the direct purpose of the criminal statute is fear, which should be felt by the masses, who are inclined to act in pursuance of their baser sensual desires and contrary to the true laws of nature: "tertem vulgo nisi metuat." In other words, criminal law is based on deterrence and determinism. It is left undecided whether the effect is to be attributed to the statute or to the execution of the punishment. But in one respect, Spinoza, the more profound thinker, differs very materially from Hobbes. He gives to the "lex naturalis", from which the State may not completely separate itself, a far more definite meaning than had been given by Hobbes. His philosophy of law betrays a democratic tendency in the remark (reminding one of Aristotle) that a great body of people who united, exercise the criminal power will not readily do anything that is absolutely perverse; and so he suggests the conditions of lasting sovereignty to be the satisfaction of the true needs of the people: not a formal contract but rather rational agreement binds the subjects. From this there arises a far wider limitation of the power of the State in respect to what acts may possibly be punished (a matter, however, argued by Spinoza merely in regard to freedom of thought and religious belief).

Influences of Spinoza's Life upon his Writ. — Upon the whole, Spinoza's philosophy of the State and of law reflect in clear outlines the necessity determined by the universe of the philosopher's life. Spinoza belonged to the Jewish race, which was at that time almost universally persecuted. This circumstance excluded him from active participation in public life; and he therefore found in quiet meditation and investigation of the relations of things the highest pleasure and calling of humanity. For this reason he does not expect much from the power of the State; but he does demand at least a certain guarantee of quiet and the enjoyment of the natural essentials of life and above everything else freedom of investigation. With the possible exception of the province of freedom of thought and religious faith, there was hardly an opportunity for such a sensitive and retiring disposition to have any conflict with the criminal law, — a conflict experienced by even noble natures who come into real participation and active share in public life. He regarded criminal law as essentially intended only for the rabble, and therefore views it from its baser side as a
means of deterrence intended to hold in check evil passions and thus be overlooks its general and higher ethical significance. This is in history a constantly recurring conception and attitude. Especially is this the case among the ranks of the fairly comfortably situated and blasi middle class, who, to be sure, pay taxes but in other respects are inclined to follow their own special interests, until some unexpected case reminds them that it is not always the common people who come into contact with the criminal law and that the correct limitation of the criminal power of the State is an ideal and at the same time a substantial benefit to all.

§ 80. Pufendorf.—Samuel von Pufendorf, in that part of his work which deals with criminal law, was fully in accord with the point of view accepted by Hobbes, and he often expressly appealed thereto. Like Hobbes, he denied the originally ethical character of the relationship between man and man; and, like Hobbes, he considered a man in the natural state as entitled to all which his individual power enables him to attain. He derived the criminal law, belonging exclusively to the State, from a simple waiver of the right originally belonging to each individual, in pursuance of his own interest, to cause harm to any one who in his view, opposed this interest or stood in his way. Punishment, in the true sense, according to Pufendorf, exists only in the State, and is inflicted “al impetrante.” Of retribution as a principle of punishment, he would have nothing,—“non est homo proprie

4 In accordance with this conception slight attention can be paid to the criminal. Spinoza entertains no doubt as to the expediency and legal propriety of the death penalty. Where he deals specially with punishment, he almost always speaks of the scaffold as “formido malorum.” Cf. Lessner, “Das Recht in der Staatslehre” (1852) p. 78.

5 Of, especially the third chapter of the eighth volume of his comprehensive work, “De jure naturae et gentium,” first published in 1672, the chapter referred to is entitled: “De poenis summae criminalis in vitium nec bona civium in causa delicti.”

6 I am unable to concur in the statement of Reinecke (“Staats- und strafrechtliche Erörterungen”), p. 254, that Pufendorf holds essentially the same conception as Grotius.

7 In particular, he is, e.g., § 6, where in opposition to Grotius, it is argued that the criminal justice belongs to “justicia expiatoria.”

8 Pufendorf, like Hobbes, contemplates the right of punishing as ultimately merely a question of might. No attention is given to founding punishment from the viewpoint of the party punished. The idea of voluntary submission to punishment is very correctly and effectively criticized: “quum solum quantum admittat quia neminem sperat, non habeste ad una ratione possunt possunt declaratum.” However, in § 25, it is stated that no one can complain about the severity of a punishment which has been made public previous to the commission of the offence.

406

Chapter III. Theories from Grotius to Rousseau

poenam, sed poenam propter hominem,” and consequently the principle of the “lex talionis” in criminal law, according to his view, is both practically and theoretically impossible. The true character of punishment exists rather in a security against future injuries,—i.e., deterrence of others, or reformation (or relatively a “making harmless”) of the criminal himself. In consequence of this (and in accord with a fallacy of Pufendorf and of many others), as applied to intentional homicide, the death penalty under certain circumstances appears justified.

Comparisons with his Predecessors.—Pufendorf, as perhaps no other, spread abroad through Germany those fundamental maxims of the absolute power of the State, which eliminated the State of the Middle Ages and its social system. Yet his theory of the absolute power of the State does not have the one-sided, harsh, yet essentially logical character, which distinguishes the theory of the State and law propounded by Thomas Hobbes. As with Spinoza, the “lex nature” and the “lex divina” had with Pufendorf a definite meaning, and the “publica utilitas,” the “salsus reipublice,” is the foundation and at the same time a limitation of the absolute power of the State. Nevertheless, the dangerous point of this principle, which otherwise would so readily lead to the theory of the sovereignty of the people, was blunted by Pufendorf, in that he set forth a presumption, by virtue of which the acts of the power of the State correspond to the “salsus reipublice.”

This is his point of resemblance to Hugo Grotius. But unlike Grotius, instead of having the State and law proceed from the inner and ethical nature of man, Pufendorf laid its foundation merely upon the aspiration and need for external advantage and security, or at any rate for a certain improvement. Thus he substantially divested law of its ethical character. On the other hand, he considered man, in the condition of nature, merely from the moral standpoint; and so it came about, that while, to the law, as it was so to obtain in the State, an ethical character was denied, the law which existed before the State, or was contemporaneous therewith, was regarded as prevailing from the moral point of view. Thus the result obtained from regarding law as a moral duty was partially carried over to the State and to the law.

1 VIII, 3, § 17.

2 Cf. e.g. the investigation “De delictu et delictorum attainimento” (LXI, II, c. 5) and

3 “De jure necessitatis” (LXI, c. 6).

407
in the State. So law and morality, in spite of the fact that Pufendorf seemed to deny their common source and original unity, are confused. It was a mistaken attitude on the part of Hobbes and Spinoza to conceive the criminal law as a means of chastisement (discipline), and not primarily as a protection, or (as it were) an outer covering of the otherwise existing right, turned toward an aggressor. This aided the omnipotence of the State, but departed farther and farther from the original starting point of Germanic law, which alone was able to give stability to the criminal law.

Value of his Work. — Nevertheless, that Pufendorf was of eminent service for the advancement of law, and especially of criminal law, cannot be denied. Although he was referred to by Leibnitz as “homo parum jure consultus et minime philosophus”, and although his didactic and dialectic manner at times proved quite barren, yet, on the other hand, he knew the law applicable in particular cases, and had an interest in practical questions, — both of which elements are often lacking in a philosopher. His discussions of responsibility, self-defense, necessity and measure of punishment, must have brought new life to a judicial practice that was ossified and clinging steadfastly to authority. And in one important respect, as contrasted with Grotius, one can observe the progress of the times. Pufendorf rarely regarded it as necessary, in his investigations of criminal law, to have recourse to theology or biblical history; while the extensive investigations of Grotius as to whether his conclusions harmonize with the practice of Moses and the Hebrew judges and kings, make a strange impression to-day.

For a long time after Grotius, Hobbes, and Pufendorf, criminal theories made no remarkable progress, and, in the 1700s there were even attempts to revert from the emancipation from theology, which these men had accomplished. Yet, during this period, there were certain of the more important authors whose opinions and points of view seem worthy of mention.

1 Perhaps it may be of interest to the students of the “Normen-thories” (rule theory), which is now so popular, to learn that this theory is suggested in Pufendorf, VIII, 2, 3, 4. He also says that the penal clause of the statute is intended for the magistrate, not for the criminal. Cf. also Hobbes, “De Cive”, XIV, 4, 1, 5, who is almost more explicit. However it arises only incidentally.

2 VIII, c. 3, §§ 16 et seq. Little attention is given to the variation of punishment.

Chapter III: THEORIES FROM GROTIIUS TO ROUSSEAU

§ 81. Other Writers. Locke. — Locke, like Hobbes, proceeded upon the theory of a right belonging originally to the individual to revenge real or fancied wrongs according to his discretion, — a right which, through relinquishment, passed over to the State. Fundamentally regarded, criminal law and the right of self-preservation appear to him to be identical; therefore the purpose of punishment is security, through the reformation of the criminal, if it can be so obtained, — if it cannot, then through the death penalty. To inflict the latter is in no way different from the killing of lions and tigers, whom every one has a right to hunt. The criminal (and this reminds one of the later theory of Fichte) has no reason to complain of the punishment. He has declared, through his crime, that with law and equity he is not concerned, and also that every restriction is removed which protected him from violence and injustice. For this reason, the amount of punishment is determined merely by the conscience of the party inflicting the same. However, there is no absolute obligation to punish; a penalty can, if it seems expedient, be remitted.

The ideas, from which an actual advance of criminal law could arise, lay in the different utilitarian purposes of punishment, which, however, portray in proper order and in a correct relationship, the absolute principle of justice regarded, as it were, from the other side. The absolute theory (which does not include relative theories) stands essentially for continuity of purpose, — at any rate it operates as a warning to change, in case criminal law and its theories start upon a false path or are led astray in following out a relative theory.

Leibnitz. — Historically speaking, little influence has been exercised by the ideas of Leibnitz, which appear scattered throughout his “Thésodeî€€”.

Leibnitz, in his fundamental idea, reminds one of Plato. To Leibnitz, as to Plato, reward and punishment seem to be part of a principle of harmony governing the entire world, and, as externally, so internally, in the criminal himself, the punishment restores the obscured predominance of ideas.

1 "On Government" (London, 1900), II, especially § 27. Cf. Leistner, pp. 73 et seq. 2 Le"vinae consacri de theodicea", I, 1, § 2. 3 "Leiden: ed. Erdmann, I" p. 215 b. 4 I, 70, 71, 72, 73 (Weimar: ed. Erdmann, I, pp. 521 et seq.) 5. I, 73 says as to punishment: "un rapport de convenance qui contenue ne seulement l'offensé, mais encore les bages qui la voient comme une belle maison ou bien une bonne architecture contente les esprits bien faits." 74: "... Dieu a établi dans l'Univers une connection entre le peine ou la récompense et entre la mauvaise ou la bonne action."
divinely implanted. Naturally this leads to the purpose of reformation. But Leibnitz does not entirely abandon the principle of deterrence. He says, however, that this must be harmonized with the purpose of reformation. As with Plato, however, everything is subjected to an absolute theory. Satisfaction ("Genugthunung"), which is dependent for its meaning upon the acceptance of freedom of the will, is the primary element; and justice, according to Leibnitz, does not rest upon the possibly changing needs and opinions of mankind. A deeper insight is shown by that passage in which Leibnitz points out, as one of the most effective means of punishment, the general scorn of the community towards the criminal, and he compares this especially with excommunication among the early Christians. This is not far removed from the principle that punishment may conceivably be something other than an external evil.

Thus the "lex talionis" appeared to Coceci as essentially the correct form of punishment, and the existence of a wrong presupposes the violation of a right. But the jurist felt obliged to modify the idea of the "lex talionis" into the idea of an evil of equal import.

2. Cf. loc., I. 74.
4. "Introduzione ad Hebrei de Coceci Grevitch illustrato" (1751), diss. XII.
6. This was conformable to the treatise of Coceci from the very beginning.
7. § 554: "Saepe talionis non intelligent poenae de reo manifesto generis moenia... Sed tantum... ennulam nonnulla superest."... Arbitrio poenae definitum talionis reservata est.

Chapter III: Theories from Grotius to Rousseau

Thus it becomes as plant as wax and as elastic as rubber; and by the maxim that every act that is contrary to a statute or the command of a superior is also a violation of a right (namely, the right to obedience), everything can be justified. The distinction between law and morality is often confused, since the violation of a right is presumed, unless the law expressly gives to a person the privilege of acting in the manner in question.

Thomasius and Wolf. The legal philosophers and jurists who preceded Becariss, and sought to found criminal law upon a relative theory, contributed just as little to the advancement of the cause.

Thomasius reproduced, in the short remarks which appear in his "Fundamentum juris natura et gentium," the theories of Pufendorf. Expiation, insofar as it is undertaken by man, he designates as "cruelitas." "Assurario" and "censurario" appear to him to be the goal of punishment; but he chiefly explains the latter, and compares punishment especially with medicine, which must be differently applied according to the time and circumstances. Nevertheless, and in spite of the fact that Thomasius had striven so often against the theologians, he has recourse, in some passages, to the ban of theology, since he is of the opinion that, for certain offenses, the punishment is fixed through "jus divinum."

Christoph Wolf proceeded consistently. He believed that no act deserves punishment as a consequence of its own nature. The only purpose of punishment should be the warding off of injury from the individual and from the legal community ("Salus reipublicae suprema lex esto!"). It is worthy of mention that, in Wolff, there is clearly apparent the relation of punishment to the protection afforded by law. There should be no punishment on account of an act that is only mediated ("actus intermeditius"); punishment may be based only upon an injury ("laxio").

14 § 521. Thus, especially, the punishment of suicide was justified, since no one had a right over himself, except for his own maintenance. Cf. also XI, § 27: "Principium juris naturalis est voluntas Creatoris... Omnis aeterna illa voluntas has generalis propositionis continetur, ut creaturae rationis jussus suum gessit: ipsumque..."

15. Cf. § 523, c. 4.
17. "Institutiones juris naturae et gentium" (1754), §§ 92, 137, 410, 759, 800, 1043 et seq.
justification of punishment as toward the criminal is thus based upon the violated right, and, from the point of view of the State, is based upon the "Salus reipublicae."

Rousseau. — One cannot call what little is found in Rousseau a real theory of the basis of criminal law. Rousseau merely endeavored to reconcile that punishment which, whether good or evil, he was obliged to regard as practically indispensable, with his theory of the absolute freedom of the individual, — a freedom upon which not even the State might infringe. He accomplished it in this way, namely, that he considered the crime as a breach of a contract which gave to the State the right of war and defense against the individual. Yet there was connected herewith another fundamental principle which bases punishment upon the will of the criminal; and it is in connection with this second fundamental principle that Rousseau, under certain circumstances, would require that the individual be sacrificed for the State. According to Rousseau's view, every one assumes the risk that the State may say to him, that it is necessary that he die for the sake of the State. It is certainly true, that Rousseau abandoned the purpose of deterrence in punishment; — also that he observed something of worth even in the basest individual, — yet the maxim that one has the right to kill any one who cannot be allowed to live without danger, entirely releases the conception of punishment from its historical and ethical bases, and makes it expensive as rubber. It has been seen how the fairest theories of humanity and nobility were able to justify themselves in the French Revolution under the plea of necessity. Necessity, measured solely by concrete circumstances, gave rise to the theory of extraordinary legislation and despotism.1 And yet it is still more questionable, if one proceeds (as Rousseau certainly did not do with any degree of precision) upon the basis that crime consists not so much in the violation of a right as in disobedience. In the case of violations of a right, one is traditionally rather accustomed to fixed degrees of punishment, — yet a fervid imagination is able to deduce, from every act of intentional or actual disobedience, the overthrow of the State, and therewith the need for repression "à outrance" by means of the criminal law.

1 "Contrat social" (1762). II, ch. 5.
2 Along with this there are occasionally profound and correct observations. Thus, in the "Discours sur l'origine de l'inégalité" ("Du contrat social", ed. Masson, Paris, 1823, p. 291), he states that in the initial stages of legal development every violation of a right was conceived as a personal injury.

Chapter IV

CRIMINAL THEORIES FROM BECCARIA TO FEUERBACH

that portion of freedom guaranteed to others. This pledge lays the basis for punishment,—the purpose of which is security obtained by deterrence, since a crime either violates or endangers the rights of others. In other words, it is the fiction of the consent of the criminal on one side and on the other the principle of the necessity or inevitability of punishment, to which Beccaria has recourse. But the lack of truth in the fiction that the individual has agreed to have himself offered up as a victim for the purpose of deterring others is today apparent,—and the more so, since, both in Beccaria (as well as later in Feuerbach), the deterring element rests not so much in the threat contained in the statute, as in the carrying into effect of the punishment.

Defects and Merits of Beccaria’s Work. — The weakness of the argument is especially apparent in its theoretical objections to the death penalty (Beccaria, however, availed himself of other and more correct bases, learned from experience). Beccaria was of the opinion that the individual could not have consented to the community the right to put him to death,—since this right was not his to concede. This argument obtains equally against all punishment, except possibly mere confiscation of property by virtue of a fine,—and the terrible punishments by way of imprisonment, which he would substitute for the death penalty, and which presently found practical expression in the Austrian Code of Joseph II, were in reality worse than death.

Nevertheless, his theoretical foundation was well suited to establish a truth upon which the reform of criminal procedure, at that time, must turn,—and this explains the extraordinary consequences of the book and its opinions. The method of dealing out criminal justice in the middle of the 1700’s was naturally open to the reproach that it exhibited a revolting profligacy in its punishments,—in other words, in its dispensation of human misery,—and that these penalties by no means achieved adequate results. What Beccaria did was not so much to lay a foundation of criminal

4 Cf. Glaser, pp. 10, 11.
5 Cf. 16. He would, however, under exceptional conditions, not entirely reject the death penalty as an extreme means for attaining safety. He regarded the death penalty as a kind of release into the condition of future existence.
6 Of. Glaser, pp. 69, 70. Beccaria, however, believed that imprisonment of long duration had more effect upon the one observing it than upon the convict himself (1). Thus there are in him traces of the idea of an appearance of punishment. The idea that imprisonment should be made as terrifying as possible in external respects (e.g. through the appearance of prisons) recurs in others.

CHAPTER IV] THEORIES FROM BECCARIA TO FEUERBACH [§ 82

law as to emphasize its limitations. According to his argument, only those acts should be punished which were dangerous to the State and relatively to others. Only so much punishment should be inflicted as was absolutely indispensable for deterrence (The State has the duty to prevent crimes by means other than punishment, and has to consider whether or not some other means would serve this end better, and, accordingly, whether or not it would be better in many cases if punishment were given up. These principles are undoubtedly correct; and Beccaria used them to assail a countless number of grave abuses in the criminal law and the criminal procedure,—abuses such as torture, the disgraceful conditions of the prisons in which suspects were detained, the long duration of the trials, the lavish infliction of the death penalty, the cruel punishments tending to harden the sensibilities, the infliction of severe penalties for offenses entailing little danger, confiscation, etc. In this consisted his indisputable and never to be forgotten service,—as all concede. He also recommended the greatest possible celerity of punishment.

It is self-evident that such a theory was opposed to the conception of punishment inflicted by the State as a purging out of divine justice, and to the conception of crime as sin. In this respect, to be sure, his writings contributed nothing new. But the subject had never been so popularly presented. Although Beccaria made no attempt to harmonize his relative theory with an absolute basis of criminal law, yet the noble enthusiasm of its author and the masterly language in which the book was written, permits the reader to assume, as it were, that an absolute principle could be found, behind his principle of the general utility, of the greatest possible happiness of the many.

Later Writers. Pianigiani. — As a result of Beccaria’s writings, there arose the view that punishment by the State and divine justice are not identical, and this apparently became the general view of the educated classes, of legislators, and of prominent ju-
The theory of retribution was virtually abandoned, until it was again habilitated by Kant. The Austrian jurist, Von Sonnenfels, a jurist of great merit, speaks as follows: "Through a kind of tradition, an explanation of punishment has intruded into jurisprudence, which is more ingenious than correct: an injury to the feelings because of the wickedness of the act." He also rejects the definition of Hugo Grotius.

Fliangieri considers it no longer necessary to refute the basis of criminal justice as resting upon divine or human retribution. To him, punishment is reparation for the breach of contract implied by the crime, and this reparation can only consist in security from the individual offender and a destruction of the influence which the bad example can have upon others. Thus Flangieri's theory consists of an uncertain and vague confusing of the so-called "special prevention" theory and the theory of "deterrence" (deterrence by the infliction of the punishment). There is no mention of a justification of criminal law from the viewpoint of the criminal. The extravagant results of deterrence are rejected only by appeal to the necessary observance of humanity. It deserves mention, however, that Flangieri has more of the historical sense than e.g. Beccaria and others, and that he by no means represents the unlimited omnipotence of the State. His arguments concerning the range of punishable acts have even to-day a claim to recognition. He is far removed from confusing law and morality, as he is from denying that they have any relation, and in this respect he assumes a higher and more correct attitude than Feuerbach.

§ 83. Globig and Hustner. — Of far more superficial and (from to-day's viewpoint) almost intolerable character is that abortive treatment which the views of Beccaria received in the treatise of Globig and Hustner, "Über die Criminalgesetzbahung" (1780), — a treatise famed in its time and awarded a prize for merit. The book deserves mention, however, because its authors for the first time worked out a theory of criminal law as a preliminary to legislative action. While both authors evinced their hostility towards "visionary appeals to a divine law" for justification, yet they themselves grouped together a number of theories for punishment (compensation, retribution, deterrence, reformation) without any attempt whatsoever to determine which should be given precedence. They were, however, chiefly influenced by the ideal of deterrence (although at times this was obscurely combined with the ideal of retribution). And they even went so far in this as to recommend, in spite of the improving practice of the times, steps manifestly contrary to progress. Thus, for example, they recommended insulting treatment of the offender's dead body, if he could not be caught alive, and even mutilation by the cutting off of the tongue, although only in exceptional circumstances. Naturally nothing is said of a foundation of criminal law from the viewpoint of the offender. The book, indeed, expands many correct views; it asserted that a punishment that is necessary is also justifiable; that the legislator should not confuse offenses that are criminal and those which are merely violations of police regulations; that punishment is not to be founded upon a contract with the criminal (and that for this reason the propriety of capital punishment cannot be contested). But it also contains pernicious juridical fusions. Thus, for example, there is a complete confusion of the conception of "dolus" and "culpa" (i.e. malicious intent and negligence). There are also principles which only the most shallow understanding could admit, and throughout there is an absolutely unestrained and arbitrary application of the maxim: "Salus republicea suprema lex esto." One would be inclined to

15. Till detto non si alzere la vibrazione d'un pasto.
16. How far should the principle of security and how far should the principle of making an example extend? There are many cases in which the former principle would be satisfied when the latter would require something additional, and vice versa.
17. Flangieri had e.g. apparently correct conceptions of the historic origin of criminal law. According to his view, it was only after the lapse of some time that criminal law was transferred to the State. To this extent his theory can not be designated a relative one.
wonder at the influence exercised by this writing, if there had not been such frequent repetitions of such things in scientific writings. Acknowledgment should be made, however, of the suggestion as to the need of making the criminal law more definite and more suited to the times.  

§ 84. Servin. — Beccaria's ideas as to the necessity of punishment were transformed, in the treatise of Servin, into a formal theory of self-defense. This treatise was originally written, in competition with that of Globig and Hunter, for the prize offered by the Society of Economics at Berne. Servin regarded criminal law merely as the individual’s natural right of self-defense transferred to the State. Just as the individual, in the state of nature, can render himself secure against a repetition of an attack by slaying his aggressor, so, later, the State may do the same thing by means of punishment. According to this, by virtue of the presumption (incorrect, however) that the criminal would repeat the crime he had perpetrated, one would necessarily expect security against the individual criminal to be the purpose of punishment. But, regardless of the fact that self-defense can have reference only to the aggressor and not to third parties, the author gives especial prominence to the deterrence of others. The logical deduction from the theory of deterrence, viz., that the degree of the punishment should depend, not upon the importance of the injury to the injured person, but upon the strength of the inducement to commit the act, which is often stronger in minor offenses (e.g. thefts when opportunity presents itself), is avoided (as later by Tocqueville) by a second indignation of logic; for, while quite openly recognizing this deduction, 5 he says it is not in accord with experience. There is absolutely nothing to be said in defense of the logic of this once-renowned commentator. While, for example, like Beccaria, he approves the greatest possible restriction of punishment and makes the pathetic appeal, “Spare the liberty of the citizen”, 6 he has not the slightest scruple against asserting an excessive duty to inform on others, and advocating punishment of the party in  

1 The principle of deterrence in accordance with the maxim: “Salus reipublicae suprema lex esto” appears in a more moderate manner in Grotius, “Grundsätze der Gesetzgebung über Verbrechen und Strafen”, 1766.  


3 Cf. pp. 27, 28.  

4 Cf. I, 4 and p. 265.  

5 § 84.  

6 The death penalty (but primarily for the reason that it does not sufficiently deter), he favors the widest range of corporal punishment, and even those punishments by mutilation which the practice of his time had abandoned. The application made by Servin of the distinction between “droit naturel” and “droit conventionnel” is also remarkable. Infringements of the former he regards as “crimes” (i.e. offenses of a grave character), while infringements of the latter are merely “délits” (i.e. offenses of less grave character). Here, for the first time, we meet this classification of punishable acts, which later became so important, — but he is unfortunate in the application of his classification. Life, health, and freedom belong to natural law; the “droit conventionnel” consists of that which results from the “contract social” and here it is also included property, since the State appropriates property (1); consequently theft is never a “crime”, but only a “délit.” As to punishment, he derived from the conception of the “droit conventionnel” the principle that a death penalty or a sentence to life imprisonment should never be inflicted for a “délit”, since no one can enter into a contract extending to another the right of slaying him by depriving him, for life, of his freedom. Together with these useful, although mistaken, attempts to distinguish the various kinds of punishable acts, there appears a considerable confusion of law and morality. Servin quite correctly recognized that grave crimes are always also violations of the laws of morality. But he committed the error of deducing legal maxims directly from the moral law. And as a result of the interchanging of law and morality, he characterized “délits” as “intent to injure” (“envie de nuire”), a conception which later became seriously harmful, in many respects, for French administration of justice.  

Welzland. — The extent to which the maxim “Salus reipublicae suprema lex esto” can lead to a disregard of the experiences of
reason can be found which induced the criminal to commit the crime, there the regular punishment cannot be applied, and the criminal must be treated more leniently. So it is, for example, with a robber who murders his victim because he fears discovery. Also, as a further illustration, a false witness who by his false testimony merely desires to obtain an advantage for another; or even for himself is not actually a criminal. Consequently the State and the judge (in pursuance of most unsafe presumptions and of fundamental principles which in their practical application conflict with each other every moment) are obliged to fix (arbitrarily) the punishment, i.e., to mitigate it. But the State and the judge, if they are sufficiently convinced of the "wickedness" of the criminal, may also punish very severely. The author who, in the beginning, seems so much concerned that the State should not punish where no useful purpose would be served, and who, in the beginning, argues that only a violation of the so-called natural right should be a crime, is ready later to designate as an actual crime "wicked disobedience" to any law of the State whatsoever; for, of course, such disobedience towards the State will ultimately be availed of to violate natural rights.

This is the argument of despotism,—an argument, indeed, which is not scorched by a certain stupid liberalism of to-day (one has only to substitute the word "principiell", which here has but little different meaning, in the place of the word "wicked", which is no longer in favor). Since every act whatever can be "wicked" and every act can be dangerous, mere persuasion leading to discontent in the State can also be a crime; and since the perfecting of the individual is an unconditional duty of the State, so the individual may be coerced by means of punishment. Thus we find preched the greatest conceivable interference of the police (with privilege of punishing) in the affairs of the individual and of the family; and with such omnipotence in the power of the State, is inherently associated the doctrine of the limited intelligence of the fundamental motives which are connected with its observance, and in the moment of transgression has sufficient strength to suppress every motive, and by means of this suppression to fix for himself an entirely opposite application of his powers. Cf. also 1, p. 356, where it is argued that violent passion may preclude the notion of the real self.

14 The deliberate choice of detrimental acts is wickedness and every wicked violation of a statute is a crime. 1, p. 275; II, p. 101 and other places.
15 I, p. 306.
16 I, pp. 177 et seq.; I, pp. 350 et seq. At times even prizes and rewards for good behavior are recommended. 1, p. 165. 420
§ 85. History of the Theories of Criminal Law [Part II]

One of it is firmly implies that the methods of the General Code of Prussia, promulgated a few years after the appearance of Hetzel's work, that his views were those of many of his time is also apparent from a comparison with the "Draft of the Bavarian Criminal Code" by Kleineschrod, which was so ably criticized by Feuerbach.  

§ 85. Kant. — When such errors were prevalent, it became a matter of practical importance, on one hand, to mark the distinction between law and morality, and on the other hand to save the law from being completely reduced into mere considerations of expediency in the individual case. A theory which could undertake this successfully must necessarily create a remarkable impression upon contemporary thought, however striking may be its defects in other respects. This primarily explains the remarkable influence of Kant's theory of criminal law. Kant absolutely denied to man the possibility of knowledge of "things in themselves" (truth in the objective sense); but (as is well known) by a rather daring mental leap he saved the possibility of an ethics based upon the free will of the individual. This he did by the acceptance of a standard for practical action which presupposed freedom, God, and immortality, and was capable of being directly known, and was invariable. This "categorical imperative" meant for him, in criminal law, retribution. Unconditional retribution must come upon the criminal. In this retributio commanded by justice, no place is left for additions or for modifications on grounds of expediency. Upon it depended the dignity and value of all human institutions. "If justice ceases, then no longer is it worth while for man to live upon the earth." "Even if civil society should dissolve with the consent of its members . . . the last murderer found in prison must first have been executed, so that each may receive what his deeds are worth." From this standpoint the justice and necessity of the death penalty are especially asserted.

Criticism of Kant's Theory. — It is easy to refute Kant. If one will be self-respecting and not permit himself to be dazzled by a famous name, Kant's theory hardly deserves the status of a scientific attempt. It is nothing other than an appeal to pure sentiment, — a sentiment which, even in Kant's time, varies greatly with the individual. It would be very difficult today for a man of scientific training to maintain that there is a uniform categorical imperative, in the way that Kant accepted it. Ethics has its historical phases of development; and this fact, as well as legal history in general, relentlessly militates against the acceptance of capital punishment for murder as a principle valid from the very beginning. Kant was correct merely in this, that the fate of the individual criminal should not (as in his time was so often maintained) be made to depend upon indefinite considerations of expediency. For this purpose, his emotional appeal to the "categorical imperative" superior to time and space was admirably adapted.

Since, however, it is impossible to carry out a theory of retribution, so Kant (although it was not his task really to carry out any theory) was actually obliged to give up his theory, which did not proceed further than spurious statements: for, in many cases, he substituted for the real retribution of like with like a retribution according to effect or feeling. However, his "categorical imperative" involved him in some serious entanglements. E.g. an illegitimate child, being a child contrary to law, should, strictly speaking, not exist, and consequently it is difficult to declare the murder of such a child as punishable. The demands of honor appear as "categorical imperative" (is there anything that may not at some time and under some circumstances appear as "categorical imperative")?; as a result, the question of dueling, he
finds no proper avenue of escape. Here the "categorical imperatives" contend with each other and, although they should stake their life on the issue, they form here an exception.

However Kant's theory very properly criticized and refuted that sophistry that the criminal himself wields the punishment as a consequence, and that it is for this reason justified. The same exposure, indeed, in somewhat more decisive manner, had already been made by Hobbes and Rousseau. That it so soon afterwards could have been set up by Feuerbach, is indeed proof of the vitality of such legedernai of logic, with which, the solving of the weightiest problems is so lightly attempted, and even anew.

§ 86. Fichte. — Like Kant, Fichte made a complete separation of law and morality, and based law upon the correct, although in itself meaningless, conception of freedom.

As Fichte based the right of property upon an arbitrarily conceived contract of abandonment by non-owners to the owners, and as he bases the State merely upon contract, so he regards crime simply as a breach of contract, i.e., of the rights guaranteed by contract. This breach on the part of the criminal, strictly regarded, results in a severance of all legal relations between the State and the criminal, i.e., the loss of rights on the part of the criminal. He who is without rights is an outlaw. Still the State

1. P. 208: "If then I enact a criminal law against myself as a criminal, it is in me the pure reason, legislatively giving a right (homo nonnomen) which subjects myself to the criminal law in a person capable of crime, i.e., as another person (homo sconcinnus), together with all others in the compass of the citizen. In other words, not the people (each individual among them) but rather the court (the public justice), i.e., one other than the criminal, establishes the capital punishment, and certainly the social contract does not contain the promise to allow oneself to be punished and thus to dispose of one's self and one's life.

This was characteristic of the period, which again is closely related to Hobbes. Abel., "Unter Belohnung und Strafe" (2 Parts, Erlangen, 1849), would also completely separate moral order from legislation from civic retribution (criminal justice). (As to this, see Hepp, 1, pp. 64-64.) Carl, Chr. Erhard Schmidt, "Versuch einer Moralphilosophie" (Jena, 1790), distinguished (cf., especially § 397): "corporate evil" - this can be applied by any injured individual and by the State in his name, chastisement - this is an affair of the educator, making an example the authorities are entitled to do this by virtue of the social contract. Solms believes that only the infinite can do this (i.e., fix a lesser degree of happiness in accordance with deserts of character. Kant even had previously in his "Kritik der praktischen Vernunft" pointed to punishment simply as moral retribution. As to this see Hepp, 1, pp. 24, 25.

"Grundlage des Naturrechtes nach dem Prinzip der Wissenshaftleute" (Jena and Leipzig, 1780), 2 parts. Nothing less was offered by Fichte's later and well-known "Staatstheorie, oder die Verhältnisse des Orteslichen zum Vermögenlosen."

2. II, pp. 113-130.

Chapter IV: Theories from Beccaria to Feuerbach

does not take complete advantage of these harsh results. It can, as a general rule, satisfy itself with a guarantee that, in the future, the criminal will better observe the contract; and it finds this guarantee in the so-called "Abschussungsvertrag" (i.e., contract of expiation), from which the criminal derives "the important right" that he is not declared absolutely without rights but is to be punished. Thereupon, by virtue of this "Abschussungsvertrag," the criminal is subjected to a reformatory punishment.

But, as above stated, the "Abschussungsvertrag" merely constitutes the general rule. There are crimes of such a character that the criminal does not appear to be able to give a satisfactory guarantee of his future observance of the contract. In these cases "Abschuss" ("atonement", i.e., punishment in its proper sense) does not take place; there still continues the total deprivation of rights. As a result of this deprivation of rights, the State is justified, for its own security (and, if need be, for the security of the rest of the citizens), in taking the criminal's life. But, as Fichte expressly emphasizes, this is not punishment, but rather a police measure. A purely judicial sentence of death is, according to Fichte, an impossibility. And since, if the "Abschussungsvertrag" did not exist, any action would be permissible against the criminal, what, in the abstract, has absolutely no rights, he believes that it is not only right but also expedient for the law, which necessarily regards the "Abschussungsvertrag" as a benefit to the criminal, to also assume the purpose of deterrence.

Fichte, indeed, had but little conception of the specific consequences upon the individual criminal of the theory of deterrence and the theory of security. The controversy between Groshmann and Feuerbach soon enough revealed that these theories did not harmonize, and the State was absolutely no attempt to specify what acts are punishable (deserving of punishment). The most be
proposes, by way of allotting the objective amount (degree) of
punishment, is indemnification in the form of a certain punish-
ment, obscurely defined, by imprisonment in a workhouse. 8

According to Fichte, the law in general, and obviously criminal
law also (as Stahl9 has very correctly demonstrated), is nothing
other than an external arrangement for coercion, benefit of all
moral ideas, with but one exception — the maintenance of a certain
abstract freedom. Fichte's ideal 10 is that of an "arrangement
working with mechanical necessity, whereby, from every illegal act,
there results the opposite of its purpose." 11 Consequently a con-
ception such as this, in which the sentiment of the members of
the State amounts to nothing, amounts to nothing other than holding
that the ultimate security for the maintenance of the legal system
is found in unlimited police supervision and red tape (with permis-
sions and passports). This is remarkable enough in a philosopher
who had so ardently defended the German nationality against the
French. It is nevertheless instructive to that pedantic and false
liberalism which seeks primarily for security against wrongdoing
and in no manner trusts to natural sentiments. Fichte is also
absolutely lacking in a true historical sense. Otherwise he certainly
would have realized that that basis for the outlawry of the criminal
which he everywhere ascribes to criminal law is merely in conform-
ance with the first stages of legal development.

However, some things may be learned from Fichte. In the first
place, there is involved in this assumption of the outlawry of the
criminal a relative truth well worthy of consideration; it leads to
a valuation of criminal statutes which is much more correct than
3. e.g. in the later theory of Feuerbach. 12 In the second place, the
philosopher has a better perception than many of the jurists seem
to be mentioned, in that he sought a basis for criminal law from the
viewpoint of the criminal also.

1) I. p. 112.
2) "Die Philosophie des Rechtes", I (3d ed.), pp. 230 et seq.
3) ib. p. 169.
4) The purpose of reform is in inextricable contradiction to this
mechanical manner of conception: for according to Fichte the law has
nothing to do with the understanding. But how there can be reforma-
 tion without a change of the understanding, it is difficult to conceive —
since every mere habit certainly changes the understanding. Fichte here
(H. p. 114, cf. pp. 118, 110), just as is done later by Grohmann, avails himself
of the statement that it is political (that) reformation that is aimed at rather
than mere reformation.

5) The criminal statute (if it rest upon historical necessity and not
upon discretion) should be the limitation rather than the basis of the
punishment.

423

Chapter IV: THEORIES FROM BESKARIA TO FEUERBACH

§ 87. Grohmann. The "Special Prevention" Theory. — Groh-
mann's theory (that of special prevention), 1 like that of Fichte,
found the basis of punishment, as against the criminal, in this,
viz.: that, against him who opposes government by law, there may
be a right of coercion, which may go even so far as to include his
destruction. In his search for a moderation of this coercion, 8
he finds it in the use of a means whereby the one threatening dan-
ger (i.e. the criminal) can, for the future, no longer be regarded as
such. This means is punishment. 3

The criticism of Grohmann, made by Feuerbach especially and
by others, that he would make the mere possibility (apparently the
evil intent) of an act rather than its actual commission the reason
for punishment, is, upon closer investigation, not well-founded.
Grohmann, indeed, would prevent future wrongful acts of the crim-
inal, but the punishment is to be directed in reality against the
character of the criminal as revealed by the act he has committed,
from which the commission of future crimes seems indicated as
likely. An evidence of this 4 (although Grohmann himself does not
bring it out in his definition of punishment) is the fact that he takes
the unlawful disposition, 5 i.e. the permanent character of the crim-
nal, as the determining factor in the fixing of the punishment to
be applied, and advances the rule 6 that the greater the wrongful
tendency of the criminal, and thus the more dangerous he is for
the future, the greater must be his punishment. The extent of the
wrongful tendency, he sees reflected in the nature of the right
violated by the illegal act. 7

Herein the untenability of his entire theory becomes openly
manifest. Criminal law and morals, according to Grohmann's
conception, have nothing to do with each other. He formally
protests against the assumption that a man should be improved
morally by his punishment. 8 Punishment should be directed not
against the wrongful tendency of the heart, but rather against the

1) "Grundsätze der Criminalrechtslehre nebst einer systemati-
 schen Darstellung des Gesetzes der deutschen Criminalgesetze" (Greens, 1796);
"Ueber die Begründung der Strafrechte und der Strafgesetzes-
 lung" (Greens, 1796).
2) Cf. "Begründung", p. 167. The State would itself become degraded
1 without a further reason it killed the banished criminal.
3) P. 32.
4) Cf. especially pp. 120 et seq.
5) P. 121.
6) "The more irreparable and important the violated right, then the
more supposedly does the interest of humanity demand the "not doing" of
the act, and the greater the wrongful tendency."
§ 88. Feuerbach. — In contrast with the foregoing theories, Feuerbach’s theory \(^1\) was calculated to serve as a foundation for that positive legislation of which there was at that period urgent need.

His efforts are directed primarily towards freeing the criminal law from the prevailing theories, which regarded the positive criminal law merely as an imperfect attempt to give expression to an ultimate criminal law corresponding to the nature of things. These theories declared a judge to be justified in setting aside a rule of positive law where it did not seem to be in harmony with that law derived from general principles. The speculation upon and the discussion of the purposes of criminal law, and the theory connected therewith that moral freedom was a prerequisite to the complete amenablebility of the criminal to the law, were especially well suited to justify the above-mentioned method of procedure, and at the same time to give the judge the necessary appearance of being bound by the statute. This resulted in that arbitrary discretion of the judges which has been described in Part I. This arbitrary judicial power even extended to an increasing of the penalties; since it was considered that, as the judge in some cases dispensed with the statutory penalties, so in other cases he was entitled to increase the penalties in pursuance of general principles.

As opposed to all this, the issue now was how to strengthen the authority of the positive law of the statute, and also the code (the Carolina, the codification of the common law, in many respects becomes (in practice) to show how much might be accomplished by a precise and up-to-date code. Feuerbach indeed, primarily, had only the first purpose in view. But the second was a logical and natural result; consequently it was not merely an accident that Feuerbach was soon entrusted with the composition of an important code.

His Theory. — Feuerbach’s theory (he also vigorously opposed the intermixture of theology and criminal law) \(^2\) is in substance as follows: It is a function of the State to prevent wrongs. Not being sufficiently able to attain this object by direct physical compulsion, it is therefore entitled to use psychological compulsion by threatening an evil to those who would commit a wrong (a crime). This threat, if itself, is permissible; it violates the right of no one. But without fulfillment the threat would become ineffectual. Therefore the fulfillment of the threat is justified. This is so even from the standpoint of the party punished. Since he had knowledge of the threat of punishment prescribed for

\(^1\) Cf. also the criticism of Grolmm’s ‘‘Criminalrechtswissenschaft,’’ in the ‘‘Bibliothek fur piet. Rechtswissenschaft,’’ Vol. 2, St. 1, p. 88.

\(^2\) Cf. also the criticism of Grolmm’s ‘‘Criminalrechtswissenschaft,’’ in the ‘‘Bibliothek fur piet. Rechtswissenschaft,’’ Vol. 2, St. 1, p. 306.
the wrong, which he, even apart from this, was bound to avoid, he has voluntarily subjected himself to the fulfillment of the threatened punishment.

Feuerbach's theory accordingly is called the "theory of psychological coercion" or the "theory of deterrence through threat of law," and it is proper to designate it. But perhaps it would be more correct to call it the "theory of the positive law." The punishment is justified by the positive law. It extends so far and only so far as can be expected from the operations of a positive statute, i.e., a published statute, made known to everyone. This is the true essence of his theory; deterrence played a more subordinate part.

As may easily be seen, this theory was not entirely original. In its fundamentals it frequently reminds one of Pufendorf. But in its thorough treatment of details it is new and original. Originality is also a fit word with which to describe Feuerbach's polemic against the theory of moral freedom, and his ability to formulate laws. In certain respects Feuerbach and Kant form a parallel. Both seek a permanent support for criminal law. Kant, however, in his idealistic fashion, derives our knowledge of criminal law, as it were, from Heaven, by means of apodictic maxims of eternal justice, which are without proof or further foundation, — axiomatic facts, as he believes. Feuerbach bases criminal law upon the power of an earthly legislator over the baser impulses of human nature. Herein lies a great, although limited, truth. The power of an earthly legislator and the baser impulses of human nature permit of a certain calculation, and consequently Feuerbach's theory accomplished a greater step in advance than the grandiloquent emotionalism of the philosopher of Königsberg.

Above everything else, Feuerbach denies that punishment, as inflicted by the State, is moral (retributive) punishment based upon a pretended and, to us incomprehensible, moral freedom; the assumption of this moral freedom entailing for criminal law the most absolute contradictions, as Feuerbach ably demonstrated. Punishment is civic punishment (i.e. temporal, inflicted for purposes of State as distinguished from morality). It is based upon the clear pronouncements of the statute, which finds its justification, from the viewpoint of the criminal, in the latter's voluntary submission, brought about by means of the threat of punishment, and from the viewpoint of the State, in the possibility of deterring from crime and thus preventing crime by means of the threat.

---

This threat of punishment has, essentially, nothing to do with the individual. With him, only the fulfillment of the threat is concerned; and this, according to Feuerbach, is somewhat of a secondary matter, and is requisite only that the threat may be effective in the future.

In this way, Feuerbach was able to increase the authority of the statute law, and also to effectively demonstrate the subordinance of the judge to the statute law. For now the issue no longer rests upon the nature of the individual, which is so difficult to ascertain, but upon whether or not there is included in the act those characteristic elements which the legislator has established for every case; since it is only these that can be the criterion, in the abstract threat contained in the statute. That which lies in the heart of the criminal and that which is external, coming from attendant circumstances, are equally unimportant. There must be but one exception, and that is where the threat of punishment could not be effective in advance, — where an intelligent decision of the author of the act in accordance with the baser impulses against which the legislator has interposed the threat (itself a mental impulse) was not possible.

Thus Feuerbach acquired a firm position for answering the question as to criminal capacity. Moreover, since he found the ultimate purpose of the threat of punishment to be security from violations of right, i.e., the subjective right of the State and of individuals, he, at the same time, acquired a criterion for determining the punishability of a crime in relation to its objective or subjective dangerous character. Objectively, its dangerous character is appraised according to the importance of the jeopardized or injured right, and subjectively according to the dangerous nature and intensity of the baser impulse.

It is apparent that all these principles are easily grasped and are adaptable to legislative enactment. In their presence, illuminated by Feuerbach's polemic, the doctrines of moral freedom and of indeterminism vanished into thin air. Against all the other relative theories with their special purposes of punishment (security against the individual offender, reformation, etc.), Feuerbach acquired a firm position for answering the question as to criminal capacity.
alteration of Feuerbach’s theory, it is apparent that, abandoning a justification of punishment from the standpoint of the criminal, it used the criminal chiefly as a means for other ends, — as did the theory of deterrence by the infliction of punishment, which Feuerbach had opposed, and the “special prevention” theory. It is also clear that it did not escape many of the vagaries of these last-mentioned theories, and that it dealt with the criminal, not according to his individuality but according to a certain average of humanity — since the law does not know anything about the individuals.

If Feuerbach had arrived at a full comprehension of this, he would necessarily have discovered that there was not as much opposition between moral judgment and the public weal as he thought the law had. Nevertheless, he was obliged to confess that everywhere in the criminal law, moral conceptions and judgments “intrude.” He would also have come to realize that these two kinds of judgments differ merely in this, that the judgment of the criminal judge tests the morality of the act only to a point that is certain and easy to establish, and also that criminal law presents in both cases the morality of the community. In that case he would not have been led, as he was, to separate the law from the popular conscience, nor to justify punishment merely upon the ground of an alleged utility in threatening punishment or upon the dangerous character of the act. Nor would he have been led to base criminal law exclusively upon the violation of rights in the subjective sense. He would not have needed to resort to his discredited presumption of “dolus” (malicious intention) in order to avoid the result that a person ignorant of the criminal statute and its penalties or mistaken in thinking his act did not come under the statute, could not be punished on account of “dolus” (malicious intention) — since deterrence is possible only where there is knowledge of the penalties. And, finally, he would not have been obliged to regard man as committing crime only for baser motives, nor the legislator as operating solely upon these motives.

The short work of Thibaut: “Beiträge zur Kritik der Feuerbachischen Theorie über die Grundbegriffe des peinlichen Rechts”


Offenses against morality which do not at the same time violate a subjective right, see, according to Feuerbach, only offenses subject to police regulations. Cf. “Kritik des Kriminalsozialen Entwurfs,” I, p. 16.

1862.
(which in many respects is excellent, although it seeks to establish deterrence as the correct theory in criminal law) lays down the following sound principle: No criminal legislation is more successful in attaining its ultimate purpose than that which takes as its criterion the ordinary conceptions of moral retribution, while the principle of deterrence, in its consequences (since that evil must always be threatened which is fitted to deter, and thus as far as possible to overcome the impulse to crime) necessarily leads constantly to more terrifying punishments and therewith to impoverishment and animosity. Thibaut herewith openly repudiated the logical results of the principle of deterrence; Feuerbach had already unconsciously done so, since he desired primarily to apprise punishment in accordance with the importance of the jeopardized or injured right. The importance of the injured or jeopardized right can be fixed only in accordance with the moral valuation of the public conscience. Deterrence on the contrary is obliged to take into consideration primarily the greatness of the impulse to the commission of the crime, and this is often very strong in the minor offenses. The practical weakness of Feuerbach's theory lies in this, viz. that it leads the legislator at certain times and under certain circumstances to confuse the former standard with the latter, and also convinces him that if only the punishment has been threatened by the statute, he himself can not be blamed for its injustice. Feuerbach's theory also leads to a frequent confusion of legislation and right.

8 P. 58.
9 P. 68; pp. 82 et seq.
10 This had already been correctly brought out by Schulze, "Leitfaden der Entwicklung der philosophischen Prinzipien des bürgerlichen und strafrechtlichen Rechts" (1839), p. 346.
which would attain such a result, and on the other hand to threaten harmful acts with sufficient and effective punishments. Accordingly Bentham, in masterly fashion, analyzes to their extreme ramifications the actual or presumed evil which arises or could arise from acts actually or possibly coming into consideration as offenses. He also investigates the effects of the punishments which might possibly be applied. The question of the degree of the punishment herein assumes a subordinate position. Thus, less than in Feuerbach, there is to be noticed the contradiction which lies in attributing more or less of a punishable character to acts in accordance with the greater or less importance of the injured or jeopardized relation of life, and in the theory of the subduing of impulses to crime by threat of evil. But, as everywhere in Bentham, one is obliged to accept much that is erroneous and distorted along with his numerous ideas that are truly profitable.

Romagnosi's Theory of Necessary Defense. Romagnosi's theory in many of its aspects agrees with that of Feuerbach, but in others it is quite different. This is the theory of "necessary defense" and was first advanced in 1791, though it did not acquire influence in Germany until 2.

1 "Genesi del diritto penale." Translated into German by Ludes, "Romagnosi, Genes der Strafrechtslehre" (2 vols. 1853).

2 Among the adherents of this theory are: Martius, "Lehrbuch der gesetzlichen Rechtslehre" (first published in 1827 by Carrao, "Teoria della legge della sicurezza sociale" (2d ed. 1832, Pisa), 47 et seq.; furthermore, A. Franck, "Philosophie du droit penal", 2d ed., especially pp. 115 et seq. Necessary defense of the community, since it need not be completely analogous to that of the individual, in reducible to a concern to repair an intended moral injury. In reality, Feuerbach's theory of necessary defense is identified with the "restitutio theory" of Wolker. But in addition there is present in Franck (p. 120) the foundation laid by Fichte. Carrara, "Programma del diritto criminal" (ed. 5, 1857, 11, §§ 608 et seq.) may also be called an adherent of the theory of necessary defense. However, he deduces criminal law not as a right of the State but rather as a right founded upon "Necesita della umana natura" (§ 608). The State has the right to punish merely so far as it accomplishes that legal protection ("Tutela giuridica") which is exerted to it. Carrara stands upon the basis of the old law of nature and the logical consequences of his view would accord therewith, to the extent that criminal law (which it is stated in § 612 is to maintain human freedom) may not be applied merely to promote the welfare of the State. The difficulties inherent to this theory of "diffensio" or of "tutela giuridica" are too easily dismissed by this famous and useful writer, whose theory, since it fixes as the goal of punishment the attainment of peace (of the party wronged and of the citizen), is completely reversed in the "restitutio theory" of Wolker. From defense calculated to operate in the future, there does not necessarily follow (as Carrara, p. 614, postulates) the justification of any advancement of punishment whatsoever. We would gladly express our approval of the several excellent statements of Carrara, but a separate volume would be requisite for this purpose.

436

CHAPTER VI THEORIES FROM HENTHAM TO HERBART

Romagnosi separates himself from Feuerbach by very properly refusing to give recognition to the doctrine of a voluntary submission by the criminal to the punishment. Such agreements he characterizes as figments of the imagination. In his conception, punishment is simply defense against future injuries, which might be committed either by the criminal himself or by others. The right of defense, as he undertakes to explain it, is merely one element of the right of life and all other rights. When man was in his natural solitary condition, the right of self-defense, indeed, would cease at the same moment as the attack. But when human society came to exist, there arose from the impurity of the individual making the attack a new danger both for the party attacked and for all others,—a danger for which, as the natural consequence of his attack, the criminal is liable. In other words, there arise the right of punishment, which of course has no purpose other than that of deterrence. This last-mentioned line of thought brings Romagnosi to the same conclusions as those reached by the theory of Feuerbach. Moreover, like Feuerbach, Romagnosi falls into the error of assuming that it is in accord with the principle of deterrence to establish more severe penalties where rights of greater importance 2 are attacked; whereas the principle of necessary defense, as a matter of fact, would require the same penalties for each and every aggression, if it could not in some other way be prevented. This last deduction is recognized even by Romagnosi himself, since, according to his conception, there really arises only one right, which appears in its sundry phases along with the various other so-called rights.

Difference between Romagnosi and Feuerbach. — Romagnosi's conception, however, is to be distinguished from that of Feuerbach by the fact that while he, like Feuerbach, makes a distinction between law and morality, he does not regard them as absolutely separate. Yet, on the other hand, for this very reason he fell into a fatal error which Feuerbach was able quite easily to avoid, and against which, as we have seen, he very emphatically and effectively undertook to warn his contemporaries. Romagnosi regarded the

4 §§ 251, 251 et seq. The conception of punishment as atonement is expressly repudiated. § 1345.

4 §§ 446, 1350.

5 Cf., especially § 1306.

6 These attacks should show a stronger criminal tendency. § 1367.

7 Romagnosi, just as Feuerbach, takes the average human being as the basis for calculation of his punishments. § 1380.

8 §§ 222, 1385.

437
so-called moral freedom of the criminal as a prerequisite for his liability to the full penalty of the law. His "malvagita" is nothing other than this moral freedom; and closely connected with it is his error of ascribing the basis of the crime, not to the self-love of the criminal, but rather to unnatural impulses. Here Romagnosi's theory goes absolutely astray.

Defects of the Theory of Necessary Defense. — There are other respects also in which the theory of necessary defense is not satisfactory. Its falsity does not lie so much in the fact that the necessary defense ends as soon as the attack does; since this, if one consider it closely, holds good only under conditions where the administration of justice is very certain, and where this is not the case, the party attacked can so extend his defense that the aggressor will be rendered harmless in the future. The falsity of the theory lies rather in the fact that the criminal in reality is not always punished because of his own baseness but because of that of others. If these others were morally perfect, they would not allow the baseness of the criminal to lead them astray. Thus the criminal must suffer for the others; thus the theory of necessary defense is no more just than that of deterrence. Moreover, it has the evil of gravitating towards the theory of security against the individual criminal, — a theory which in its strict personal tendency necessarily leads to despotism. Proof of this is given by Romagnosi's arbitrary and false provisions relative to the degree of punishment.

Oersted. — There came about necessarily a reaction against Feuerbach's theory, and especially against his absolute separation of law and morality (which Romagnosi had already repudiated). To every unbiased observer the relation between criminal law and morality is too manifest. The adherents of Feuerbach's theory were in this respect obliged to make some revisions. Thus the Danish jurist Oersted, at the very beginning of his valuable and famous work "Ueber die Grundregeln der Strafgesetzgebung",

* Cf. especially § 473.
* "First particularly Hepp, II, pp. 716 et seq.

The founding of punishment upon the disadvantageous results of absence of punishment is, as a matter of fact, a "petitio principii." It is as if one designated the absence of a dam as the cause of a flood, and thereby hypothesized that there should have been a dam at the place in question, "Si quadratur demonstrandum."

In Romagnosi's work, which is a mass of dialectical argument, and is often quite tedious, there may also be found many excellent principles of permanent value [see Bonvillain's critique of Romagnosi in "Rivista Penale", Feb. 1914 — Ed.]

Translated from the Danish (Kopenhagen, 1818).

Chapter VI: Theories from Bentham to Herbart

declares that, according to his view, criminal laws are rooted in the moral laws. He thus casts overboard the erroneous view of Feuerbach which regarded a criminal statute as a necessary prerequisite for a punishment, and also Feuerbach's doctrine of a voluntary submission of the criminal to the punishment. But, as already remarked, the abandonment of this last-mentioned doctrine destroyed the scientific unity of Feuerbach's system, and the defense undertaken by Oersted against the reproach of having the characteristics of a Draco which was cast upon the system of Feuerbach as being its ultimate result, is just as little effective as that by which Feuerbach himself sought to avoid this same result. Where Oersted breaks away from the logical deductions of the theory and accepts milder punishments because popular sentiment does not desire the harsh penalties required by pure deterrence, he is saying nothing other than that popular sentiment replicates the results of the theory of deterrence, and thereby repudiates the theory itself.

§ 90. Bauer. The "Admonition" Theory. — The "admonition" theory of Bauer is also regarded as a modification of Feuerbach's theory of deterrence. Yet Bauer, by proceeding on the course on which he began, might have accomplished much more than a mere attenuation of Feuerbach's principles, as his theory is designated. It was the severity and the erroneous conclusions of Feuerbach's theory which led Bauer to his attempt to modify it. Bauer, like Feuerbach, made a distinction between the purpose of the criminal statute and the purpose of the infliction of the punishment: and, like Feuerbach, he justified the latter not upon some relation already existing between the individual and the State, but rather solely upon the existence of the criminal statute or the positive legal rule. Still, the difference between Bauer and Feuerbach is one deeper and more far-reaching than even Bauer himself perceived. The "admonition" of Bauer is not an effect

* Cf. especially p. 5.
* Especially p. 109.
* Pp. 149 et seq.
* Oersted's attempt to unite the "special prevention theory" with Feuerbach's "theory of deterrence" is a complete failure. Cf. Hepp, II, pp. 560 et seq.
* "Die Wurzeln der Riesengreise als Basis der Strafrechtstheorie" (1867). Also an article published by Bauer in 1867, in the "Archiv des Strafrechtsrechts", pp. 400-472 ("Untersuchungen der Theorie des psychologischen Zwangs").
* "Wiederhaktheorie", p. 120.
* "Moned lex primae partis." p. 139.

438
upon the baser impulses (or, more correctly, a paralysis of the same) produced by the threat of the punishment. For (as Bauer very correctly remarks) by no means all crimes have their origin in the baser impulses. Crimes can also arise from political or religious fanaticism, i.e. from an erroneous comprehension of moral duties. The "admonition" in the conception of Bauer affects the moral as well as the baser nature of man, and is rather the reflected image of the value of the legal system. The legislator holds up before citizens a picture of the liability to punishment of the criminal acts; and the measure of the punishment he derives from the importance of the individual legal institution or legal interests which are jeopardized or attacked by the act of the criminal.

From this point of view, Bauer, unlike Feuerbach, conceives the criminal punishment of acts which violate no subjective rights but which indirectly undermine the legal system. Yet, although Bauer (as above mentioned) repeatedly maintained that the "admonition" of the criminal statute also affected the moral element of man, he was unable to discover a relationship between law and morality. Since he repudiated Feuerbach's view of the voluntary submission of the criminal to the punishment, his theory ended in a renunciation of a philosophical justification of punishment, and thus in a justification merely by reference to the positive law (i.e. ultimately again shifting towards the viewpoint of Feuerbach), which is at least open to question. In strict analysis, the legislator can threaten any evil by way of punishment, and if the threatened evil is inflicted, the criminal upon whom it is inflicted may not complain as to its injustice. This freedom of the legislator, according to Bauer's presentation, is not limited by regard for historical tradition, and is, indeed, limited only by the consideration that possibly too severe penalties are less effective. This reliance upon the positive law is something totally different from the "admonition", the operation of which is to be seen only in the voice of conscience. In spite of its fair promise to find a better principle, the conclusion of the admonition theory is merely a reproduction in paler colors of the theory of Feuerbach, or, as Heine puts it, a restricter theory of deterrence.

---

1 P. 199.
2 P. 196 et seq.
3 P. 38.
4 P. 126 et seq.
5 P. 56.
6 C. 229 et seq.; P. 233.
7 In Van Holten's "Handbuch", I, p. 208.

---

\section{Chapter V \ Theory from Bentham to Herbart [191]}

\section{§ 91. The Reaction against Feuerbach's Theory of Deterrence. Schultze. — Of those writings which were published in opposition to Feuerbach and Grolmann and sought to establish again the relation between law and morals, the most important and the most valuable in criticism of principles, is that of the philosopher, G. Ernst Schultze: "Leitfaden der Entwicklung der philosophischen Prinzipien des bürgerlichen und penitentiellen Rechts", published in 1813. Schultze's combination of his ideas with the formal theory of necessary defense has unfortunately led to his theory being regarded as merely a slight modification of the other, and for this reason it has not received the attention it deserves.

Schultze regarded morals as the principal criterion in determining the range of punishable actions. Consequently, he does not make a specific distinction between juristic guilt and moral guilt; he regards the punishable character of an act as existing independently of the statute law. Without any special predilection for dealing with definite varieties of punishment, he exhibits as the chief purpose of punishment, not the evil which may be inflicted upon the criminal, but rather the express designation of the crime as an act prejudicial to the progress of humanity. But instead of proceeding from this basis to determine how the morality exerted generally by the State, and which must coerce the individual, is to be distinguished from the morality of the individual, and thus founding the specific character of law as opposed to morals in the ordinary sense, Schultze suddenly substitutes the principle of necessary defense (or protection of the legal system). The criminal is punished because punishment is a means to restrain both him and others from doing further damage. This opened the door to critical objections. That punishment is not necessary defense in any ordinary sense is, as already remarked, easy to demonstrate. For this reason Schultze's other and more thoroughgoing ideas were overlooked, and consequently his book actually had little effect.

\section{Stelzner. — In the meantime, in Steltzer's "Kritik" of Freiherr v. Eggert's draft of a penal code for the Grandduchies of Schleswig and Holstein, the Friedrich-Grolmann doctrine is found, with a fundamental change, viz. punishment was to be regarded as a means of reformation. According to Stelzner, punishment did away with the
otherwise existing necessity of excluding the criminal from the legal community; since by reformation of the offender it secured immunity from him for the future. But a presumption of reformation should be determinative in the fixing of the amount of punishment. Since the uncertainty of a moral reform by means of the State and its agencies is self-evident, Steltzer speaks of effecting a juristically reformed attitude on the part of the party punished; he seems not to have realized that this is an impossible conception. Punishment, according to Steltzer, is essentially a continuing suffering by deprivation of liberty. Steltzer did not attempt to designate precisely the acts which are punishable in accordance with his principle; but generally speaking, he regarded all acts as punishable which imperiled the rights of others.

Apart from the objections to be noticed later, which could be urged against any punishment having as its principal and primary purpose the reformation of the individual, Steltzer’s theory of reformation lacks a foundation, in so far as he was unable to establish punishment against the criminal as a right. He conceived it rather as a rule imposed upon the State by necessity. There is no need of such a basis if the punishment is contemplated not as an evil but rather as a means of education.

§ 92. Theory of Reformation Founded upon Determinism. Groos. The theory of reformation was taken up also from the standpoint of medicine and natural science by Groos, and from a general philosophic standpoint by Krause and the adherents of Krause’s philosophy, notably Ahrens and Rüder.

Groos regarded the criminal as a grown-up man in need of further training. A crime he regards as a piece of rogue mischiefs ("Bubenstück"). His investigation of guilt was, on the one hand, influenced by an understanding, due to his experience as a physician of the insane, that crime and insanity border upon each other and are at times hard to distinguish. Also (in accord with the Greek philosophy) he sought for guilt not so much in the will as in a defective understanding of the good. Thus, his theory rested upon a clearly defined determinism. Man acts necessarily and only according to motives, although these motives are often quite obscure. But these motives are not moral. Man’s decisions are based on his intellectual conceptions. He desires the good and can desire nothing else. Only he has often a false conception of the good, as when he deems it good to purchase his own advantage with another’s disadvantage. He makes a false calculation. Consequently the question is simply, through education, to bring about in the criminal a different conception, or, as we may say, a different standard for his course of action.

To be sure, there thus disappear, as Groos himself points out, the conceptions of merit and guilt. But since the former owes its origin to our pride, and the latter to our desire for vengeance, their disappearance is not to be regretted. Nevertheless, according to Groos, criminal law and morality in no way lose their fundamental principles. On the contrary, in accordance with the deterministic doctrine these principles are more sure in their operation, while the usual doctrine of freedom of will openly admits the possibility of even the trained and educated man continuing to revol against law and morals. Groos’ conception allowed determinism to exercise a very effective influence over criminal law. The extent of the offender’s capacity for ideas, as exhibited in his mental operations, should be studied and taken account of by the legislator and jurists, in order that, through chastisements and depredations, the offender may perhaps be transformed.

There is, however, no foundation for the charge that Groos confuses crime and insanity. He expressly says that the responsible transgressor of the law is amenable to the influences of improvement of his understanding and of deterrence, while for the lunatic such influences are unavailable and he must be subjected to medical care. But the fallacy and error of his doctrine consist in its absolute exclusion of the idea of merit and guilt, without which practical life and the law (which represents one side of life) cannot

---

1 Pp. 8, 13.
2 P. 129.
3 P. 11.
4 P. 37.
5 P. 8, 20.
6 *Der Skeptizismus in der Freiheitslehre* 1830.
7 Of. p. 140.
exist. Even conceding that there generally dwells within man an impulse towards the good and rational (a point contested by Theology), there still arises the question whether this is not, perhaps, for the reason that the individual’s belief in his own responsibility can never be entirely extinguished. The weakening of this thought 4 will undoubtedly lead to the spread of evil. Moreover, let no one think that, from highly developed determinism a humane criminal law will readily arise. From the remark made by Groos that, under some circumstances, even capital punishment is justifiable, it is evident that a different method of estimating the efficacy of the means of educating the offender might lead to harsh penalties and the frequent application of the death penalty. But Groos had never made an attempt to define the limits of criminal actions and to demonstrate the possibility of a sufficiently definite criminal law based upon his theory. Here his theory was subject to all the charges which Feuerbach had justly made against the theory of Grolmann. 5

Krause. — Krause, 6 who in other respects was not an adherent of determinism, regarded punishment as a means of education (i.e. not in its nature and purpose as an evil). He who was undergoing punishment, was under guardianship like the immature. The State has the right to interest itself in the development of the immature, in the reformation of the morally depraved will. According to Krause, 7 there can be no such thing as a legal authority to inflict evil, as such, and thereby cause suffering. These theories have their deeper foundation, on the one hand, in that absolute value placed upon the individual by the philosophy of Krause, which forbids an employment of the individual solely as an instrument.

4 Cf. also Jacrois’s polemic in his “Zeitschrift für die Criminalrechswissenschaft” (1826, Vol. 21-22).

5 It will not be necessary to take up carefully those erroneous doctrines which are indispensable as a base for exact observation in the sense of natural science — doctrines which regard crimes as a consequence of a mental configuration of the criminal (George Combe). Concerning this, and especially in opposition to the results of the mental doctrines of Goethe, cf. Millenarian, in “Neues Archiv des Criminalrechtes” (1850), pp. 414 et seq.; Heyn, II, pp. 464 et seq.; Frenck, “Philosophie du droit pénal”, pp. 51 et seq. A new attempt at a founding of criminal law upon the foundations laid by Groos is that of Karl J. Rohan, “Ein Versuch über die Oberschluß und Brauchbarkeit der menschlichen Handlungen” (1881). But here determinism is made use of in the sense of Feuerbach’s “theory of determinism.”

6 See § 1020, post, for this group of theories. — Ed.


8 Pp. 457, 532.

Chap. VI. Theories from Bentham to Herbart

most of the civil community; and, on the other hand, in that solidarity of interests of members of the community, which Krause so frequently emphasizes, and in accordance with which the community must interest itself in the training and culture of its individual members.

Ahrens. — Ahrens 8 gives to this theory a coloring which touches even its absolute foundation; for he regards the purpose of the punishment as the restoration of the violated legal order of things. But he found this restoration of the legal order only in the personality of the criminal and not in an effect upon others. Consequently, rejecting all absolute theories (which he regards as amounting more or less to retribution), he designates his theory as the theory of reformation, and effectively defends himself against numerous obvious objections.

The first of these objections consists in the criticism made against theories of reformation in general, viz. that they confuse the standpoints of legality and morality. Attention to reformation involves solely the latter, — reformation has no place in a legal decision. In opposition to this, Ahrens justly observes that a decision as to guilt presupposes a certain moral consideration.

The second objection is that, under the theory of reformation, crimes committed in a rebellion must remain unpunished, since it is certain that their author will never again commit them. To this Ahrens in a sense answers with justice: “Where a man’s proper power of will has shown itself so weak that, through emotion or passion, it gives way to a crime, e.g. homicide, can certainty exist that he will not again, through his passions or emotions, yield to further or similar crimes? This must be answered in the negative, and for his reformation a full period of time will certainly be necessary.”

However, the theory of reformation can never defend itself against the objection that the execution of penalties, even when done in the most humane and advanced manner, must necessarily differ specifically from the training of the immature. The teacher must deal with the pupil solely with the viewpoint of advancing him. If this were done by the State in respect to the criminal, then, for those classes among which crime especially arises, the punishment would be something to be welcomed. The State would improve the individual, but would encourage the masses.

inclined to wrongdoing. But there is no identity between the extent of the wrong and the duration of the unlawful or immoral will, and they in no way run parallel. A reformatory punishment, to be consistent, can and must be pursued only so far as an improvement (presumptive at least) is obtained: it can never, at least only occasionally, be generally and certainly fixed by statute or judicial decree. The above-stated principle is, therefore, only a sophrathy with which Röder (who is really of value in the problem of prison systems) deceived himself; the possibility of shortening a sentence that has been pronounced because of the subsequent improvement of the convict can never have more than a relative justification. While Röder, in order to maintain the character of actual punishment for his educational penalties, speaks of the "untutored sinner" who are to be thus educated, he thus conceals the fluid and obnoxious 17 logic of the theory of reformation, viz. that the desirable things in life must be conferred upon the delinquents, if we can manage to raise the needed funds, whenever these good things would help to reform the said delinquents, and although the great mass of honest people in the world have to get along without them. The theory of reformation can never free itself from the reproach of raising an exclusive cult of the individual. 18

§ 93. The "Restitution" or "Compensation" Theory.—The so-called "restitution theory" or "compensation theory" which has been worked out in an interesting manner especially by Welcker, is in reality merely a collection of the various relative theories, especially of the theories of reformation and of deterrence. However, the theory of deterrence appears in such a malleable form that it is similar to those theories which would merely designate, by means of punishment, certain limits which a man’s course of action must not violate. In order to justify the

---

17 Cf. especially "Grundsätze", p. 99. 18 D. 107. 19 Carrera, "Programma del diritto criminale", II, 619 very aptly states that the uncertain duration of the punishment resulting from the principle of reformation completely destroys its moral effect "forces morale." 18 Indubitably the reformatory punishment can also be pushed in the contrary direction, if one argues that the convict must not be set free until he has reformed and there is no danger from him for human society. The legal system in the State does not need to secure absolute safety from violations of law and injuries, and it is not able to do so. That dangerous men must be set free is no reproach against the other criminal theories. 20 Die letzte Grenze von Recht, Staat und Strafe" (1915). Cf. also Welcker, "Die Universal- und die juristisch-politische Klassifikations- und Methodologie", 1920, pp. 93 et seq. The citations refer to the former work.
punishment from the standpoint of the criminal, he joins to this theory the contract theory of Fichte, although in a more moderate form and not designated as such. The violation of a right contained in the crime creates an obligation to make indemnification. The criminal does not (as Fichte would have it) become completely without rights, but only to the extent that the community possesses an absolute right over him, since it can hold him to compensation. The damage occasioned by the crime may be either material or ideal (or both at the same time). The material damage was the object of the civil law, while the ideal damage was the object of the criminal law, and its indemnification is the punishment. This latter is accomplished in the individual. Through the commission of the crime the criminal exhibits: (1) an evident absence of lawful intent and of its principle, a lack of consideration of moral values and of the statute law, a lack of that predominance of reason necessary for legal relations (the legal system); (2) especially, a superabundance of too great strength of base impulses and an absence of harmony between these impulses and the requirements of justice. In the other citizens the crime produced (without any fault of theirs): (1) a lack of respect and confidence in the criminal, who through the crime has become disqualified as a member of the civil community; (2) a violation and destruction of their lawful will. The non-observance of the statute encourages the base impulses of the others to the like commission of wrongs. Especially is harm done to the mental attitude of respect for the law on the part of the party wronged, who feels that the crime is a disgrace in so far as it is not avenged or expiated. Accordingly there are seven proper purposes of criminal punishment: (1) Moral, (2) Political improvement of the criminal, (3) Restoration of the respect and confidence of his fellow-citizens towards the criminal, (4) Restoration of the proper mental attitude of regard for the law on the part of the citizens, of their moral and political respect for the law, (5) Restoration of the honor and esteem of the party injured, (6) Restoration of his mental attitude of regard for the law, (7) Purification of the State from the completely pernicious member.

There is no merit in the objection raised against this theory that ideal injury can not always be shown, and does not invariably exist, and that, for this reason, it is improper for Welcker to place this ideal damage on an equality with civil law damage, which is invariably only indemnified when it is proven in the individual case. The law can, and to a certain extent must be, satisfied with that which holds good in the majority of cases; a further search as to whether the result in question holds good in each individual case would be too difficult, and indeed would often fail in its purpose. Moreover, purely civil law methods of reckoning damage are derived from fundamental principles of custom and expediency; it is certainly not to be denied that unpunished commission of offenses (as well pointed out by Welcker) would gradually result in the dissolution of law, morality, and the State. The civil law tolerates inexact calculation of damage only because it is an evil which is difficult to avoid. In criminal law, however, justice would go completely astray as a result of a too exact discussion of the consequences of the individual crime.

But, despite this answer, Welcker’s doctrine contains a fallacy. For, although he maintained a moral basis for the law, and (though perhaps not with sufficient clearness) designated the law as morality practiced by the community and enforced upon the individual, yet he conceives punishment not as a necessary reaction of morality against the immoral act, but rather as based upon the effect upon the criminal himself, upon the injured parties, and upon others. Now this unfortunate effect of crime upon others and upon the injured parties does not come about, as Welcker believes, without their own fault. It is rather the sign of a morally imperfect condition, of a condition not yet relatively well advanced, if the commission of a crime or the wrong done by the crime constitutes an incitement to the commission of a crime. The ideal damage can not in every case be charged exclusively to the account of the criminal, and consequently, according to Welcker, the criminal is really punished to make an impression upon others. The attempt made by Welcker to base the punishment directly upon the wrong is also

\[\text{[449]}\]
Chapter VI: Theories from Bentham to Herbart

is just as difficult as the foundation of a punishment. For, in concrete cases, the rendering of indemnification can actually constitute a very mortifying punishment, and it is very possible that in such cases one law is satisfied with the indemnity, while another inflicts punishment. Here, at least, the chief considerations for excluding punishment do not govern.

Hepp — Hepp's "Theory of Civil Justice" 8 ("Theorie der bürgerlichen Gerechtigkeit") is, in principle, only a repetition of Weckler's theory under another name. The offender has to repay the moral damage arising from certain actions. But it is not clear how it comes about that this compensation consists of the evil inflicted as punishment, which must be undergone by the offender. It must therefore be that the strength of the evil example (which in any case is not to be denied, and which in reality rests upon the defective moral sense of those who are, as it were, led astray) is regarded as a reason for this. This influence of the example is indeed broken by evil undergone by the offender as a punishment. In individual matters, many correct statements of Hepp deserve appreciation, particularly those concerning the distinction of a wrong criminally punishable from a mere breach of morality and a tort.

§ 94. Changes in the Absolute Principle of Criminal Law. C. S. Zachariä — We may now revert to a consideration of the evolution of the absolute principle for the basis of punishment.

The chief attempt of C. S. Zachariä, 9 to give to the absolute theory of retribution an interpretation more in harmony with the sentiment of his time, deserves little attention. He regards the crime as an encroachment upon the freedom of others, and accordingly would have the retribution consist of deprivation of freedom. 5 This deduction rests upon a simple confusion of conceptions: in the crime, the encroachment upon freedom is conceived as a wrong; in the punishment, freedom is regarded as the opposite of imprisonment. With such manifest faults there is no profit in taking up the unsatisfactory and artificial provisions relating to the amount of punishment and, in part, to the kind of punishment, which Zachariä believed must be deduced from this fallacy.

9 Carl Simon: "Zachariä, "Anfangsgründe des philosophischen Crim- 

makrechts" (1833); "Staatsgenossenbuch (1835). Cf. especially 
"Anfangsgründe", § 42.
5 But from the law of necessity the State other punishments are allowed.
Hippocractic. — The modification given to the theory of retribution by Henke, according to which it appears practically as a theory of reformation, is more attractive. Punishment is to him the necessary reaction against every attempt of the individual to tear himself away from the unity of the community and to avoid the law whereby the community orders its life. There exists no further proof of the necessity of this reaction; it proclaims itself in convincing tones to every one in whose life there is the instinct of humanity. The punishment is based upon a moral impulse, and the criminal must sooner or later bring it upon himself. It represents the cure of the State, which again attains its health through the civil or physical death of its diseased member (i.e. the criminal), or through his undergoing some other punishment. It also frees the criminal from internal discord, since it imposes him by a reformation which corresponds to the inner guilt and is in its effects not entirely external. This reminds us of Plato. Henke is also in accord with Plato's course of ideas in requiring the punishment to bring about an actual moral improvement of the criminal. And he abandons (justly) the idea of a mere so-called political reformation as an empty abstraction. But Henke was no more able than Plato to bring into actual harmony the reformation, in the sense of a restoration of the "majesty of the State" (the law), and the reformation of the criminal. It is an undeniable truth that the evil is eliminated in the most complete sense if the offender, because of a change of heart, recognizes the supremacy of the good (and of law). But, while the general ideas of retribution and reformation seem to dwell in such peace and harmony, their logical results are in violent discord. Punishment motes out up to the time of reformation is not retribution if even a severe offense is quickly followed by the reformation of the criminal, and it is more than retribution if the stubbornness of the criminal, even in a minor transgression, causes the reformation to be long delayed.

§ 95. Combination of the Absolute and Relative Purposes. — More approval has been given to the combinations of the theory of retribution with a theory that is relative. This combination takes place in the view that punishment is given its legal basis in necessary retribution; while the consequent justification for penalties may be used only in so far as it serves to attain rational future purposes, or, if the attainment of the single purpose is not allowed to prevail exclusively, only in so far as it is necessary for the maintenance of the legal system. This coalition of the theory of retribution with a certain indefinite theory of necessary defense has found favor, especially in France and among those commentators who are strongly influenced by the French spirit. It has also been, in truth, equally the predominating influence in legislative commissions and legislative assemblies. The judicial practice of Germany, however, dominated by trained jurists, has almost universally condemned such a coalition. There is good reason for such positions. While the form in which it is advanced is theoretically untenable, this coalition in practice furnishes the most correct results; results which actually harmonize with those of a theory which professes to find its practical, direct, and evident conclusions only as the reverse side of a principle absolute in itself.

Rossi. — The first and abest of the supporters of this coalition was Rossi. He regarded the retribution of evil with evil as an unqualified and firmly established mandate of justice. But since the duty of the civil community consisted merely in maintaining the legal system, it was not incumbent upon it to give complete and absolute effect to this mandate. It gave effect to it only in so far as seemed necessary for the maintenance of the legal system. Thus the consideration of utility restricted the exercise of justice, but it was not its basis. And so, quite correctly, the propriety or impropriety of the punishment for acts contrary to morality was discussed with a view to the fact that while human justice claims the right to punish such acts, it has to reckon with the possibility of error and the difficulty of certainty.


2. This statement is axiomatic: "elle est, parce qu'elle est", p. 290.

3. La but de la justice humaine est extérieur et borné. C'est encore la justice absolue, mais la justice absolue appliquée seulement aux violations de nos devoirs envers les tiers, en tant que ces violations trouvent d'une manière sensible l'ordre social." p. 290: "La répression des dérives qui n'est donc évidemment qu'à la condition que les peines s'appliquent aux complices, et aux complices seulement... Dès qu'on dépasse l'âge de la vulnérabilité, il n'y a plus justice : on retombe dans le système de l'absoluté."

cause the legislator to desist from using such measures of expediency. But there is little importance in this distinction. However, the matter is completely confused by Henrici's observation that justice (i.e. absolute justice) must also guard the legislator against doing too little and against giving way to unreasonable pity in respect to crimes deserving the death penalty. Here, according to Henrici's conception, absolute justice is also advanced simply as a constitutive principle, without being limited by ideals of utility and humanity. If this is permissible, then the choice between the punishments of absolute justice (sentiment) and punishments based on considerations of utility or relative necessity becomes merely a matter of sentiment.

This criterion, which is at the outset an independent position for the principle of the right of punishment, since he begins with the relative theory of defense or maintenance of the legal order, and as opposed to this principle he regards absolute justice as a restricting principle. As a matter of fact, it all amounts to one and the same thing,—if one goes only so far as the two principles are in harmony, one may consider an individual question either by principle A or by principle B.

In the case of Rossi, as will be conceded, there is the danger of transferring punishment primarily and perhaps too much to the realm of pure morality; in the case of Mittermaier and Henrici, there is especially the danger that punishment as a measure of expediency will be extended to many things which in fact do not deserve punishment, and that it will be difficult for justice to

Principes généraux du droit pénal Belgo” (1865), pp. 26 et seq.; p. 29: La peine est une mal; elle retombe sur la coupable parce qu’il a enfreint la loi, parce que cet infraction méritant la souffrance qu’ou lui fait éprouver. Le pouvoir social a-t-il le droit de punir? Pour qu’il ait ce droit, il faut que le peine soit un moyen propre à réaliser ce but qui lui est assigné. Il faut ensuite qu’elle soit un moyen de protection nécessaire.

Ortolan, “Elements du droit pénal”, I, pp. 150 et seq. According to page 157, society says to the one whom it punishes and who rejects a question concerning the evil inflicted upon him, “Tu le mérites”, and to the further question how this somnus the society, it answers: “It has to do with my maintenance.”

Il pro ed il corso sulla questione della pena di morte” (1866), p. 52.

Versuch über die Begründung des Strafrechts” (1820), especially pp. 57 et seq.

“Ueber den Zweck der Strafe” (1827), especially pp. 30 and seq.


“Ueber die Unzulänglichkeit eines einfachen Strafrechtsprincips” (1830).


Herbert sought to give to the absolute theory of retribution a modification which was really new although certainly not fortunate. In many respects he reminds one of Plato and Leibnitz. Retribution is contemplated and demanded as an aesthetic judgment. As law is only the means to eliminate the aesthetically offensive conflict of numerous individual wills, so punishment rests on the - see page 387 et seq. Of course, “Ueber Strafe und Beginnungen” (1805).

Chapter V. Theories from Bentham to Herbart [§ 96]
better. But in the aesthetic judgment of Herbart, we find ourselves immediately upon the real and practical ground of the present criminal law, and hence it is especially noteworthy that Herbart has but little knowledge or interest in the reformation of the criminal. And Herbart’s idea of punishment (which may quite properly include death and life-long imprisonment) is opposed, even from his aesthetic standpoint, to that lofty idea which does not desire the death of the sinner, but rather the suppression of evil by means of good. It is at least a “petitio principii” to maintain that the former is aesthetically more agreeable than the latter.

Herbart was himself sensible of this. He concedes that the retribution of evil with an evil merely for its own sake falls within the sphere of megalomane (“Uebelwollen”) and therefore punishment requires a motive. Such motive is furnished it by the ethical ideas of perfection, benevolence, and justice, and especially the ideas of the improvement, advancement, and security of the entire people. Thus ultimately Herbart’s theory becomes merely a reproduction, only under another name, of Rossi’s “coalition theory”; i.e., as against the criminal, punishment is based upon the idea of retribution, but the community may make use of this retribution only in so far as its purposes require it, or (speaking rather in the sense of Herbart) in so far as its purposes make it seem desirable. For a strong legal system with its free development of the individual as possible was not the object of Herbart’s State. An administrative system, a system of rewards and a system of mutual benevolence, could necessarily make a far more extensive coercion of the individual than the legal system would require.

“it is possible to exercise discipline wherever it advances welfare, and wherever the general recognition that the punishment produces no strife can be presumed”; and “the legislator may discipline where the judge may not.” In other words, where general sentiment would not be injured by the punishment, there may punishment be inflicted, and at all events, in this case, where the positive law so desires.

Ultimately this leads to pure positivism. It is in accordance with the aesthetic feeling that the laws are obeyed, and therefore,

1 "Abhoben von praktischen Philosophie,” “Werke,” 8, p. 418.
2 "Tages reformation of the party punished.” No! Rather, since unfortunately this is often impossible: legal reformation of the community.
4 "Werke,” 8, p. 67.

acquaintance with them, if they so desire, punishment be inflicted. This is the standpoint of the most absolute modern liberalism, which is no longer able to distinguish justice and law. There is no doubt that Herbart was far removed from this adoration of the law as such. A law may have just come into being, upon the vote of a bare majority, but afterwards we tend to regard it as an idol secure from criticism. But the outcome of the theory very clearly revealed the impracticability of the aesthetic judgment as a means of teaching good law for criminal law. Essentially corresponding with the categorical imperative, Herbart’s so-called aesthetic judgment exceeds it in indefiniteness. According to the categorical imperative, punishment can be inflicted only if our conscience unconditionally demands it; according to the aesthetic judgment, punishment may be inflicted if our conscience is not expressly opposed to it.

It is impossible here to take up the aphorisms concerning criminal law which are more or less closely connected with Herbart’s fundamental conceptions. But though they include some well thought out statements, as a whole, they demonstrate that the philosopher knew little about criminal law, the subject upon which he was philosophizing.

Geyer. — Herbart’s philosophy of criminal law has found few followers. It is best and most skillfully defended by Geyer. But even this defense, remarkable as it is for its many excellent and apt statements, shows that an effective defense of Herbart’s principle is not possible for any one who does not possess a complete knowledge of the subject. In Geyer, the maxim: “The act for which no retribution is made is offensive,” again changed over completely to the idea of simple retribution. But this retribution, although it is fundamentally contrary to its nature, according to Geyer admits of the limitation: “The giving of pain is offen-

1 P. 45. "To sum up, the foregoing gives rise to a sharp distinction between the possibility of being punished and the possibility of punishing. That any one should be punished is only possible because he has previously done something from which the punishment results upon him.” Whether any one can punish depends upon a new condition, whether or not there is present a motive, that the punishment be merely a means and not an end.”

"Werke,” 8, p. 418.
6 "Thun,” 1859, 1859.
8 Cf. the article cited, p. 219.
457
Therefore the State must punish, as such, all intentional giving of pain, and even, as Geyer later sets forth, every giving of pain caused by negligence. However, the aesthetic judgment is a categorical imperative which permits of treatment. Consequently the maxim "Minima non curat praeter" takes root; a too extensive criminal power results in numerous evil conditions; accordingly the spirit of the people and the force of existing circumstances must be recognized. Under some circumstances the obligation to indemnify can arise in the place of punishment. Since indemnification under some circumstances is also required of those to whom there is attached no guilt, this is indeed a complete rejection of the idea of retribution, of aesthetic judgment. It is impossible for it to be otherwise. As soon as one comes to the consideration of individual details, it is only by a rejection of the ideas of retribution that Kant's absurdities may be avoided.

According to Herbart's and Geyer's conception, the evil act is a discord. Would one be less sensitive to one discord, by having a second one result from it? Punishment, however, should furnish evil or pain to the criminal. If one schoolboy whom another has struck cries, this cry does not become a pleasant sound because the second boy whom the schoolmaster has chastised for his offense also cries. Of course, for one who takes an interest in pedagogical discipline, it may be a pleasant sensation to know that discipline was applied in this case. This is exactly the case with punishment. If we conceive punishment chiefly as an infliction of pain, as an evil, then this evil can lose its repulsive character only if it becomes a means of attaining some benefit. And if it must be retribution, would it not be the best retribution, and also one to be recognized as such by the State, if the criminal in the commission of the act brought down upon himself a mortifying pain or damage, without obtaining an advantage at all? Geyer meets this objection

10 Cf. pp. 225 et seq., especially p. 228.
11 P. 231.
12 Binding's arguments ("Die Normen und ihre Uberbietung", I, pp. 267 et seq.) concerning the diametral opposition of indemnification and punishment are properly opposed to a theory which would found punishment upon retribution or unconditional aesthetic approval. But it is different if the punishment is not founded upon retribution, or if the matter is not viewed from the standpoint of the positive law but rather historically and politically.
13 Common opinion will always regard this as retribution in its eminent sense.
14 P. 223.
CHAPTER VI
CRIMINAL THEORIES IN GERMANY FROM HEGEL TO BINDING

§ 97. Theory of the Negation of Wrong. Hegel. — In contrast to the foregoing theories, the theory of Hegel reveals a distinct step in advance. To Hegel, punishment is simply a negation of wrong, and wrong is the negation of right. Of course, wrong as opposed to right (i.e. as opposed to the general system of right, which abstractly regarded, cannot be harmed) is in itself a nullity; but punishment has to bring about this non-reality of wrong in the individual will of the criminal and also to restore therein the right. This gives rise to a distinction of reactions corresponding to the various kinds of wrong, — simple wrong (i.e. "unbefangen Unrecht"), fraud and crime. The first of these (i.e. "unbefangen Unrecht") is not that which exists in the will of those who oppose the right, — it refers rather to cases in which the right, in abstract, is desired, but in the concrete case is confused with the wrong. This is the case in civil wrongs. In fraud ("Betrug") the appearance of right is maintained, but under this appearance the wrong is desired. In crime, the right is both objectively and subjectively repudiated by the offender. Here it is also necessary to exhibit externally the non-reality of the wrong by means


460

of punishment. Therefore punishment from its very nature can not be termed an evil. As Hegel expressly states, the infliction of one evil merely because another exists is irrational. "The undoing of crime is retaliation to the extent that it is conceived as an injury, and, conformably to its being, crime has a definite quantitative and qualitative extent, and the same thing also holds true of its negation. But this contemplated identity is not parity in the specific character of the injury, but rather in its abstract character; it is sameness in accordance to value." "In crime, when the infinity of the deed is the fundamental issue, the mere specific external elements tend to vanish, and the parity remains merely the fundamental rule for the essential, i.e. for what the criminal deserves, but not for the specific external form of this which is deserved. It is only according to their specific forms that theft, robbery, fines, imprisonment, etc., are absolutely unlike, but, according to their value, to their general capacity to be simply injuries they are capable of comparison." In other words, the essence of crime is rebellion against the general principle of right; and therefore the question by what external means, conformably to quality and quantity, should this rebellion become expressed as a non-reality is not decided by the principle. First the idea as to value fixes the ratio of comparison between the act and the means of its elimination. Accordingly (as is not developed however by Hegel) the dimension and the form of the punishment depend upon the "idea as to value", i.e. upon the valuation in a certain State and at a certain time. These elements of dimension and form would not be governed by the principle. Furthermore, it is quite conceivable that the declaration of the non-reality of the wrong may not be an affair of the State. It can take place in the form of the vengeance of the party injured. This, however, is imperfect and easily becomes pernicious, since the negation of wrong easily becomes confused with wrong or can degenerate into wrong, when in the form of vengeance.

1 C.f. the statement in § 83 concerning the conception of "value." Supplement to § 96: "How any crime may be punished is not to be determined by these ideas (i.e. as to value), but positive provisions are necessary." Only in the case of murder, according to § 104, a different condition exists. "Since the entire range of existence is comprehended in life, therefore punishment cannot consist in a deprivation which cannot exist, but can consist only in deprivation of life." Here is seen an effect of the traditional view, and the "criminal" view, the idea of which has not entirely disappeared.

461
This theory which, because of its frequently abstruse method of expression, is not sufficiently appreciated by many, has, at any rate, one merit. As appears from the deduction given above, it can be reconciled to history. It is able to recognize in revenge the preliminary step towards punishment inflicted by the State. It is able to regard the numerous forms of positive definite punishment as phenomena in which its principle manifests itself without becoming inconsistent. But its most important service is that it does not conceive punishment as an evil, i.e. as something which has, as its chief purpose, the creation of an evil for the criminal. Here, for the first time, from the standpoint of the absolute theories, there is actually eliminated the contradiction between morality (especially Christian morality) and punishment inflicted by the State (not merely pedagogical discipline).

The attempt is also made not merely to justify punishment as a necessary standard for people as a whole, for the community, but also to show that punishment is also required by the individual characteristics of the offender himself. Punishment is even a right of the criminal. In him there exists that universal reason which controls the punishment. Thus in the punishment "the criminal is respected as a rational being."

This last statement, indeed, sounds almost like mockery, and seems calculated to bring Hegel's theory into ridicule. As advanced, it is, moreover, incorrect. The criminal does not recognize that universal reason which obtains in right and in positive law. At least this is the case with that hardened class of criminals who, as it were, engage in war with the rest of humanity. But the principle approaches the truth. Even with hardened criminals an enlightened criminal law proceeds differently than with a beast which threatens our life or property, or with the animal which we sacrifice, perhaps in a painful manner, for purposes of humanity. Compared with these last-mentioned methods of procedure, punishment always honors the reason in the criminal. It ought not to be said that the reason in the criminal demands the punishment. It must be said that, strictly taken, the criminal severs himself from lawful society. Therefore he can be dealt with without consideration, and so it was done in the initial steps of legal development. The criminal lost all rights. The moderate punishment of later times is thus a benefit to him. The bond of legal society is still regarded as existing in respect to the criminal, and thus, as a matter of fact, he is respected as a rational being. Here again we have Fichte's ideas, viz., that to be punished and not to be treated as one absolutely without rights is an important right.

Hegel's distinction between civil wrong and punishable wrong also approaches the truth. In the first place, however, the intermediate grade of wrong, Hegel's fraud ("Betrag"), must be rejected. This is apparently the result on one hand of his well-known dialectical division into threes, and the result on the other hand of the observation that in social intercourse the maxim "invicem esse circumscribere iaceat" can apply and therefore cunning fraud be immune from punishment. This latter, however, is so only to a limited extent and not generally. In the second place, it can only be conceded that punishment generally limits itself to intentional wrong. But by no means every intentional wrong is punished. There are also cases of civil wrong where malicious intention is present and cases of punishable wrong where it is not present. There can, however, be no punishable wrong without there being some will (although perhaps only indirectly) responsible therefor. The starting point for the question, which is still, in our times, so much discussed as to the distinction between wrong that is punishable and wrong that is not punishable, is contained in Hegel's remarks.

The dialectical transformation of right in punishment is more unsatisfactory. Right is not an active principle. A right does not say: you must do this; it says merely: you may do this. If the injured party (or the State) has the right to punish, yet he is not obliged to punish. The duty to punish, which, according to Hegel, apparently must be received along with the right to punish (at least where the State is concerned), requires a special demonstration. It does not follow from the necessity of self-preservation of the law. From this the mere deduction may be made that, if one entitled thereto desires, a condition actually contradictory to law shall yield to a lawful condition. It necessarily entails nothing more than a compulsory restoration dependent upon the pleasure of the one entitled — as far as such a thing is possible. A duty can be derived only by seeking out a moral basis in the right. A right in itself is not active, but morality under some circumstances must become active or cease to be morality. Thus there is a flaw in Hegel's deduction, which also

\[\text{p. 136}\]
that punishment is also obliged to adjust itself to purposes other than that of retribution.

It is not the legislative statute (Stahl says) which should be maintained by the punishment, but rather its majesty (or supremacy). "Every (criminal) act involves an assertion of authority; there is contained in it a permanent actual power, an absolute effect." This authority (rebellion) of the individual will should be suppressed by the punishment, should be eliminated. In other words, "By means of the punishment—... the State is preserved and secured against the danger to it which is contained in the crime; and if the State does not perform its moral duties of administering justice and of punishing, it must externally and automatically fall to pieces (self-preservation). The punishment does not merely render permanently or temporarily incapable of doing harm that worst portion of the people who through actual crime make a test of the punishment (prevention). But, what is far more important, it also restrains the entire people from crime (deterrence) by fear of punishment. With the predominance of evil in our present earthly condition, nothing but fear is able to preserve order and security for the individual and for all. — In the same way, morality is aided by punishment and the dealing out of justice. First, the morality of the criminal (reformation), since the external suffering which falls upon him must bring him to his senses and to reform, unless he resists through stubbornness. Secondly, the morality of the people; since the punishment not only psychologically deters from crime through fear of the contemplated evils of the punishment, but also morally supplements both the consciousness of the utter perdition of crime and the abstinence of baser motives which lead to crime.

This attribution of the origin of the State and of punishment to a divine will may indeed be accepted. Every one, who will at all recognize a higher relation of things, is also obliged to recognize it in respect to the State and to punishment; and through the reference of punishment to a law higher than that of human despotism or of calculated utility, there may perhaps be secured for criminal justice a certain wise moderation.

Stahl's criticism of Hegel's purely dialectical derivation of punishment is also appropriate. "The question, how the injury of the criminal in person may constitute an elimination or even a logical negation of his preexisting criminal influence and deed is
not answered, nor is it at all explained how a repentant criminal in whom the crime no longer has existence must or merely may be punished." But Stahl, according as it suits him and his tendencies, picks out certain maxims of the Bible as legal maxims; and, in spite of his protest, he succumbs to the danger of confusing the divine sanction of the institution in general with the divine sanction of a certain development of the institution, and relatively, of the institution in certain of its operations. Furthermore, the derivation of punishment directly from divine justice (although from modified divine justice exercised by a representative) is not to be reconciled with the founding of punishment upon the necessity of maintaining the law and the State. As an illustration, from the latter there can be deduced the necessity of some punishment which the former does not require. Such a punishment is not, as Stahl believes, excused as a law of necessity. It is simply without any justification; since divine justice admits no more of being supplemented than of being curtailed. Also, the conception of punishment as a manifestation of divine justice, and of the State as an external representation of the Kingdom of God, must ultimately lead to the tendency to make the punishments of the State coincide as nearly as possible with divine punishments, and also as far as possible to identify sins (immorality) and crimes. The suggestion, often made by Stahl, that the State, instead of an external kingdom places but a feeble restriction upon this tendency. For, according to such a conception, the very fact of "externality" must appear merely as an imperfection to be overcome as completely as possible.

1. II. 1. p. 174.
2. II. 2. p. 683.
3. Cf. especially II. 2, pp. 701, 702, the discussion of the death penalty.
4. Authority does not carry the sword in view.
5. II. 2. p. 702.
6. Cf. II. p. 621.
7. According to this, sin and lack of piety should also be punished, although only by the police jurisdiction, for the promotion of morality and repression of offensiveness. The qualification of punishment as being one proper for police regulation, could not actually be changed. That no one may be besotted or imprisened for life for lack of piety or for some obvious.
8. This tendency is manifest especially in E. J. Reher, "Theorie des heutigen deutschen Strafrechts", 1 (1858), pp. 36 et seq., who for this reason designated as the ideal standpoint the abolition of all fixed rules of law so that the judge could punish all as he pleased.
10. At the beginning of the 19th century the principle of retribution was advanced in a peculiarly mystical way by the representatives of the Legitimists and the Papacy, Count Joseph de Maistre. This theory, however,
Indeed, it almost seems to be his idea that no punishment should be inflicted upon the sinner who is really repentant; although, if punishment is inflicted upon the repentant Christian, he should submit to it with obedience.13

Thus Schleiermacher, while correctly expressing the thought that if all — or, as we should state more exactly, if the vast majority — were true Christians, punishment would have to be discarded,14 is forced into Feuerbach's theory of psychological coercion.15 He even lays down the principle that, where the threat is preexisting and known to the criminal, it is not essentially the authority who inflicts the evil, but rather it is the criminal who brings the evil upon himself.16 He avails himself of this principle to exonerate completely those Christians who take part in the complaint, the prosecution, and the punishment; herein failing to realize that responsibility for the necessity of the punishment must be attributed not only to the criminal but also to a certain extent to every one else, even to those imperfect Christians of whom he is speaking.

But, in all this, Schleiermacher does not appear to have attained complete satisfaction of mind. He even resuscitates the ancient principle that the punishment is also something of a benefit,17 and in connection with this idea he repudiates these punishments bearing the characteristic of pure vindictiveness. Consequently he waves between the conception of punishment as a "penna vindicativa" and as a "penna medicinalis" — just as had previously been done by the Church, before the time when orthodoxy had completely established the direct justification of the punishments of the State upon divine precepts. Schleiermacher reveals his status as a theologian in regarding the crime not with (Feuerbach) as a violation of a right, but as disobedience.

13 This, however, is not perfectly clear, since the passages in question speak only of self-acquittal and of the right or duty to call in the authorities. Cf. pp. 294, 267 note. In the first passage is says: "The moral law does not require that one give himself up as a transgressor of the law... If any one has actually come to recognize his sin, then he is even upon the path that should lead to a revocation of the punishment." P. 290.

14 He is not certain however as to its results.

15 P. 248.

16 P. 255 note. In connection with this idea there is found also that false principle, reminding one of the contract notion of the law of nature, that the death penalty is allowable, since the Christian can be misled in that it inflicts no greater evil upon the offender than each may bring upon himself.

Chapter VII | CRIMINAL THEORIES IN GERMANY | § 58

of the orders of the State,18 and also in not being able to conceive that vengeance is not always positively immoral. Thus, the State again appears, after all, not as the work and creation of man, but rather as "Deus ex machina," which confers upon man the favor of inflicting evil (punishment) upon the wicked, so that the Christian in his innocence may wash clean his hands.19

Daub — The Protestant theologian Daub20 allies the Platonic conception of punishment with Hegel's conception of punishment as a negation of wrong. He portrays the blunting out of the wrong in the will of the criminal by means of the punishment as something necessary, but at the same time he denies that punishment bears the character of evil. Since the source of law is "love," punishment is a kindness, a benefit. More sins which concern only the individual and his God may be blotted out by remorse and penitence, but crimes which also affect others can be done away with only by the punishment of the offender. Thus, even the death penalty appears as a benefit. The blood-guilt of the murderer can be removed from him only with his own blood. However, if one consider it closely, this is so only if the criminal can be brought to pronounce his own sentence, so that he be convinced that justice is being done him. If this be not the case, the criminal merely succumbs to the unavoidable and the execution assumes somewhat the character of murder.21

A special criticism of this view is not necessary. The criticism of Plato's views and those of Hegel also contain a criticism of this combination of both. It is, however, interesting to observe that Daub vigorously assails the idea of retribution, which is at variance with Christianity (retribution, not through God, but through men), and protests against the misuse of the offender for arbitrary purposes of deterrence or of reformation according to the dictates of a class privileged to impose reform.22

The purest conception of Hegel's theory was held by Trendelenburg, who at the same time reworked it in very plastic style. A crime is to him essentially a wrong done intentionally, and right is restored by the punishment—in an ideal way at least (since a wrong that is done can not be undone). "In its innermost purpose, punishment is the force of law over the criminal, the force of law for the party who has been injured, and the force of law in the community." While attention is called to the fact that historical development and higher conceptions have caused the satisfaction of the injured party to be merged in the idea of general restoration; punishment, as the force of law over the criminal and as force in the society of men, is the subject of special amplification. Punishment, as a means for the prevention of crime, is aimed at enabling the offender who has maliciously violated the law to perceive that the punishment is a necessary consequence of his guilt and that it is deserved, and to enable him, in so far as his rebellion against the law is broken by the power of the law, to feel that the punishment is atonement for his wrong, and, as regards the divine government of affairs, expiation. In this relation, punishment is the right of the offender. It is a recognition rather than a violation of his individuality.

To be sure, this aspect of punishment depends upon the conception of the criminal as something that is free and can not be

satisfaction of punishment consists in its actually being retribution,") They also contain other manifestly retrograde ideas. Differing from Hegel, Rothe believes it is possible upon the whole to fixgradations in punishment by retribution and that the death penalty is justified by the same references to certain passages of the Bible (which passages he historical conception have another meaning), p. 292. On pages 297 and 298, referring to Nietzsche, he says: "And indeed as a Christian State, the State must punish: for even upon a basis of a complete reconciliation of the conflict between the interests of holiness and those of grace arising from the redemption (Would that this conciliation were already accomplished!). Christian love can not stay the arm of criminal justice, but rather it must in its own interests expressly urge it to activity"

A beug.—Hegel's dialectical treatment against wrong assumes, on the other hand, more and more of the character of retribution in certain jurists who in principle stand or seem to stand on the same ground as Hegel. If, on one hand, one can not free himself from the old remnant of the maxim: "Malum passionis ob malum actionis" and, hence, is involved in new difficulties, so, on the other hand, a proper effort is made to show that the purposes of the punishment recognizable as meeting temporary requirements are directly re-enforced by the absolute principle, to portray punishment as having a Janus head, one face, turned towards the past, permits the absolute principle of punishment to be recognized, and another face, turned towards the future, reveals the
relative purposes of punishment. And at the same time, an attempt is made, as must be the case in a correct theory, to adjust the theory to historical development.

This last-mentioned attempt is made by Abege. He portrays how the elimination of wrong passed from the form of vengeance to that of composition, and from this changed to punishment inflicted by the State with relative purposes (deterrence of others, safety from the criminal, reformation), and ultimately finds its completion in the principle of justice, which, however, adopts these relative purposes but in proper measure and relation. Hegel's method of dialectical contrast — the direct expression of feeling in vengeance, accepted purposes of punishment, and the treatment of the criminal in accordance therewith, and ultimately remission and expiation in the higher sense — is here followed, but quite foreign elements are injected into his opinions. Hegel's reaction against wrong is, as it were, meaningless in itself; it is only in the sphere of finiteness (i.e., in history) that it assumes the coloring of a definite evil inflicted upon the criminal, in accordance, also, with the prevailing tendencies of thought. In Abege there again prevails the illusion that, in accordance with an eternal and immutable rule of justice, the kind and degree of the punishment (or more correctly and in Abege's sense, the evil contained in the punishment) can be definitely fixed. Under this conception, the alliance of the purposes of deterrence, security from the offfender, and reformation, with the absolute principle, is only an appearance. Such an alliance is impossible — for those very reasons which of necessity prevail against Ross's theory. If absolute justice and a relative purpose of punishment are two different aspects of the same thing, then both are consistent. The acceptance of them as consistent is Ross's theory. But in Abege's theory, also, there is no possibility of these two conceptions being reconciled, as is revealed by a contemplation of the results. He who takes the trouble to follow up closely the results of the various theories (as was done by Feuerbach) thus pragmatically united, will necessarily agree with Feuerbach's criticism, that the two garments are so badly torn that it is impossible to patch up a decent covering for the State.

Heffer. — The defect of such a combination of theories is especially manifest in the clear and concise expression given it by Heffer, one of its supporters, in § 199 of his valuable treatise. "Punishment," says Heffer, "in its absolute character, as an elimination of the guilt in the offender, is in and of itself not dependent upon the attainment of any specific purposes. It is rather a purpose in itself, and in accordance with its nature has the effect of curing. In the sphere of the State and its rights, as in finite affairs generally, punishment assumes certain peculiar relations. While here it may be inflicted solely in the general legal interest (for the general utility), it becomes a satisfaction which the State requires and takes from those guilty of a violation of the general legal system, for the purpose of the restoration and maintenance of the same." It is, indeed, not apparent how in the sphere of finite affairs the absolute purpose of eliminating guilt can change itself into the purposes of deterrence, reformation, etc., and at the same time remain true to itself. Nor is it apparent how it is just that the criminal must submit to these purposes. The solution of the problem is presumed, but it is not given. The contradiction is merely concealed by distinguishing between the sphere of principle (idea) and the sphere of finite affairs.

Küstlin, Merkel. — Küstlin and Merkel, in spite of the many excellent statements concerning individual points of criminal phi-
criminal only in accordance with laws which the latter himself has established.

Merkel involves himself in a peculiar difficulty. He capably demonstrated that the distinction favored by Hegel between the circumstances of punishable and non-punishable wrong acts is not tenable. But this demonstration carried with it the assumption that no distinction exists at all between criminal wrongs and civil wrongs, and that civil and criminal sanction are identical in nature. Both do away with wrong, —criminal sanction in the ideal inner sphere and civil sanction in the external sphere. This is fundamentally connected with Merkel's assumption that wrong is conceivable only as blameworthy, and that law consists merely of commands (rules) and prohibitions addressed to persons who are responsible for their acts. However plausible this assumption may be made through the observation that the contrary view would logically compel us to regard an unreasoning character as a possible author of a legal injury, yet fundamentally it rests upon the long-since repudiated foundation of law by contract. I have a right only because a rule of law forbids other responsible beings to take the object from me. That is, I have a right merely by virtue of a forbearance on the part of others which is either voluntary or compelled by the legal system. I do not have it by virtue of a reason inherent in the nature of things. Not because my family and I have possessed and cultivated a field for one hundred years is it my property; but the legal system can give effective orders to others that they leave it alone. If Merkel's assumption were correct, the State would have no right to protect itself and its subjects against predatory attacks of barbaric hordes and nations. It would only protect a "factum." Yet the spontaneous feeling of every one leads to a different conception, viz., that there exists a right to protect peaceable possession and culture against barbarian destruction, whether the invaders had the capacity to understand this or not. Not for a moment can we concede that humanity at large has no right to protect itself against wild beasts

\[\text{474}\]

- Philosophy for which we are indebted to them, do not carry their ideas substantially farther than the foregoing. Köstlin, in part adhering more closely than Ileffter to Hegel, merely adds an examination into the possible kinds of wrong. He classifies unconscious wrong as the object of civil justice, possible wrong as the object of the police system, and known antagonism of the will of the individual towards the general law as crime. He designates punishment as coercion brought to bear on the will of the criminal. According to Köstlin, punishment may not consist of a general reaction against the personality of the criminal, but it may be such only to that degree to which the criminal himself has thwarted the general will. Consequently, as Köstlin himself says, he regards punishment externally as retribution and as an evil.

The theory of retribution here again becomes very prominent; and the statement that this is the case only "externally" does not suppress the truth. It merely conceals the difficulty of proving that the punishment should also inwardly be a benefit to the criminal, — a thing which in empirical conditions is by no means uniformly the case. If, without giving that necessary attention to an injury to the public, one could, in the case of many a repentant criminal, forgo the punishment, he would certainly thereupon reform. And if we consider how defective the measures have been and still remain (how difficult, for example, is the erection of a penal institution corresponding to all requirements), we shall, as it appears, perceive that here a single phrase has bridged over the chasm between good and evil. Moreover, Köstlin's classification of the three kinds of wrong is not satisfactory, — the distinction between civil wrong and criminal wrong for the reasons previously dealt with. As to the intermediate classification favored by the dialectical method of Hegel, the penalties inflicted by the police power are, as a rule, not juristically preventive, but rather, as it were, remedial; the action contravening a police regulation is not merely a possible wrong but an actual wrong, although it is not necessary that it directly violate a subjective right or work a real external injury. This is exactly the case with quite a number of criminal offenses; and the facts is merely that police regulations concern themselves with acts which are not aimed at a violation of a right but which nevertheless place a right in jeopardy. — The justification of punishment as a right of the criminal is only incidentally treated by Köstlin. He believes that punishment reaches the

\[\text{475}\]
and unreasoning nature. It has this right. It merely uses it and avails itself of it in a different form than as man against man; wild beasts and lifeless objects are not possessors of rights.

The logic of Merkel’s view would also compel the judge of the civil court, before ordering a debtor to pay or a detainer to deliver, to ascertain whether these parties had realized their wrong; for without this preliminary condition no legal obligation exists, and the judgment is not intended to create legal obligations but merely to declare those already existing. From this standpoint, also, it becomes impossible to construe the differences between the civil sanction (i.e., payment of damages) and punishment which exist in the positive law and are uniformly recognized as reasonable. If the civil sanction pursues exactly the same object as the criminal sanction, why is punishment in its positive development governed by laws quite different from those of the civil sanction? Why, e.g., does not the punishment pass, so generally the obligation to indemnify, to the heirs of the party originally obligated? In this complete disintegration of the conception of punishment it is no longer, as a matter of fact, possible to arrive at the conception of retribution which Merkel on the other hand finds realized in criminal justice. Private law and civil justice have essentially nothing to do with the conception of retribution, but nevertheless punishment according to its nature should not be different from the criminal sanction.

The postulate of a comprehensive foundation of criminal law is contained in the following principles: “To each and every living being there is conceded the right to remain and maintain himself and the conditions upon which depend his being and his existence. To the struggle for the latter belongs the reaction which in social life responds to the crime, whether individuals or the community take part in the same. For the crime which is not followed by retribution jeopardizes all of those conditions.” Punishment is, indeed, the reaction against acts hostile to the conditions upon which the life of society depends,—a reaction which necessarily takes place where society as a whole would still express itself as being moral. Moreover, the way and manner in which Merkel rejects a retribution which should sever itself from social interests and which at the same time would not be in a position to adopt the relative theories of punishment, must command our entire accord. But one cannot perceive the bridges which on one hand connect these interests with that retribution, and on the other lead from that retribution to that vague residue of simple coercion (sanction) into which punishment is reduced.

Häßchens. — Häßchens also uses Hegel’s ideas as his foundation. But he is not satisfied with the mere dialectic necessity of punishment, and consequently (more even in his latest works than in his earlier) he is under the influence of the idea, which sees in the law merely rules for the will of those who, in the concrete case, are without rights. Thus, the right is merely the vacuum which is left to those entitled to something when it is appropriated by those not entitled. This is a view which we have already seen in Merkel, but which has since found its clearest expression in the “Norm theory” of Binding. Häßchens quite properly asserts that the legal rule should be a moral one; and he is also quite correct in maintaining that law should not merely be the compass, or at any rate, a skilled adviser of power, but rather that law and morality be in themselves a power. But, peculiarly enough, he is unable to assert for law in itself either activity or coercive power (sanction). This activity and coercive power, apart from cases of self-defense, first arise through the State “in which the organism of law acquires its finite existence,” and in which “every exercise of vengeance is designated as not merely formal, on account of the danger of its getting beyond control, but also as material, as unlawful, because morally unlawful, and improper.” Punishment is that coercion which is used against an active opposition of the will to the law, or against a force done to the law, or against a power which has intruded into those spheres over which the State alone predominates, and which is therefore designed to repel
the despotic encroachment of the individual will upon the legal power of the State. Its purpose is: "to administer justice by the elimination of wrong, by the restoration of the legal condition and the undiminished power of the State. In this sense and not for the sake of a limited utilitarian purpose, to punish is a moral necessity." However, the sanction should not be unrestrained, nor should the criminal be seized by the power of the State "as something absolutely without a right." Justice should be satisfied by a punishment which completely corresponds in kind and amount to the guilt in respect to all elements under consideration. And yet the various possible purposes of punishment (security, etc.) should be attained. A conflict of these various purposes, Halschneu feels, is possible only when exclusive predominance is given to one of these purposes, or if there is assigned to punishment some purpose foreign to its ideal nature (?).

We have already frequently pointed out that a combination of the relative criminal theories, either singly or collectively, with a theory which believes that an absolute standard of justice must be established for punishment, is impossible. The so-called inner agreement of such an absolute theory and a relative theory is and remains simply a pious wish, which will not bear up under examination in the individual cases. For example, suppose, in the light of that theory, we try to answer the simple question whether or not the legislative power in a case of special danger, e.g., in a time of special excitement, has the right to materially increase the severity of the punishment for certain offenses, as it were, to make an example. But apart from this, the doctrine cannot free itself from numerous inconsistencies. It is asserted that coercion is in no way an element of law, and yet it is immediately stated that coercion is, on other grounds, not only morally possible but even necessary for the law. But if a thing is necessary for law, then it is also included in the nature of law. The point of view which lies at the basis of this is incorrect. It is assumed that law can be completely separated from the other relations of human life. As such it requires no coercion. But as soon as law is considered and asserted as existing among these relations of life and dealing with them, then coercion becomes necessary. But this last-mentioned point of view is alone permissible. A law which floats in the air, withdrawn from all relations of life, is a will-of-the-wisp.

As to Halschneu's comment that the rules of law applicable to monarchs do not cease to be legal rules because no coercion sanction can be applied to monarchs, he overlooks the fact that coercion may exist without a civil or a criminal procedure. A very effective coercion may exist by virtue of the pressure of the united conditions of things, without there being an especially organized machinery for giving effect to the same. The coercion might very well exist in this, viz., that the monarch, by the disclaimer of such a legal duty, might encounter opposition to legal rules otherwise intended by him, and in glaring cases could not avoid a breach of the constitution which would be prejudicial to his position. The coercion exercised by the law can also very well consist in this, viz., that the law deny to him who violates its provisions any assistance; or that it recognize the right of self-defense on the part of those offering opposition, etc. Coercion is absolutely necessary, because the law must be valid generally; and the law, as opposed to the individual will, must, because of this very generality, not yield but must compel. Consequently it is not apparent wherein vengeance specifically differs from punishment. Historically, as Halschneu admits, it is the root from which the criminal law sprang. Therefore theory requires identity with it in its fundamental essence; and has not the State often given its assent to the exercise of vengeance? Moreover, in the initial stages it is certainly not necessarily immoral, and the less so since it can then hardly be distinguished from self-defense. If in those times a bold aggressor had merely encountered opposition as limited as is our modern self-defense, and never had to fear anything further, then certainly (e.g., as with the early Germans) there would never have existed a sure legal protection. And the same thing can be asserted if the range of self-defense had been limited merely to the protection of one's own rights. It is not so limited even today. In the initial stages of development, when there is no strong governmental power, such egoism would destroy all further development of the law and of the State; yet, in times of danger, when another's right is boldly attacked, we recognize the correctness of the principle: "Tu es regnator." And it is not apparent how punishment should

Footnotes:

II P. 32.

II P. 565.

II P. 11.
be a necessary consequence of wrong deserving punishment, if it did not exist prior to the State.

All this is but a result of our knowledge of the ideas which Herbert first promulgated (cleverly but incorrectly): that the sanction for the law did not originate with the law. Thus the sanction must first have been introduced from without the law, and the same would hold true of punishment, which should be a sanction. But since punishment should also be distinguished from that which we customarily term as sanction in the administration of private law, Hächscher does this by denying that the administration of private law contains a sanction (although this is contrary to the simple and natural way of viewing the matter), and ascribes the private law duty to indemnify to the injured person’s power over the property of the one doing the damage. Finally, it is not an improvement upon Hegel’s classification of civil wrong and criminal wrong, to conceive the latter as a wrong in which the criminal essentially places himself in opposition to the general legal system. We shall revert to this point later.

Berner. — In spite of many excellent comments for which we are indebted to Hächscher’s discussions, his involved theory does not leave a satisfying impression and is in many respects a very difficult one for precise examination. Much more satisfactory is the simple theory of Berner. Following mainly the specific system of ethics of J. U. Wirth, he clearly and definitely changes Hegel’s idea of elimination of the wrong to one of retribution (measured according to the intention as evidenced by the external injury). Moreover — and this is a special feature of Berner’s view, wherein, in our judgment, he is quite correct — he maintains that retributive justice leaves a certain province for free discretion as to the quantum of the punishment (which however is again conceived as suffering inflicted through the senses).[27]


Within this province the purposes of deterrence and reformation can and should exercise an influence upon the amount of the punishment. “Here are the limits within which justice allows the realization of these purposes.” And within these limits (as had already been demonstrated by Aleeg and Wirth) both these purposes are simultaneously achieved with the retributory punishments. Thus, according to Berner, the relative theories of criminal law ultimately acquire an extensive influence upon determining the amount of the punishment.

Kitz. — Hegel’s theory receives from Kitz a new tendency which is deserving of notice. It deals, we may say, more with inner and subjective matters, thus practically veering around towards the theory of reformation. The immoral act is declared not so much to become “null” as to be undone, rescinded (“Rescission theory”). The intention which has not yet become an act, which has not manifested itself to the external world, may be rescinded by being given up, by simply being withdrawn. But where the intention has become an act, its rescission requires a positive contrary act, an opposite treatment of the will; and since the offender has acted in order to furnish gratification to his base nature and desires, it requires his receiving pain inflicted through the senses, receiving punishment. As it had already been stated in the Decretum of Gratian: “Qui pecator est, et quem remordet propter conscientiam, silet accipiendo et plangat . . . propriam delicta . . . et cubat et dormiat in saeco, ut pretenderis delicias, per quos offendent Deum, vitae austeritate componas.”

Kitz has very correctly combated certain objections which could be raised against his theory. Thus, there is the objection that in actual life an equalization of the pleasure of the crime and the suffering of the punishment cannot be established. A principle, however, is not valueless, because in its application to concrete life a certain province for the exercise of discretion cannot be avoided. Moreover, it cannot be asserted that, according to Kitz’s theory, an action that had no effect must remain unpunished, since the essence of the intention as manifested does not lie in its consequences; an isolated, a slight, an isolated offense furnishes a motive for the commission of a grave offense.

[29] “Das Prinzip der Strafe in seinen Ursprungs aus der Stärkung” (Oldenburg, 1874).
[30] Cf. p. 28: “In my heart, my deed was not my own.”
[32] Thus p. 35.
§ 100. HISTORY OF THE THEORIES OF CRIMINAL LAW [PART II

does not for this reason get off with a slight punishment. That
desire for sensual gratification, existing prior to the act and become
habitual, is to be considered as the motive, and thus the punish-
ment rather increased. The distinction between punishable crime
and mere immorality is marked by the fact that the function of
the State is limited to countering encroachments upon moral
freedom, and that within this province the State fixes and controls
the suffering afflicting the senses which seems necessary for the
recession of the immoral intention. It is perfectly manifest that
within the State has to attend the conversion of the intention of
the criminal (and also his reformation). For this reason, imprison-
ment seems an especially commendable form of punishment, while
the death penalty, on the contrary, is objectionable.

However, as the reference to the penance of the Canon law
shows, the character of temporal punishment (i.e., inflicted by the
State) is not preserved in Kita’s reformation theory. This
temporal punishment attains greater perfection, the more it is
calculated to bring about the inner reformation of the criminal;
but first and foremost, it has in view as its object not the criminal
but the purposes of the community. The logical outcome of
Kita’s reformation theory is a theory of reformation, on one hand
limited by a consideration that means of reformation may never
be a pleasure for the condemned, but rather suffering, and on the
other hand materially restricted because the means of reformation
must not be suffering. According to Kita, the State has no further
right to punish, if the offender has already voluntarily undergone
the evil which (according to the view of the State and also accord-
ing to the statute) must be inflicted upon him. This would be the
perfect punishment. In this the official character of the pun-
ishment vanishes. And finally, it is a fiction that a deed which
has been done can be undone by the contrary desire of its author;
for this, as the ancients said, could not even be accomplished by the
gods. Even an evil intention and desire cherished and nour-
ished in the inner recesses of the soul leaves its trace. The reality
of criminal law cannot be founded upon a fiction.

§ 100. Combination of the Theories of Hegel and Heine. —

Heine. — The theory of Heine, which in part at least stands
upon the basis of Hegel, is complicated and perhaps difficult to
comprehend in the sense in which it was intended. One cannot

1 In Von Holzendorff’s “Handbuch des deutschen Strafrechts”, I.

483

CHAPTER VII [CRIMINAL THEORIES IN GERMANY]

deny its searching glance into the nature of wrong, of law, and of
punishment; but on the other hand (as Laistner’s criticism
has revealed and manifested) it exhibits a certain wavering
back and forth between various principles and a certain obscure-
ty.

Heine very correctly perceives that a proper theory of criminal
law must also be adapted to historical development and to the
various, and perhaps also imperfect, manifestations of punish-
ment. He also perceives that a correct theory of criminal law has
to consider principally, although not exclusively, punishment
inflicted by the State. From this point of view, Heine very
correctly observes that punishment does not need to be an “evil”
or a “suffering.” It is regarded as the specific substance of civic
punishment that it be something done by the criminal, which should
be the guiding principle in the fixing of imprisonment, along with
which the punishment of banishment (complete or partial ban-
ishment from the legal community) is recognized. Both of these
punishments are diminutions (“Minderung”) of rights (i.e., of
the criminal). The undergoing of the punishment by performance
of something and the fulfilment of an obligation frees from the
diminution of right in the future, yet it directly asserts the diminu-
tion of right in the most direct and actual manner; and it follows
from this conception, as Heine argues, that it is an error to as-
sume that punishment cannot attain realization until the beginning
of physical atonement. No one can deny that a criminal sentence,
in itself, fulfills a part of the function of punishment; a portion
of its activity takes place, even though it was certain from the
beginning that the punishment would not be inflicted. Even
before the commission of the crime, the punishment has an inde-
pendent existence. In the criminal statute or in the rule of crim-
nal law founded upon custom two aspects may be distinguished;
the ideal one lies in the judgment that the punishment is the legal
equivalent of the crime; the practical one, in the order that this
punishment shall be inflicted upon the author of the crime. The
punishment is also a manifestation of the criminal’s unworthiness.

These two ways of conceiving punishment, as they are advanced,
cannot be reconciled. It is possible, if one regard the manifesta-
tion of the unworthiness of the criminal as the cardinal element,
to proceed from this to an accompanying diminution of right or performance of punishment, and also even to banishment. But the reverse cannot be accomplished. The community has no further interest in him who is expelled, and there is no special need to proclaim the unworthiness of him who has paid what he owes. It is also clear that if there can still be an effect to punishment when a real diminution of rights in individual cases is impractical, real diminution of rights cannot be the essence of punishment. Moreover, if banishment, according to Heinze’s conception, is the prototype of public punishment and is little by little mitigated by public punishment, then would not the criminal have the right to choose banishment from the society of the State instead of undergoing public punishment? Heinze is able to avoid this result, which would be quite acceptable to our modern criminal world, only by appealing to the civilizing mission of the State. Suddenly the State appears as the one formally injured. The crime within the State is the violation of that law of life operative in civil society and in the State and indispensable to its progress. . . . Through the crime the criminal formally becomes, in respect to the State, a wanton violator and despoiler of the legal system of the State and materially a renegade of that civilization which furnishes the basis for rights. For this reason “there cannot be ascribed to the individual criminal the right of choosing a voluntary withdrawal” from the State and the association of civilized mankind in preference to undergoing the punishment which will rehabilitate him in the State. This would be directly to allow him that which constitutes the essence of the worst crime, viz., a complete lapse from civilization expressed and accomplished by a withdrawal of one’s self from the State and from civilized humanity.” According to this, any one, who, as a hermit, took himself to a desert island would thereby commit the worst crime conceivable. The doctrine involves the following simple fallacy: One may regard grave crimes as being also a lapse from civilization, but not every withdrawal from civilization is a grave crime. If the punishment rehabilitates, then it is a right and not a duty of the criminal. “Beneficia non obstrudit.” If one desires to insist strongly on the philosophic attitude, a moral duty does not always give rise to a right, and the civilizing duty of the State does not carry with it the right to punish. Otherwise there could be inferred from the civilizing duty of the State the right to improve (all) individuals through punishment as far as it might seem desirable to the State.

As a matter of fact, Heinze’s theory, as supported later by Laistner, reveals two distinct circles of thought. To the system of Hegel belongs the idea of the declaration of nullity or baselessness of the crime. To Fichte belongs the thought that crime breaks the legal union between the criminal and the State, and that this is reunitied by punishment. “If we inquire after the embodiment of the penal power, on both sides we are told it is the State; the one State as the defender of rights, the other State as the party injured, which relies not upon its criminal law but rather upon its missionary duty.” However, we do not subscribe to that severe judgment which Laistner later passes upon Hegel’s theory, after he had in the beginning praised that “ Janus head” which Heinze in a somewhat mysterious manner had set up as the only correct starting-point. We are rather of the opinion that the ideas of Hegel and Fichte may quite well be joined in a certain unity; and we can express to Heinze the appreciation of science for his suggestion in this respect. But the way in which it is sought to bring about this unity is in our opinion misleading. And misleading also is the way in which the relative purposes

---

11 From the moral duty e.g. to feed children, there does not arise the right to do so at another’s expense — indeed there arises no definite right against others.

12 If e.g. p. 327: “Punishment is the right inherent in the crime.”

13 “Not punishment, but crime and punishment together must be regarded as the Janus head, the face with the features of wrong is the crime and the face with the features of justice is the punishment.” Heinze, p. 327. Such a figure can be made use of at the end of a deduction in order to make it more clear and impressive; but at the beginning of the deduction it leads to the error of confusing the figure and the deduction and thereby even itself to become uncertain.

14 p. 173. “And the word is so loosely woven that the warp and woof can be distinguished without effort. We also have here before us one of the so-called mixed theories to which the criticism of its own author as to such mixtures may be applied.”
are finally inserted in Heine’s theory. They are designated simply as “accidental purposes of punishment.” But in a theory there can be nothing accidental. One can not thus accidentally adhere to an absolute principle, nor cherish the pious thought that these relative purposes are so peaceably reconciled to each other or to the principle of rehabilitation or of banishment, or to the principle of pronouncing the unworthiness of the criminal or his crime. Heine refers here to the operation of the statute. The statute may indeed reassure the judge but not the legislator or the theories and their philosophers. And since (on p. 333) the justice of mere police penalties, which may be felt as keenly as criminal punishment, is founded simply upon the fact that the State has the right for the sake of the public welfare to gain its end by means of threatening with punishment, what need was there, for expounding together crime, wrong, and punishment, of “the right inherent in the crime” and the “Janus-head”? Would not the theories of Bentham and Feuerbach have been more simple and logical?

Since it seems to be a natural right of authors to place their own theories at the end of their investigations, although chronologically regarded this may have preceded some other theory, so, with Heine’s “combination theory,” we will take leave of the description of the evolution of Hegel’s principle and turn to the other most recent theories. Upon the whole, either they amount to a renunciation of any philosophic explanation (except in so far as they are content in the belief that the description of a phenomenon or its process constitutes its explanation) or else they contain simple reproductions of former theories. A special position can perhaps be assigned to Binding’s theory, which will be mentioned at the close.

§ 101. Von Kirchmann.—The doctrine of Von Kirchmann\(^1\) in reality entails a renunciation of every theory of criminal law. This renunciation, in a peculiar manner, reminds one of Kant. But closer consideration reveals that here we have to deal merely with the shell of Kant’s philosophy, and not with its true kernel. According to Kant, morality consists in an unquestioning obedience to the categorical imperative, in this direct fact of our perception. Kant understands this by the unconditional submission to the transcendental principle, existing in God of development or being. But Von Kirchmann derives from this an unquestioning obedience towards any authority whatsoever, i.e., obedience to every authority which appears absolute to the individual.\(^2\) For this power (of God, but also of the ruler, of the nation as a whole, and of the father over the child of tender years) there is no morality, since it considers itself sovereign and actually exercises sovereign prerogatives.\(^3\) Now law in the subjective sense, in its very nature, consists of physical power, which, on one hand, is strengthened and protected by means of the authorities, and on the other by means of a coercion called by the authorities to their assistance, and especially by means of threatening with evil for any case of injury done to this power.\(^4\)

Criminal law is thus degraded into a mere means of deterrence. We do not need worry our heads to ascertain whether or not such a conception violates the sense of justice and morality or stands in contradiction with other known facts. For the settlement of the controversy between absolute and relative theories, Von Kirchmann has, as a result of the foregoing, a ready and simple expedient. “Both utility and morality are the foundations of punishment; the former for the authorities, the latter for their subjects.”\(^5\) In other words, the individual must accept all that the authority ordains, but the authority may do what it pleases. There is justice only within the sphere of the statute, but to the statute itself the standard of justice cannot be applied.\(^6\)

Schopenhauer.—Schopenhauer’s conception of law and of criminal law is an almost perfect reproduction of Feuerbach’s theory on a metaphysical (Spinoza) basis, but without Feuerbach’s exact presentation in detail. In accordance with his general philosophy Schopenhauer does not require a specific justification for punishment, in the sense that no injustice be done to the party punished. For, according to Schopenhauer, the existence of the individual being is only an appearance; since the

\(^{1}\) "Grundbegriffe," pp. 62 et seq., and especially p. 65.
\(^{2}\) P. 112.
\(^{3}\) "Grundbegriffe," pp. 107 et seq., p. 111.
\(^{4}\) "Grundbegriffe," pp. 165 et seq.
\(^{5}\) "The theory of the law of might and morality can scarcely be conceived. Also et especially p. 178. It has already been shown that the substance of morality is based upon the accidental, disassociated, and often doubtful commands of various authorities. Von Kirchmann also in 1849 published a pamphlet which was intended to demonstrate the worthlessness of all judicial practice." ("Die Würdigung der Juristengesetze, ein Vortrag").
veil of the "Maja" does not permit the individual to see the entire truth, the individual believes himself distinct from the rest. Also, if the individual being inflicts suffering upon another, this in reality brings harm to himself, and as a result every evil act carries in itself its own retribution; a further retribution, such as vengeance, is absolutely senseless and without purpose. Law, the State, and criminal law are consequently merely external means whereby, in the world of appearance, there may be reduced to the narrowest possible limits, with a certain sacrifice, the doing of harm, which is the result of the irrefrangible "egoism" with which every living being is imbued. Law and the State therefore have nothing to do with true morality, which is only in the common feeling, in the recognition that one is merely part of a whole, although law has its origin in morality to the extent that it marks the point to which the will of the individual can go, in its own assertion, without denying the existence of another will, which is in any case a violation of morality. The State is based upon well-calculat...ed "egoism" because no one desires to suffer wrong. Morality, on the contrary, desires no one to do wrong. Up to a certain point the result of both can be the same. "A Wolf with a muzzle is as harmless as a lamb." The criminal statute, i.e., the threat contained in the criminal statute, is nothing other than the "muzzle" for the egoism. If this "muzzle" requires in the enforcement of the punishment, then, in Schopenhauer's sense, one could simply find consolation; to meet the criticism that the criminal must have been sacrificed for others, one could say that in reality the punishment was not inflicted upon one but upon all. And also, for other reasons, it would be permissible to behave as many as one might choose, since the beholder would all be dispatched to that happy land of indefinite nothing or everything, the "Nirvana." However, Schopenhauer seems to have an indefinite feeling that

---

CHAPTER VI CRIMINAL THEORIES IN GERMANY

since all are as one and hence all are equal, it will not do to leave the world of appearance to its own brutality. He accordingly remarked — herein reminding one of Rousseau — that, for the security of his life, the individual has pledged his life, his freedom, etc.; but at the same time he acknowledges, since a pledge has meaning only if it possesses value, that a certain value is as a matter of fact attached to the individual. And so Schopenhauer's philosophy varies back and forth between the world as it actually is (the "thing or things in themselves") and the world of appearance. Schopenhauer embarked upon a voyage into the world of "things in themselves", which Kant had decided to be impossible and of which he believed only a fragment could be acknowledged in the "practical reason" under the domain of ethics. In a subjective mood (and so frequently that the reader finds difficulty in observing it) he shifts the scenery between the world of appearance and the world in abstract. Principles which according to Schopenhauer can have application only in the world in abstract are suddenly applied to the world of appearance. Practically regarded, it is the philosophy of the "biasé." If things become disagreeable, the sensitive philosopher retires to the world in abstract; then suddenly the world of appearance has no further meaning. Strictly examined, the nature and law have only those meanings which protect the comfortably located philosopher from unpleasant disturbances. In criminal law particularly he can be little interested. He himself will not commit a crime. For character is unchanging and he acts or fails to act as necessity dictates, and the philosopher knows his character. So, criminal law is, in reality, only for the brutal masses, or, at any rate, for those who have charge of their discipline and prisons. It is merely sympathy that connects the philosopher with the criminal. This sympathy, however, does indeed lead to a noble suggestion, which can be turned to good account in the criminal law: We are made of the same material as the criminal whom we condemn; we all share his guilt with him; therefore we may not use him solely as a means for accomplishing other purposes. There

---

1 Cf. particularly: "Welt als Wille und Vorstellung" (2d ed. of complete works by Paterkott, Vol. II. 1877), p. 418. Moreover it deserves notice that the theory of deterrence has been gaining adherents, recently. Doubtless this has been furthered by the exaggerations and extravagances of the theory of reformatories, and also by the apparent simplicity of the theory of deterrence, the defects and contradictions of which are not visible in the purely philosophical view of those who are not jurists. This also lends true to respect the indefinitively "Fear and Discipline Theory of Ueber" (First and the Mensch," II, 1, sep. pp. 411 et seq.), who in opposition to Schopenhauer proceeds from the freedom of the will (cf. pp. 42 et seq.).

2 See citation above: p. 408.
are many evidences of deep insight on Schopenhauer's part which one must admire. And even if one regard his fundamental principles as absolutely wrong, one can only agree with him in considering the criminal dispassionately and in certain sense as a product of nature, and in his application of the punishment (like Herold's) primarily to the act rather than to its author. His specific statements concerning law and criminal law, where they are not limited by his philosophic principle, will always maintain their value. In conclusion, he rises above Feuerbach in that he does not explain crime merely by sensual motives, and that he does not make so complete a separation between law and morality as Feuerbach would have done.

Dürring, E. von Hartmann, von Liszt. — The theory of criminal law in Dürring.

E. von Hartmann's and von Liszt's amounts to a mere description of the origin of criminal law, with, however, a repudiation of the negative tendency of ideas of retribution. According to these writers, criminal law developed from the natural impulse for revenge, the active return of an injury received. This impulse towards retaliation, according (especially) to E. von Hartmann, while directly related to the impulse of self-preservation and of necessary defense, unconsciously serves the end of creating and supporting the legal system. Later, however, it becomes more moderate, and, since it becomes to be exercised by the State and no longer by individuals, it consciously assumes various purposes, — the purpose of giving security to the community and the purpose of bringing about a reformation of the criminal.

Cf. "Wehl als Wille und Verpflichtung" II, p. 685: "According to my view, there lies at the basis of criminal law the principle that not particularly the man but rather the act is punished, from which it does not follow that the criminal is merely the material substrate in which the act is punished."

A philosophy such as that of Schopenhauer, which completely denies the freedom of one or which nevertheless maintains the unity of all, necessarily wanders back and forth between refined sentiment and gross brutality. In this respect compare the discussion in "Die beiden Grundprobleme der Ethik" (pp. 236 et seq.), concerning the torture of beasts and the statements in "Wehl als Wille", II, p. 687: "The damage to be avoided gives the proper standard for the punishment to be threatened, but it does not give the moral value (lust of value) of the forbidden act. Therefore the law can justly cause penal servitude to be inflicted for allowing a flower-pot to fall from a window, or can impose labor with a wheelbarrow for smoking tobacco in a forest in the summer, although this be allowed in the winter."

"Kernwahrheit der Philosophie" (1875), pp. 219-243.

"Phänomenologie der physischen Wahrnehmungen" (1870), pp. 196-212.

"Das deutsche Rechtsdenken im gegenwärtigen Stunde" (1881), §§ 2-6, pp. 2-24.

Abegg had previously suggested that this transformation of the natural impulse was the last step, but was not the realization of the purpose aiming solely at human welfare. He designated it as the realization of justice. Von Liszt[16] positively rejects this last step: everywhere progress lies in making this natural impulse, as a power of nature, serviceable to the purpose to be attained. Definition of aim and choice of means suited to its purpose are the criteria of all progress. E. von Hartmann[17] expressly asserts: "Every concession to the demand for the 'talis' (i.e., retribution in kind) for its own sake we must regard as immoral. We certainly no longer inflict punishment because sin has been committed, but rather that sin may not be committed." This view does not need consider justification of punishment as being justice in respect to the individual criminal. The natural impulse is there and such as its justification.

However, E. von Hartmann's remarks concerning the possibility of making wrong cease to be harmful, not by means of punishment but by means of forgiveness, showed that here a certain remnant of contradiction still prevails (even that which is natural is regarded as justified "per se") and that the views of the writers mentioned do not contain a theory but merely a description. It is quite evident that we may derive from them neither the slightest information as to whether of legislation nor a criterion for the criticism of the historical and positive.

Von Liszt, however, desires, by emphasis upon the purpose of punishment, to introduce new progress, and so long as his theory keeps time with a certain indeterminate music of the future, it proceeds exceedingly. Thus he says: "Punishment in its substance and range must be one thing if it would prevent, another if it would reform, and still another if it would furnish security. However, it is only seldom and for the most part unconsciously that modern legislation cherishes this thought. It deals in the same manner with both the incorrigible habitual thief and the criminal of opportunity who is filled with repentance. But the sharp emphasis upon the element of purpose, both in law generally and especially in punishment, is constantly finding countless and more important adherents. And it is to be hoped that in the not too
distant future the time will have passed by when the demand that the State's power shall not without aim or purpose destroy the legal rights of members of the State, can be dismissed merely as a piece of rationalistic determinism." But as soon as he begins to proceed from such generalities to practical details, it becomes manifest that the various purposes of expediency which apparently are receding so harmoniously together commence a hard conflict with each other.\(^1\) Such are the results of negating that principle of justice inherent in the historical aspect of the subject. Ultimately this entire tendency, rejecting every absolute principle (as even von List\(^2\) cannot deny) rests and is even expressly placed upon the doctrine that law is only a product of the State will. The controversy between these relative theories and an absolute principle of criminal law is thus a continuance of the old controversy concerning the Étage v. république and the république v. étage.\(^3\)

\(\S\) 102. Binding's Theory of the Effect of Disobedience to a Rule. — And here, too, is the point of connection with the theory of Binding, who regards the right to punish "as a related right to obedience on the part of offenders."\(^4\) Binding regards the entire law as merely the sum total of rules, commands, and prohibitions, and the State enactts and makes use of these rules.\(^5\) For disobedience to a rule it demands satisfaction in the punishment.\(^6\) Yet this corporal satisfaction should be neither revenge nor retaliation.\(^7\) It is somewhat like payment of damages in private law, merely, a right of the State, not a duty. Whether or not there arises this duty, which the State claims for itself in its criminal legislation, is determined by the consideration whether the evil of not punishing is greater for the State than the evil of punishing; — since the

\^1\) Von Hartmann a. e. (p. 210) says: "Since society as a whole is more important than the individual criminal, so the protection of society is more important than the moral discipline of the criminal. The latter can be followed only as a subsidiary purpose when allowed by the chief purpose, the protection of society."\(^8\)


\^3\) Grundrisse, etc., p. 109.

\^4\) As far as the State is considered as acting absolutely without restraint, it is not clear. Moreover, in the very first principles of the "Grundrisse" right and law are confused with each other. Punishment is the loss of legal rights which the State imposes to the offender, i.e., by a breach of the right, in order to maintain the authority of the violated law.\(^9\)

\^5\) Grundrisse, p. 110.

\^6\) Chapter VI. CRIMINAL THEORIES IN GERMANY 1102

punishment is also an evil, and certainly not only for those upon whom it is inflicted.

Von List, himself an adherent of Binding's "norm" theory ("Normentheorie"), "without which a deeper understanding of the criminal law... is scarcely possible"\(^10\); is certainly not hostile in his criticism. We may therefore, while we ourselves abstain from criticism, give here as our own the criticism of List,\(^11\) to which, perhaps, something could be added: "Binding's view is not a solution; it is rather a shifting of the problem. Whence the State obtains the right to establish rules and to require obedience, and why the State's right to obedience is transformed into punishment, we are not told."

Laistner. — If we correctly comprehend the meaning of the above, Laistner's work has exercised some influence upon Binding's theory. Laistner aims especially to distinguish sharply the right of the State to punish and the duty to punish; so that, while the right is based upon justice, the duty can be fixed and especially can be limited in accordance with considerations of expediency. We are not of the opinion that law and duty are traceable to actually different origins for the State (as is hereafter shown). Laistner's own attempt to establish a theory of criminal law is indeed quite extraordinary. It reminds one of Schopenhauer's theory of right and wrong, although not of Schopenhauer's theory of criminal law. "The criminal, while intruding upon another's sphere of will and right, is in his own view the master thereof; the injured party, however, accepts only the single fact that each one belongs in the realm of his own will and regards the intruder as being placed at his disposal. The true punishment, as a direct consequence of the crime, does not consist in the execution (i.e., of the punishment), but rather in detention under the will of the party injured... The above described condition being inevitable, it is equally true that the necessity for the execution does not arise from the formal character of the act, as is maintained by the absolute theories; what we find is not a right, it is a privilege. Whether and how far and in what manner use is to be made of this right, — these are no longer legal questions, but are rather practical questions, questions of morality."

\^7\) "Das deutsche Recht und die Strafe", p. 6.

\^8\) "Das deutsche Recht und die Strafe", p. 25.

\^9\) Laistner, "Das Recht in der Strafe", pp. 196, 197.

403
This theory can be illustrated in the following manner: The (subjective) right is a spider's web; the violator of this right conducts himself as a fly in the net; apparently master therein, he merely falls into the power of the spider, the owner, lurking in the background. The spider does not need to suck the blood from the fly, but he has the power so to do. Whether or not he does so depends upon considerations of expediency, i.e., his hunger, etc. Now if Laistner does not limit the "right" so exclusively to the subjective right of the individual, and if Laistner e.g. does and must conceive, as also violations of right, grave violations of general morality or even the violation of such of the commands and prohibitions of the State as he may choose, then what does the entire theory mean other than that one may legally do anything he pleases with the criminal, the transgressor of a rule? The only restrictions imposed are those of expediency and morality. In other words, law is that which the omnipotent State desires. The limitations which it herein imposes upon itself concern neither the law nor relatively the philosophy of law. Or, expressed in another way, there is no philosophy of law. And indeed there can be no philosophy of law at all, if it is true, as Binding maintains, that the science of law is obliged to build only upon the squared cornerstones of the legal maxims of the State, instead of upon the waves of moral opinion which constantly advance and recede in the State and also in the individual. Does not philosophy signify the contemplation of things and of science in their relations, one with the other?

§ 102a. Modern Theories of Criminality outside of Germany. — At this point the learned author's historical outline of criminal theory comes to an end. But at the very time of his writing (1882) a movement in another country was giving new directions on a grand scale to criminal theory; and in the succeeding generations, entirely novel vistas were broadly opened and the older general theories took on a new content and new applications.

Von Bar's history ends in Germany with 1880 and in other countries with 1850. But the story of the rest of the century has been fully told by another author, in a treatise which (with slight overlapping) begins where Von Bar left off, and traces the progress of criminal theory in chapters which exactly complement Von Bar's work and render unnecessary any supplement here. C. Bernhard de Quiros' "Modern Theories of

Criminality" I serves the purpose as if it had been composed therein.

De Quiros divides his account under two heads, Criminology, and Criminal Law and Penal Science.

I. Criminology. Under this head, he groups the various theories as follows, in chronological order:


(II). The Three Innovators: Lombroso, Ferri, Garofalo.

(III). Development: A. Anthropological theories: (a) Atavistic theories: from Bordier to Ferrero; (b) Theories of degeneration: from Magnan to Dallamagne; (c) Pathologic theories: Roncoroni, Ottolenghi, Perrone, Capano, Lewis, Benedikt, Ingegnieres. B. Sociologic theories: (a) Anthropo-sociologic theories: Lacescausae, Aubry, Dubuisson; (b) Social theories: Vaccaro, Aubert, Nordau, Salillas; (c) Socialistic theories: Turati, Loria, Colajanni.

II. Criminal Law and Penal Science.

(1) Origins: Beccaria, Howard, the International Prison Congresses.


(III). Applications: Garraud, Tarde, Polletti, Gross, etc.

This imperfect outline of the progress of theory described in De Quiros' chapters indicates their service as complementing Von Bar's history for the 1850's and completing the account to the present day. — Eb.

I Modern Criminal Solano Series, Vol. I (Boston, Little, Brown & Co., 1911; published under the auspices of the American Institute of Criminal Law and Criminology).

494
APPENDIX

A CRITIQUE OF THE THEORIES, AND AN EXPOSITION OF THE THEORY OF MORAL DISAPPROBATION (REPROBATION)

By C. L. Von Bar


§ 107. The Degree of Punishment.


§ 112. Summary.

¹ (This Chapter forms the final Chapter (q) of the author's Part II. But as it is not historical in treatment, but critical, it is here placed as an
§ 103. Defects of the Absolute and Relative Theories. — Consideration of all the theories of criminal law heretofore advanced reveals that none of either the absolute or the relative theories has been satisfactory. The absolute theories lack purpose and also preclude the possibility of the criminal law being sufficiently used to serve the well-being of the public at large. The relative theories are in overwhelming majority, but these are unable to satisfy the conscience of the people, because (as they are expanded) they renounce the principle of justice. An impartial mind will always require that it be the crime, and not some purpose disconnected with the crime, which brings down the punishment upon the offender.

The combinations of these two theories must also be characterized as erroneous; for an absolute foundation of criminal law, taken unrestrictedly, admits of no compromise with relative theories. That in this respect such combinations, and the so-called "pragmatic coalition," suffer the same fault of inconsistency, we have previously undertaken to demonstrate.

Moral of Hegel's Theory. — Of the previous absolute theories, there is only one which, if logically carried out and freed from erroneous additions so as to be properly understood, is reconcilable both with utilitarian purposes and the course of history. This is the theory of Hegel. It is, in addition, entitled to a certain presumption of correctness, because of the fact that it has been adopted with more or less modifications by a considerable number of the most eminent criminals in Germany. There remains, however, in Hegel a remnant of the old theory of retribution, and punishment cannot be deduced from the conception of right as he has attempted it. The claim between wrong and punishment cannot be bridged over by defining the latter as a negation of wrong and consequently an assertion of right. It is conceivable that wrong could be removed from the world by some means other than by that which we call punishment, e.g. by the forgiveness of the wrong or the doing of kindliness to the offender. E. von Appendix. It belongs more naturally in the "Modern Criminal Science Series," already cited.

[498]

Hartmann makes the apt statement that forgiveness corresponds to the former moral balance, i.e. that existing before the wrong, but that the payment of an evil with an evil presses down further one end of the scales. Moreover, as we have previously stated, there is nothing in the conception of right which requires an active prosecution of the criminal.

Morality as the Basis of Law. — On the other hand, morality is an active principle — at least to a certain extent. The law can give to one the right to kill another, e.g. can give the master the right to kill the slave. That which determines whether or not we exercise this right is not the law, but rather a morality, correctly or incorrectly understood, in accordance with which (whether we will it or not) we measure all our acts of which we are clearly conscious. Now it is not the meaning of an absolute principle that a right is given to any one to punish or not punish the criminal, and certainly not a right to be exercised at pleasure. It is rather the meaning that the right is also essentially (although there are conceivable exceptions) a duty. Consequently the absolute principle of criminal law can be found only if we discover a moral basis in the law. The proof that law is nothing other than the morality of the community which is conclusive in respect to the individual is not to be expected here. There are, however, a great number of legal rules which have no direct relation with morality, but rather rest upon historical tradition or upon purposes of service to morality, since they preserve to the individual a sure province for the exercise of choice and thus of ethical action. Regulation, therefore, whether it
to limit or deprive the individual or the public at large of this moral judgment. Dühring and Von Hartmann recognize this in their theory of resentment, or moral antipathy, but they pay too much attention to the egoistic aspect of the question. In natural man this moral judgment is most strongly manifested if he himself be the party suffering from the immoral act. But this restriction of the idea to one's own injury is not necessary. On the contrary, where man is changed from his natural state (i.e. of isolation) into that of membership in a certain association, where he becomes a Ζώον πολιτικόν, this judgment, although with less spontaneity, is likewise provoked and occasioned by the malicious injury of others.

Disprovval of an Act Entails Disapproval of its Author. — This disapproving judgment prevails primarily against the act. But of necessity it extends also to its author; for an act cannot be condemned independently of its author. If the author is not known individually, there appears always in the act, although in hazy and indistinct outlines, a mental picture of the author. Whether we may start from the acceptance of extensive freedom in human action, or from the assumption of complete determinism (the "operari sequitur eussa" of the Scholastics and Schopenhauer), the deed appears as the product of the nature or character of its author. In our disapproval of the act we also always express our disapproval of the personality of its author.

The Possible and Proper Methods of Expressing this Disapproval.

— But this disapprobation in the abstract does not reveal the relative to many has undergone many changes. Binding even confuses the moral rule with the comprehension by the same of the individual case. This disapproval of the act with those coming under the rule is frequently more difficult and is subject to more changes in "fashioal opinion" than to principles of law. Why this is so, appears later.

But as far as the sovereignty of the individual conscience is concerned, a thing disputed by Binding, this reproduction of Fichte's theory of morality is untenable according to the modern researches. The conscience of the individual is a product of history and of the morality of the whole nation. (C. Hegel, "Philosophie der Rechte" (3d Ed.), pp. 192 et seq.; Lütte, "Märkisches" (3d Ed.), II, pp. 366 et seq.; Altwe, "Über die Wissenschaften des Moral im Menschenbezogenehen" ("Verlag", Basel, 1879); Baumann, "Handbuch der Moral und ihrer Rechtphilosophie" (1879); Von Bering in Schmitt's "Jahrbuch für Gesetzgebung", etc. N. S. Vol. 6, 1882), p. 4, et seq., and especially in contradiction to Binding, see Jellicoe, p. 123.

The unjustifiability of the objection made by Hugo Meyer to the reproduction theory that disapprobation of the person of the author of the act is not possible. On the other hand, that punishment is primarily applied against the act and not against its author has been maintained ever since the,—by many of the most profound thinkers.

6 Hugo, "Grundzüge und Zwecke der Sünde" (1876), p. 11, regards the principle of disapprobation as not sufficient. Although it can be conceded
manner of its concrete expression. It could possibly confine itself to the mere mental processes of the one disapproving; or on the other hand it could manifest itself in a destruction of the author, which except for this would be without purpose. For the destruction of an object without ulterior purpose is of necessity the strongest expression that there is nothing for which it should exist,—that it is of no moment, and is thus the strongest expression of absolute disapproval. Reserving the various methods for the expression of this disapproval, we will seek first to establish the extent of the justification of this possibility of expression.4

The more doubt involved in the moral judgment of an act, the more reserved and the less manifest must be its disapproval. But, vice versa, in the case of obviously grave violations of morality, wherever there exists a moral community this judgment necessarily becomes a public one. For (as even Kant believed) morality is not a thing prepared for all times and exclusive of everything else; it is a product of the history of humanity and thus a product of the community. The moral judgment of the individual is founded upon tradition, upon the moral judgment of others. This necessarily presupposes a certain communication of the moral judgment, without which tradition would be impossible—in other words, it presupposes a certain publicity of the moral judgment. Here again logic is in accord with the actual facts. In the case of grave violations of morality, in the case of serious crimes, public disapproval, as already remarked, manifests itself irresistibly. Public disapproval therefore, in a manner more or less formal or informal, is within certain limits and in certain cases that the inviolability of certain fundamental maxims of morality must be continually emphasized, he believes proof was yet needed that this emphasis can be made only by punishment. However, this proof is lacking in Sobel's own arguments, which (p. 124) amount to a paraphrase of my own, yet (2, especially p. 28) with the elements of uncertainty that with the fundamental principle of criminal law—emphasis of certain fundamental moral principles—that these principles of deterrence and reformation. The result is that in reality the asserted principle loses its true meaning and can with difficulty be distinguished from a moderate principle of deterrence. The proof desired by Sobel is already furnished, if it is proven that in general punishment is required there is no need to show that punishment is absolutely necessary in each individual case, since the law must as a rule ignore the special features of the individual case. And this in certain, that if crimes are punished at the present time suspend its functions, morality would thereby receive its deathblow.

4 According to our view, that which we are accustomed to call punishment (e.g., deprivation of freedom or property) is only the amount of punishment. Cf. the derivation and earlier meaning of the word "s zarówno" (punishment).
in the early periods of the human race, law and morality are the same, it is quite logical that a serious violation of law, of morality, brings upon the wrongdoer exclusion from the legal association, i.e. outlawry. For this reason (as Fichte has correctly observed), everywhere the original punishment was outlawry. This outlawry, as was naturally the case in the rather loose association of the old German “Edelhöfe” and “Freihöfe,” might affect only the party injured, who thereby obtained an unlimited right of revenge. It might, as was the case in the city of Rome with its closely crowded population, entail an immediate outlawry in respect to all (as “sacer”).

Accordingly every expression of disapproval, even where it involves complete destruction of the offender, or any other conceivable injury to him as an expression of this disapproval, is justice in respect to the offender: “Jus levi infinitum.” The latter cannot complain, since he it was who first severed the bonds of morality and law. This is the true and correct meaning of the principle (which Hegel indeed did not fully comprehend) that the method and measure of punishment belong to the realm of chance. Hegel here overlooked the fact that history also gives prominence to a certain principle of justice. A remnant of the original conception always continued to exist. Even the strongest adherent of the principle of justice in its ordinary sense, which would measure the justice of punishment in accordance with its method and amount, cannot to-day fail to perceive that to a certain extent the criminal and his sphere of rights are placed at the disposition of society. Otherwise it would be impossible to in any way account for the purpose of reforming the criminal, etc.

Any recognition of a relative purpose in punishment necessarily carries with it the principle that the criminal may to a certain extent be placed at the discretionary disposition of society.

Disapproval is Not Retribution.—The history of criminal law exemplifies the foregoing idea in its course of gradual

4 Cf. also C. L. von Haller, “Restauratio der Staatswissenschaften”, II, p. 35. On this point I modify my earlier view. I had found a justification for the violation of the sphere of rights of the individual in this, viz.: that in other cases (e.g. in war) the individual may be sacrificed for the sake of the community (“Grundlagen des Strafrechts”), p. 76. But such cases are different. The individual and his property may be sacrificed only in so far as voluntary acquiescence would be of service. Punishment is essentially repressive. This applies especially against the attempt at a justification of punishment in Ed. Hart, “Das Gericht und sein Formen” (1832), p. 49.

APPENDIX

In the beginning, vengeance knew of no restraint. Retaliation in kind (”lex talionis”) furnished something akin to a fixing of the amount for certain cases (but by no means for all). It was a very imperfect measure, but nevertheless a measure which is characterized by a certain ideal symmetry. But, as history shows, this is not a fundamental principle, but rather a principle limiting the application of the dominant principle of destruction. A readily conceivable change has been able to raise the idea of retaliation to an independent principle. It is absolutely impossible for any one who has given close consideration to the history of criminal law even to speak still of the possibility of a principle of retaliation. There is sense in saying that evil things and persons must be destroyed. It is possible only for one who considers himself an administrator of divine justice to say: “I do an injury,—because evil must be requited with evil.” This idea is of later origin, and was long ago proven to be inapplicable for the criminal law of the State.

It is only if one case to regard retaliation as the cause of evil or sorrow, and regard it merely as tending to lessen progress and hinder development, that it has a rational meaning, and furthermore a meaning in harmony with the idea of disapproval. If to live and act morally is in accordance with the general rule of existence, then the opposite must impede and hinder the author of the immoral act, just as he who lives contrary to the laws of health suffers injury for so doing. The moral system abandons the evil doer or, what amounts to the same thing, it turns against him; but to find its principle in causing pain to the evil doer, is logically impossible and is the opposite of morality.

The more firmly the moral system is established, the less vigorous need be its expression of disapproval—for in many respects this is supplanted by the natural reaction of the moral system. If

1 Ulrici, “Gott und der Mensch”, II, 1 (1873), p. 302, although he acknowledges that the one element common to all punishments is disapproval, rejects my argument because pure disapproval, historically speaking, did not arise until relatively later and public punishment was chiefly introduced for the suppression of private vengeance. The first point, however, merely corresponds to the law of development; and as far as the second point is concerned, it may well be asked whether vengeance also does not contain the element of disapproval. Ulrici would regard vengeance merely as retribution and absolutely repressive both. Then punishment inflicted by the State would be a completely new principle not in harmony with history, a thing which is historically false.

2 This opinion is expressed by Merkel. See ante, § 99.
the thief has difficulty in finding some one to receive the stolen goods, because general honesty subjects the title of a vendor to a scrupulous test, theft hereby comes to be something which in most cases does not profit the thief but is only to his detriment. If to the cheat, the swindler and the conscienceless speculator, the doors of the homes of honorable people (who form by far the great majority) are closed, then in many cases the expression of formal disapproval is perhaps superfluous. Consequently punishments become milder as civilization increases, i.e. a civilization which signifies an advance not only in knowledge and refinement of enjoyment but also in morality. It is possible that in an ideal state of society the individual criminal might be left simply to the consequences of his own crime; or there might be applied the principle: Overcome evil not with evil but with good. Thus punishment, regarded as disapprobation, may be reconciled with Christianity, but regarded as retribution through human agencies, it is fundamentally the opposite of Christianity. For (as even Kant has fairly and candidly shown) the principle of retribution never permits forgiveness.

Various Phases of Disapprobation as Punishment. — In order that the disapprobation of an act (and consequently of its author) may have that ideal effect of confirming the morality of those disapproving, it is necessary that the determination of the act and of its author be as exact as possible. Therefore a punishment inflicted upon a man innocent (or generally believed to be innocent) does not have the moral effect of punishment. Fear can be spread through the venting of rage against innocent people. But where a people is not completely enervated the ultimate effect of this fear will be directed against its author. A just punishment, however, strengthens the position of the legal system.

Moreover, it is in harmony with the character of punishment as disapprobation that in countries where there is a high degree of culture and refinement of feeling the trial and condemnation of the criminal constitute a part, and often a very important part,

of the punishment. If punishment were necessarily an external evil, there would be no explanation of the fact that in concrete cases the punishment may consist merely of a money fine or a few weeks' imprisonment.

The character of punishment, regarded primarily as disapprobation of the criminal act (and only secondarily as disapprobation of its author), makes it necessary that the expression of disapprobation be directly attached to the act itself as portrayed by the trial, — in other words, makes it necessary that the judicial sentence, which is nothing other than the fixing of the act in the minds of the public, substantially specify the punishment. It is contrary to the nature of criminal law to attempt in general to determine the punishment later, after observation of the character of the convict. We would say nothing here of the hypocrisy of prison officials, their usually actions, and their deceit of the prison officials. These are unfortunate conditions to which rise is given by the foolish modern movement (so totally at variance with history) to eliminate from the judicial sentence the fixing of the amount of the punishment, and to allow the duration of the punishment to be fixed later, after observation in the prison, or to remain for a time undetermined. As previously stated, the sentence of the criminal court could contain an abstract signification, without having an actual result of a penal nature; but in this case the actual result of the evil act should be affirmed publicly and be of general application, — at least it should be fixed independently of anything else. The judicial sentence loses its influence upon the mass of the people when the actual result of the act is connected with something else, i.e. when it depends upon the discretion of prison officials which is not manifest to the public and which cannot be publicly verified. The individual criminal may be reformed, to the heart's desire, but among the masses of the people crime will continue to flourish. However, if the punishment were actually retribution of evil, i.e. of the wickedness of the criminal, then no objection could be raised to first making a long observation of this wickedness, since the deed of the criminal does not afford an adequate criterion for its accurate measurement. Furthermore, the punishment of disapprobation can never be supplanted by suffering which comes upon the criminal as a matter of chance, even if this is a result of the crime and reveals (as they

9 There is even recognized in the German Criminal Code a punishment (frequently used in England) which consists entirely in public disapproval — reprimand. Hugo Meyer, § 9, maintains that the essence of reprimand is not disapproval of the act but rather of its author (i.e. thus a mild form of suffering). However, this assertion is in itself a "petitio principii", and if reprimand is not a "humiliation of the offender" only secondarily, then why are all the special forms of humiliation there eliminated? Why is the policy not to-day a desirable form of punishment?

10 This opinion expressed by me in the "Grundlagen des Strafrechts" p. 4, had been advanced by Heidegger, p. 326, as stated above.
say) the "hand of God." If a thief breaking into a house falls from a ladder and as a result of the fall becomes a cripple for life, we would not for this reason spare him from punishment any more than we would the highwayman who lost an arm or his sight as a result of the vigorous defense of his opponent. If temporal punishment were merely the representative of divine punishment, then in such cases it would be presumptuous to desire further punishment. If it were the retribution of evil with evil, then in such cases, to punish would be senseless.

The True Purposes of Punishment. — The essential matter is *active disapprobation* rather than the pain of the criminal. Therefore, whether or not the criminal in the individual case finds the punishment an evil makes no difference. He may even regard it as a benefit; — as e.g. perhaps in these times a criminal, who is not completely pernicious, regards with favor the prison which keeps him from further wrongdoing and furnishes him instruction. We should not for this reason change the punishment, so as to cause him suffering. According to Plato's ideal conception, the offender should always regard the punishment as a benefit. If pain were the essential element, why should we to-day be so violently opposed to torment and torture of convicts? This would be nothing other than a mistaken feeling of humanity, and there would still arise the question whether a short punishment entailing severe physical suffering or even mutilation, where this does not affect the capacity to earn a living (e.g. cutting off the ears) is not preferable to imprisonment lasting for years. The fact that we find nothing repulsive in the physical destruction of the criminal in capital punishment, but are offended with torture and suffering commanded for any other purposes, has as a matter of fact its deep reason, which none of the previous criminal theories has explained.

However, the treatment of the offender must always be expressive of disapproval; and so far, but only so far, is it proper that the punishment should contain a disadvantage for the condemned. Criminals should not constitute a favored and pampered class (this is a consideration which obviously opposes the extreme deductions of the theory of reformation), although other praiseworthy purposes might be better attained through such good treatment. The distinction must always remain, that as a general thing it is preferable not to be punished. A penal institution must never assume the character of an institution for instruction. However great may be the attention given to purposes of reformation, and consequently to the individual criminal, this attention is only a secondary one. The primary element is attention to the necessity of public disapproval (or if one prefers so to term it, repression). Thus Krohne states, in regard to the last international Congress for the Improvement of Prisons and the tendencies there observed: "With all the compassion which is aroused by every human failure, be it moral, mental or physical, the men who to-day are concerned in prison reform are primarily governed by the opinion that the vital question is the defense of society."

As Häscher and others have correctly stated, punishment is primarily to be conceived as a *suffering* of the criminal, — as coercion brought to bear upon him, to the extent that the criminal is involuntarily subjected thereto, but not in the sense that he should be tortured. In disapprobation there is an active manifestation of the one disapproving. Punishment cannot, as Heinzol would have it, be conceived chiefly as a *payment* by the criminal to the community. If this were so, then voluntary acceptance of the external method of punishment fixed by the State for the case in question would be the most perfect penal atonement. The suicide of a person condemned to death, instead of being prevented as is now done, would necessarily be encouraged. Only when the criminal regards himself as a means for furthering the purposes of humanity, and only when he has learned to regard the punishment as rational, can the punishment be conceived as a payment. It is only in this sense that I have previously expressed the opinion that the criminal must undergo retribution. It is with this just as with reformation; the ideal punishment will reform in fact the offender, but nevertheless the chief purpose of punishment is not reformation.

§ 105. Private Vengeance as an Expression of Disapprobation. — We have already remarked that the earliest punishment consisted of a dissolution of the legal tie existing between the injured party (or as the case may be, the community) and the criminal. Accord-
ingly, if every punishment substituted for this dissolution were a benefit, or as a matter of history the earliest right afforded the criminal, then the statement of Felote in regard to the citizen’s important right to be punished would not be so paradoxical as it seems. The development of punishment by compositions, which we are able to trace in Germanic law, confirms this absolutely. There is an apparent contradiction in the fact that later, and especially today, the criminal may not escape punishment by going into exile. But exile later and also today has no longer the significance of the old “Rechlosigkeit” (deprivation of all rights, outlawry) or (to use the language of the old Norse or Germanic law) “Friedlosigkeit” (being without the “peace”). This was an entirely different matter.

Disproportion as a punishment, when inflicted by the individual, lacks not only (as is obvious) a definite objective amount, but it also lacks a general recognition that the occasion of its infliction is a just one. Such a punishment is often very hard to distinguish from a mere unlawful attack; and it is very easy for the criminal, in order to avail himself of the assistance of others in his own defense, to set up the pretext that the attack upon him is unlawful. Thus private vengeance becomes a standing feud between various families, and the community or the king finds it well to intervene, and out of this intervention there later arises the taking over of this private vengeance by the State. This is furtheed by the increasing realization that the legal security or insecurity of one individual involves that of the others. Vengeance becomes punishment. From disproportion subjectively manifested there arises one of more general recognition. It becomes liberated from its egoistic character,—a liberation that is not merely accidental but which is in accord with the laws of development.

Punishment a Right of Society Rather than of the State. Upon this transfer of the criminal law to the State, there arises, from the right to punish, a duty. That which the individual has heretofore possessed as a right is taken over by the State, as it were, with trustworthy hands—for careful administration and not for arbitrary exercise or neglect. In the hands of the State, this right becomes a duty—a duty not only of the State but also of society. It necessarily follows that the State cannot forgo punishment at its discretion, as can the individual. As far as it is able, the State must prosecute actively. It is in the same position as the individual whom custom will not allow to permit the murderer of his kinsman to escape if he has him in his power or to leave to chance or a third party the work of vengeance. Exile is not a right, but a mere “de facto” possibility for the individual. With the passing from memory of that original condition in which criminal law was a right of the individual or possibly of all, the State becomes less able to consider or assume that the mere privilege of harming the criminal entails for the latter a real consequence, even apart from the fact that this involves a possibility of degenerating into the old barbarous custom of vengeance.

Desirability of Prosecutions Initiated by Private Parties. There always remains, however, a certain recollection of the fact that criminal justice was merely transferred to the State, and did not belong to it originally. In a case in which popular opinion regards a private person as primarily concerned in the punishment and the public right of the State as only secondarily concerned, a pardon or dismissal of the case is considered a wrong; e.g., in case of an insult, if some satisfaction has not been privately rendered the injured party or his forgiveness or his consent to the pardon has not been obtained. It is also well for the State authorities to bear in mind that the criminal law, although in a rather crude form, is older than the State itself, and that it must not be used to further temporary purposes, e.g., that it must not be used or misused perhaps to punish those having one tendency and to spare those having another. If criminal law were in all respects an original attribute of the State, such a course would not be so injurious and demoralizing. The preservation to the public or to the injured party of a possibility of a supplementary prosecution, even against the will of the sovereign or the State, is a very wholesome corrective to that opinion (which may easily arise) that the excellence of the State.

1 This process of transfer is excellently described and explained by C. L. von Haurer, “Reformations des Staatswissenschaften,” I, pp. 254 et seq. (c. 34).

2 The individual is often also under the not less actual coercion of morality.

3 That for a long time a different condition obtained among the Romans has been stated above; but this is not evidence against the argument in the text, since it was not until later that this right of exile arose. It was the pride of the Roman citizen no longer allowed an active exercise of the criminal power.

4 R. Von Hartmann, “Phanomenologie,” I, p. 202, justly calls attention to the fact that this process of transfer has by no means completely ended. It is in part upon this that three depends the continued existence of dueling in spite of the criminal law.
party in power can offset minor breaches of the criminal law which become intolerable when repeated. As the eminent French jurist, Faustin Hédée, has stated: criminal prosecution rests partly with the community and not exclusively with the State. The supplementary complaint instituted by a private citizen is (if guarded with sufficient precautions) a proposition justifiable from the viewpoints both of history and of logic.

In the case of grave violations of the duty to punish crime, the idea that this despotic power of the criminal authorities injures society manifests itself in an elementary way in lynch law and acts of violence. This also has a bearing upon the fact that legislation in criminal matters must not depart too far from popular sentiment, and that in criminal legislation there may be seen a direct reflection of the civilization of the people.

The objection can always be raised—and in fact has been raised—that disapprobation contains nothing that makes its practical application necessary—at least not in the form of criminal procedure, and even less in the actual infliction of the punishment. If only disapprobation were involved, one might in legislation go no farther than to set up general principles which would disapprove of one act or another. However, in this objection it has been overlooked that there would be no recognizable inclusion of the act under these general conceptions or principles. It is in the vengeance of the injured party, the punishment inflicted by the State, which first declares that this concrete act deserves disapproval and is absolutely reprehensible. This immediately becomes clear if one considers that there may be various grounds of extenuation for acts which possess the external elements of crime. A concrete act does not actually become a crime until this character is, as it were, stamped upon it by judicial decision. The reason why one at the present time is able to conceive that a judicial decree is not necessary in order for certain acts (e.g., aggravated crimes of murder, etc.) to be regarded as crimes by the public at large, is that one forgets the long tradition of judicial decrees which obtains as a decision for the individual case in advance of the actual decision. It would soon become otherwise if the giving of judicial decisions concerning legal criminal cases should be generally discontinued. To become convinced of this, it is only necessary to consider how falsely in the absence of established rules and regulations, the general public would decide as to the questions of responsibility and the special circumstances of extinction (coercion, error, necessity, etc.).

§ 106. Summary. — Summing up the foregoing statements, the purpose of criminal law is as follows: "Certain fundamental principles of morality should be publicly and notoriously characterized by the civil community as inviolable by attaching to actions which are contrary to these principles an impressive mark of disapprobation. This mark also necessarily affects the author of the action, since a deed and its author cannot be contemplated separately. This is simply a result of the fact that the civil community is obliged to give practical recognition to the fundamental maxims of morality."

The Idea of Disproportion Expressed by Other Writers. — The foregoing is not very different from the recent statement of my honored friend, Hugo Mayer. He, however, is unable to free himself completely from the traditional view that the scope of criminal law and the amount of the punishment should also be derived to a certain extent from absolute justice. For this reason he often speaks of retribution and conceives punishment in the sense of Hugo Grotius as "malum passionis ob malum actionis." 1 His words are as follows: "The legal basis of punishment consists simply in this: It results from the very nature of the State that in cases of necessity it give expression to the imminability of actions prejudicial to the civil community by the infliction of punishment." The statement of Montesquieu 2 also amounts to the idea of disapprobation, where he says that in the State which corresponds to his ideal, "La plus grande peine d'une mauvaise action sera d'en être convaincu." The statement of the great Leibnitz (given above) also expresses the idea that exclusion from the community, a thing resulting from disapprobation, is the ideal essence of punishment. 3

1 "Lehrbuch des deutschen Strafrechts" (3d Ed., 1884), § 2, p. 9.
2 "L'Esprit des lois", VI, Ch. 9. Cf. also ch. 21: "... les formalités des jugements sont des pénalités." That disapprobation and an articulated "crime" are something different, scarcely needs to be asserted.
3 The profound and eminently practical Francis Lieber (Franz Lieber) also says, in his article "On Penal Law," printed in his "Miscellaneous Writings" (Philadelphia, 1852), II, pp. 484-494, esp. p. 492: "A society in which every sort of wrong might be permitted with impunity would necessarily lose its ethical character... The expression of public disapprobation would be missing." Cf. also the very recent system of "Rechts-
As soon as the purpose of punishment is no longer directed towards the person of the criminal, but rather society or the community is regarded as that which is aided or protected by the punishment, and the criminal is regarded merely as something incidental—which he certainly is, as contrasted to the community—this theory necessarily gains favor. The theory of reformation treats the criminal as the chief goal towards which the purpose of punishment is aimed. It is the same with the theory of retribution. According to the latter, the criminal should receive the desert of his acts in the punishment.

The deterrence theory is the only one which harmonizes with our view in regarding society, and not the criminal, as the chief issue. But, on one hand, it takes too mechanical and base a view of the relation between the criminal and society, and on the other hand it pays too little attention to history. It is quite proper, however, (as Hugo Meyer also maintains) to ascribe the first place among the relative theories to the purpose of deterrence (or, as we prefer to say, of turning away) the public from crime. Criminal legislation which, in respect to its means of punishment, is based upon the deterrence theory, is at any rate, as history shows, capable of existing; but legislation which is based exclusively and consistently upon the theory of reformation would soon render itself impossible.

Moreover, credence may not be given (as is done by the theory of deterrence in its too base conception of the purpose of criminal law) to the belief that the criminal law has its chief effect upon the criminal world or those who are irresistibly disposed to crime because of evil training, degeneracy, etc.; or that passion which has become strong and overwhelming can be held in check through the existence and operation of a criminal statute. In this respect the objections to the deterrence theory are rather well taken. Fear of an indefinite although severe future evil can but seldom counteract the impulse to crime. Therefore, it is a great mistake, in times when grave crimes are prevalent, to expect any very important result from liberal use of capital punishment, flogging, etc. The history of the 1700’s illustrates the result of a harsh philosophe by Lessing, 1781 (especially p. 533, § 46), where punishment is designated as the victory of reason over its opposite. Yet in Lessing, punishment rather uncertainly shifts to retribution and is apparently the amount of punishment is to be derived from absolute justice. Lessing, moreover, as is usual with most philosophes, treats the subject as long distance and with only a bird’s-eye view.
is merely to overcome disobedience, only those punishments should be employed which, to the greatest degree, render impossible the confusion of such a case with cases of punishment for crime.” Licher 4 directly opposes this conception of disobedience. “One should avoid any appearance of punishing as if for the reason that the transgression or offender has ventured to be disobedient. In other words, punishment is inflicted because the authorities represent the purpose of the common good, and therefore disobedience to the authorities is an offense, i.e. is immoral.”

According to the foregoing argument, anything which entails a disadvantage for the party to be punished is “in abstracto” applicable as a means of punishment. For every disadvantage done to the author of an act, on account of the act, expresses a disapprobation of the same, and that which is taken or diminished is merely something which is generally regarded as a gift of the legal system, — since the right, in case of extremity, extends even to destruction of the criminal. However, the most perfect kind of punishment is that by which the criminal himself is brought to disapprove of the act that has been done, inwardly renounces it, and is reformed. Here the objective disapprobation of the act becomes a subjective one. But it always remains as the essential element, on account of the primarily objective character of disapprobation, that public opinion should regard the action usually taken as a sufficient disapprobation, and not too much consideration be paid to the personality of the individual criminal. By the last mentioned consideration, justice inures the danger of losing its supremacy, certainty and dignity, and of degenerating into a system of physical suffering and breaking of the will, which serves as a basis for numerous blunders. Punishments involving physical suffering which bear the stamp of a seeking after individual vengeance are at variance with quiet and deliberate disapprobation through the public authorities. The same is the case with punishments which are usually applied to animals, since disapprobation has meaning only as against the acts of rational beings and it is necessary that the expression of such disapprobation be retained.

The same objections may be raised to punishments which are so excessive as to immediately arouse pity, because pity dispels disapprobation. This also applies to punishments which are appropriate only under quite exceptional circumstances. This last objection, together with others, may be raised to punishment by flogging which is now so popular. On the other hand punishment by deprivation of property is not objectionable merely because one individual feels it but little or because, in the case of others who have no means of paying, it must be changed into some other penalty. For both reasons, however, it cannot represent the higher and sharper degree of disapprobation. That capital punishment is not absolutely improper follows directly from the original right of destruction. But whether it is relatively improper, i.e. improper for a given period of time and a certain stage of culture, is quite a different question, for it is by no means an absolute requirement of ethics. The means of punishment is, as we have already remarked, a part of the question of the amount of the punishment, and that this is dependent upon time and circumstances is obviously manifest.

§ 107. **The Degree of Punishment.** — But if, according to our view, the place is placed at the absolute disposal of the community, so far as concerns the expression of its disapprobation, what becomes of that justice which we feel is requisite in the fixing of the degree or amount of the punishment?

The answer to this question is simple. This justice appears only by considering the historical element in criminal law. It has nothing to do with the basis of criminal law. Punishment and crime (i.e. immoral acts detrimental to the conditions upon which depend the life of society and therewith the life of the State) are not commensurable. If they were commensurable, then the theory of retribution would be tenable, at any rate theoretically, if not practically. For example, how can one balance the larceny taking of a purse with a year’s imprisonment? And even in the death penalty — the favorite example to adduce — the balance is very imperfect, at least in many cases. If a murderer lies in wait for his victim and by a single well-directed blow strikes him dead, is such a death physically equal to the death on the scaffold with the mental tortures of a long period of expectation? We must cease to speak of the justice of punishments, unless we either cease to punish many cases now punished or unconsciously measure out the punishment in accordance with historical tradition. Criminal law is no more able to estimate crimes than the govern-
mental authorities are able to place an absolute value on property and industry. But there is always a justness in treating like matters in a similar manner or in like matters producing a like result. And so in criminal punishments it is tradition which furnishes the justness.

While the valuation of the degree of criminality is primarily arbitrary, yet tradition allows considerable room for the exercise of discretion. No one can say (unless he refers to the very detailed provisions of a definite statute) whether, for a certain crime, two and one half or three years in prison should be the proper penalty. Nothing can be said as to absolute justice or injustice in regard to the question of solitary confinement or ordinary confinement for a prisoner or his employment at one task or another. Within this rather extensive province the State is given a free hand, since the administration of justice should be made to serve the welfare of the public and to pursue freely purposes beneficial to the community. Herein good results may be obtained from the purpose of turning the criminal into a useful member of society.

§ 108. What Acts should be Punished. — From the principle of disapproval which we have adopted, it follows that it is only in certain grave violations of morality that the voice of public disapproval is given general manifestation; it does not follow that this disapproval extends to every violation of morality. The State is not the blind instrument of an absolute principle. It does not adopt the maxim: "Fint justitia pereat mundus", but rather the principle that justice prevails that thereby the world may continue to exist. Our principle is absolute only in the sense first mentioned.

As the individual may have reasons to be sparing of his moral judgments, so is it even to a greater degree with the State. The disapproval of the State is an authoritative one. On one hand it presupposes the utmost precision and certainty in the judgment of the act, and on the other hand it is conclusive as against the individual. For this latter reason this disapproval must extend only to a relatively small number of acts. Otherwise it will eliminate the freedom of the individual, and in so doing destroy the source of morality and of voluntary devotion. At the same time it would destroy that moderate and proper egoism which ultimately operates for the good of all and is a mighty impetus toward human progress.

Naturally this disapproval should extend preferably towards acts which violate the rights of others; — this is in accordance with the historical origin of the criminal law of the State in the vengeance of the individual. Acts whose disadvantageous results almost exclusively or even generally fall upon the author of the act are not the objects of the disapproval of the State, although they have a remote effect upon the interest of others and of the public at large. This is also in accord with many practical reasons, such as difficulty in determining the questions of fact, of guilt, the imperfect equipment of the public for the discovery of the act, etc.

Since the disapproval of the State entails a disadvantage for the party toward whom it is directed, and since it always (in criminal procedure) operates by virtue of numerous means of coercion and entails much expense, or at least loss of time to the parties concerned, and since it imposes a very severe temporary evil even upon innocent suspects — e.g., imprisonment, temporary loss of reputation, — it is always an evil in itself. Where unlawful or immoral acts find a sufficient disapproval in some other way or fail to attain the intended result (particularly because of the milder remedies of private law), it is reasonable and indeed necessary that the punishments of the State be dispensed with.

The Principle of Parsimony in Punishment. — The aspect of criminal law from the viewpoint of national economy is important. In former times human unhappiness and pain were squandered lavishly. Beccaria is entitled to credit for having first brought to attention comprehensively the principle of the greatest possible parsimony with penalties and the superfluous of many punishments. Where other means are effective for the realization of the law the use of punishment is inexusable, since, as correctly stated by Von Herring, it recalls upon society. Thibaut indeed


3 "Beiträge zur Kritik der Fenzschühel'schen Theorie," (1802), p. 103.
called the criminal law a "testimonialium pauperatum" which the authorities of the State exhibit. We would at least assert that every new criminal statute is a certificate of poverty for the moral condition of society. The disapprobation of the State is the artificial and organized disapproval of an act and is necessary only when there is not sufficient spontaneous disapproval on the part of unorganized society. Given consideration should also be given to tradition or history. There is no more an absolute principle of justice for the choice of the acts for which punishment is to be inflicted, than there is for determining the means of punishment. There exists, however, a relative principle of justice, in the sense that acts which possess the same elements of immoral or detrimental significance may not be given different treatment, and that the State may not act inconsistently with the history of the people in respect to the choice of acts to be punished. Inconsistent action of this character creates the opinion that criminal justice is not the result of an inevitable necessity but rather of despotic action and possibly of error, and that it is not the expression of moral disapprobation, since moral opinions change very slowly. There are, to be sure, perverse traditions, just as there are perverted formations of physical being. But they can be recognized, if one survey long periods of the life of the people, and if one is sufficiently unprejudiced to study closely the instructive example of the legal life of other peoples. Moreover, the significance of an act can vary with time and circumstances. And with individuals who are advanced in years, so with peoples having an old and well-established culture, general theories have but little influence upon practical action, which is already governed by detailed provisions regarded as fixed and inviolable. Pervered philosophical doctrines, pessimism, or extreme religious principles (e.g., the infallibility of the Pope), are not nearly so dangerous to-day as they would have been a few centuries ago or during the Middle Ages.

Punishments which do not possess a certain connection with tradition are somewhat odious, even when emanating from the spirit of well-intended moral reform. This is quite natural, as the people regard punishment as merely an echo of their own disapproval. Such acts appear to be merely acts of despotism and undermine the effectiveness of criminal justice in other cases. Too many punishments create indifference. One must not imagine that every coarse or vulgar act, every slight violation of right, may demand suppression by punishment. The State, like the individual, must learn to endure many minor iniquities; it must remember that the world will not instantly come to an end and that Nature has guarded against the trees growing up to the sky, and it must have confidence in the firmness of its own position and in the actual effective power of moral opinions. Where there is a progressive increase of penal statutes, or where upon occasion the public raises a general cry to help something by penal statutes or to increase the severity of the penal statutes, it is not well for freedom. For every penal statute is really one more inroad upon freedom. And the ultimate results may well be felt most keenly by those who have been the most noisy in demanding it. One may well ponder the maxim of Tacitus: "Pestima resp volupta, plurima leges." 4

Expediency and Justice in Punishments. — While, upon our theory, the choice of acts to be punished by the State is determined by numerous reasons of expediency, yet there is here no antagonism between expediency and justice. It is rather that, from the standpoint of the State, expediency is at the same time justice. However, an act of the moral sense of the people does not disapprove should not be punished. Practically speaking, this is an acceptance of the viewpoint adopted by Rossi and Mittermaier, where they seek to limit absolute justice by reasons of expediency, a correct standpoint and therefore a favorable view of legislative proposals and legislative assemblies. But theoretically it is erroneous to weld together in such a manner absolute justice or retribution

4 From Tyring, pp. 470, 479, pertinently points out that e.g. in business, dishonesty may become so great that it cannot be counteracted by civil remedies without great injury to the community.
and expediency. The State does not exercise absolute justice; it exercises merely relative justice, and such it does when it recognizes the various cases to which the rigid principle of organized public disapproval shall apply or shall not apply, in pursuance of purposes of expediency which for all of these cases are the same. It is not a departure from justice for purposes of expediency, but rather genuine and exact justice, when the State inflicts a lesser degree of punishment for an attempt at a crime than for the consummated crime, or when it pays so much attention to the outcome in a question of punishment, or when it does not punish an act of violence which is possibly not so immoral, or when much refined dishonesty in business matters is ignored but he who steals a sausages from the market is haled before the criminal judge.

The fact is simply that the State (the law) measures illegal or immoral intention to a certain extent by external result. This same principle leads to the ignoring of that will which does not manifest itself in some external action that may be definitely recognized ("Cogitationes poenam non patitur!"); and it ultimately orders that less punishment be inflicted for the attempt than for the consummated act. Furthermore, this regard for a safe criterion of application, and one excluding despotic and purely individual opinion, also leads to the use of a somewhat rigid moral criterion, which is not sufficiently plant expediency in a result that is applied to many relations which the individual at least believes can be passed upon judicially. The morality applied by the State in criminal law is somewhat crude. However, its gradual refinement in the course of time is not precluded. In-

"But such conduct is frequently based upon an illusion. Egoism, which will not bring itself into accord with general morality, flatters the offender with the idea that its condition or its case requires an extraordinary decision. With this and with his statements previously referred to, Hugo Mayer's ("Lehrbuch", § 4) objection that in regard to no act could it be said in advance that it is immoral is justified. But if this cannot be said in advance, it cannot be said afterwards. The only reason for the judgment according to the fundamental principles of morality must be omitted is that the exact circumstances of the act, subjective and objective, are not known. It cannot be perceived why the imagination is not sufficiently to portray the act in advance. For example, did there not take place in Rome many acts which are in conflict with the moral sentiment of one ending of them? Morality is not a single individual matter, as Hugo Mayer believes. If, so, it would be unfortunate for the social life of mankind and for human development.

The question may also be asked, what basis can there be, other than morality, upon which Mayer founds his retributive justice. He rejects the derivation of criminal law solely from purposes of expediency. Perhaps Mayer's view has been influenced by the ingenious essay of Kallinikos which he cites ("Ueber die Idee der Gerechtigkeit") in Remo's "Rechts und Aufgabe", II, 1881, pp. 376-392). Here retribution is expressly made the basis of the criminal law, but in a peculiar manner, for this conclusion is not derived from the premise of moral retribution, but from the idea of equality. According to this the most rigorous retaliation in kind ("talia") would constitute the spirit of the criminal law. But even this principle of justification cannot be completely separated
But all this is merely an exception due to the general imperfection of human affairs. It is by no means a ground of objection to the doctrine which sees the crime as immoral action. Furthermore, when considered closely, it comes to the same thing, whether we say (as above): “Crime is an action at variance with morality—an action which the State, since the act seems especially burdensome (or disadvantageous) to the general welfare, feels itself obliged to subject to special disapproval,” or whether we say (with von Böhring): “Crime is an endangering of the conditions upon which depend the life of society, declared to be such by the State,” or whether we say (with Hugo Meyer): “Crimes are acts threatened with punishment by the State and which are at variance with the conditions upon which the community and its progress depend.” The apparent difference rests only in that error which has long since been laid to rest by modern philosophy, but which frequently still finds a foothold among the jurists, viz.: that morality is something purely individual and that each one makes for himself his own conscience. Morality and conscience are products of the development of the human race for a thousand years—products which, like law, show different phases of development at different periods. The act that is contrary to morality is simply an act which, according to the opinion at the time prevailing among the people questioned, is more or less out of harmony with or in contradiction to the ultimate goal of man, his progress and the conditions of his existence.

§ 109. Tort and Crime.—The distinction between civil wrongs (i.e. torts) and wrongs punishable criminally is now apparent. A civil wrong represents a condition at variance with a right regardless of whether it is founded upon an action contrary to morality. Wrong punishable criminally is an act specially characterized as being contrary to morality; and it is generally from morality, as Rümelin admits (p. 192). “For the injury of injuries suffered may be favored by religion and morality, but it can never be a principle of a legal system since it would make wrongdoers the lords of society.” But Rümelin’s principle is completely unsuitable from the historical standpoint. The “tutelary” never has been a fundamental principle of the criminal law, but only a principle tending towards moderation. It may also be asked whether this idea of equality which has any claim to preservation. In the statement of Rümelin above quoted, the idea of deterrent, otherwise only incidentally observed, creeps in, since punishment, i.e. not forgiving, is justified by the remark that otherwise the wrongdoers would become the lords of society.

Hegel’s Distinction.—Especially is it incorrect to hold with Hegel that the distinction consists in crimes being intentional wrong and in tort being unintentional or innocent wrong. The positive law shows us that there are acts of negligence which are punished criminally, and that on the other hand there are cases of wrong committed quite intentionally which Nevertheless remain merely torts; for example, when a person, openly and with knowledge of its illegality, but without other violence to person or thing occupies a place of ground belonging to another, or when one shamelessly refuses to discharge an obligation of debt unequivocally entered into. It is not proper to regard these instances as errors of the law; nor to maintain, that negligence should be completely eliminated from the province of criminal law and that every intentional wrong should incur the reaction of the criminal law. The importance for the civil community of an intentional act of the individual is not to be measured solely by whether or not it is the direct cause of an action, of a result which the State disapproves. Rather (and most essentially) it is to be measured in accordance with the rights and interests which it objectively violates or jeopardizes. There is no impropriety in speaking of “minor

---

1 The unappropriability of the idea of damages is, in spite of all positive law, denied by Ed. Harts, “Das Unrecht und seine Foomen,” I, pp. 72 et seq. But Hartz’s argument is defective. It is based upon a confusion of the absolute standpoint with the standpoint of the limited human understanding, which is the only possible one for the criminal law. Regarded from the absolute standpoint, there is no damage but only necessity. If we in one moment knew the relation of everything, then no offense or attempts at crimes could deserve blame. But from the practical standpoint we can never give up the attitude of regarding things according to their physical manifestations. However, in this manifestation of our thought, which from the abstract standpoint may be termed lack of precision, there rests also the possibility of general conception, which is the condition of all progress. If one applies the abstract standard, animals think with more precision than men, since they subsume under a single individual physical manifestation, and for this reason they make no progress. This objection can be advanced against Hart’s more fittingly than against Binding and his theory of interdependence. “Equality in importance of the conditions of a manifestation of a result” is in every respect correct.
transgressions," "Trivial" and "malicious" are not terms which in the concrete case are mutually exclusive. But if something is objectively quite trivial and entirely without danger, then it would be absolutely improper to put into motion the clumsy machinery of criminal justice which entails such heavy expense for the country. This is apparent from what has been stated in regard to the determination by the State of what acts are punishable. On the other hand, when the individual is dealing with especially important rights or interests of others or of the community, this very fact in its purely moral aspect should serve to warn him not to injure unintentionally such rights and interests and also to exercise caution. As a matter of fact, the punishment of injuries caused by negligence is thus to a certain extent justified. But only to a certain and limited extent. On the one hand, the rights and interests which are concerned must be of especial importance, and on the other, these rights and interests must be such that the fact of their being jeopardized must be easy to perceive in concrete cases. By way of illustration, the general interests of the State are certainly important, but the fact of their being actually jeopardized is not easily recognizable, or in concrete cases may give rise to very diverse opinions. Therefore the offense of high treason or State treason by negligent action would be a juristic monstrosity, though it is quite natural and proper to punish homicide caused by negligence. However, one can assert to Hegel's view that intentional acts, in which the result in question is intended, are those which constitute the major portion of crimes, and that in private law the question of guilt occupies a very subordinate position. Private law is the law as external regulation; criminal law is the law as morality. But as criminal law does not limit itself to the intention, but also takes into consideration the external effect of the act, so to a certain extent the private law proceeds more leniently with him who is innocent than with him whose guilt or malice can be proven. Criminal justice must use guilty intention as a foundation, but private law does not require it. 2

Hälscher's Distinction. — Hälscher's distinction is even less tenable than that of Hegel. 3 According to Hälscher, crime should be an attack upon the general legal system, a violation of law in

1 Stahl, "Die Philosophie des Rechts", II, 2, § 185, had already advanced a similar view — acts which violate the legal system are crimes only if they challenge the authority and respect due to the State. However, Stahl's conception is more true to life and its results are more realistic. In the emphasis which he lays upon the positive nature of crime, his insistence that the act must manifest itself "in thesis" (thus under all circumstances) as contrary to law, there lies the principle that crimes must be readily distinguishable from acts that are not punishable.


3 "Normen", I, pp. 154 et seq.
while crime represents a positive attack upon the law. But taken in a strict and precise sense this principle is also incorrect; for mere absence of action may well constitute a crime. But it is admissible in the sense that an act which is to be punished must be distinguishable by definite, readily determined and comprehensible characteristics from those acts which the law does not punish; and it must, as it were, be given a 'positive' expression in contrast to the permissible acts of every day life. It is only as thus conceived that this criterion leads to expedient and realistic results. Yet Haileasser rejected it with the statement that its results were not sufficiently solid and perceptible.

**Merkel's Distinction.** Merkel is certainly correct when he asserts that criminal punishment is necessary only where the civil sanction is not sufficient for the repression of wrong. But, as shown above, the premises upon which he argues are defective in that he declares the sanctions of the civil and criminal law to be similar in character and different only in degree or intensity. On the other hand, Binding is correct in his statement that the positive law deals with civil damages and with criminal punishment in accordance with totally distinct principles. Punishment would affect the guilty and only the guilty; civil damages would restore to the injured party the damage of which he has been deprived. It is possible only by the most artificial reasoning to maintain that the obligation to pay damages should never affect any but actually guilty parties. The so-called "Liability Law" ("Haftpflichtgesetz") of June 7, 1871, for the German Empire, was a complete contradiction of this theory. In English law there is given wide recognition to a liability (at least a secondary liability) for obligations (i.e. in tort) incurred by agents (e.g. the master for his servants, etc.). Merkel to raise one further point, how does Merkel's theory explain that punishment does not, but obligation to pay damages does, pass to one's heirs?

**Relation of Tort and Crime.** Moreover, one may not, as Binding has done, draw the general conclusion that the distinction between tort and crime is purely a creation of positive law. —

---

It must be admitted, however, that a strict obligation to make indemnity can exercise a deterrent and disciplinary influence. Cf. Stahl, "Die Ermittlung des Schadensbetrages im französischen Civilprozesse", I (1890), pp. 391 et seq.; Von Bar, "Recht und Beweis im Civilprozesse" (1867), pp. 24 et seq.

---

18 Von Bar, "Grundlagen des Strafrechts", pp. 50 et seq. In respect to these, the practical grounds of distinction for the right of the State to the protection of the State and the protection of private interests are that I find myself in harmony with the frequently cited recent articles of Meyer and Merkel. Cf. especially the annotation, Hugo Meyer in "Gerichtshandbuch", Vol. 38, p. 193.

19 "Das gemäß die deutsche Strafrecht", p. 15.

20 "Kriminalistische Abhandlungen", I, pp. 57 et seq.

21 "Normen", I, pp. 166 et seq.

22 "Das Schuldeneinzelrecht im römischen Privatrecht", p. 67.
older Germanic law, as is well known, attached liability in this manner.

Since the element of guilt takes a subordinate position in private law, the latter by itself is not suited to preserve the requisite moral character of the law. A relation which, upon the whole, is morally indifferent (although there may be important modifications in individual cases conditional e.g. upon "bona fides" or "nulla fides") is treated the same as an act contrary to morality. He who unlawfully detains must surrender the object, whether he possess it "nulla fides" or "bona fides." It is not the object of the civil sanction to strike at that which is morally reprehensible, or to reprove it. It is rather that its primary object is to eliminate the objective illegality, being its source what it may. It is merely a secondary matter that the civil sanction deals more gently with him who has done nothing immoral, e.g. where one bona fides has acquired an object belonging to another. The reaction of the civil law against wrong which contains the element of guilt is one which in many cases can be perceived with difficulty and is exceedingly obscure.

Crime distinguished from Tort. — In conclusion, our view avoids the difficulty arising on one hand from the fact that the same act, e.g. injury to a person or thing, may under some circumstances entail results both in private and in criminal law, and on the other from there being acts which are punishable criminally but for which no result in private law ensues, e.g. criminal acts for which a civil remedy is excluded by the maxim: "Volenti non fit injuria." According to our conception, an act is in principle punishable not because it violates a subjective right, but rather because it is contrary to morality. It maintains a relationship to subjective right, only through the fact that the State for the most part prosecutes or subjects to moral reprobation only those acts which are immoral because they violate or jeopardize subjective right. Heyssel

13) Das Civillrecht und seine Folgen" (Wiesbaden, 1870). Heyssel, p. 15, correctly says: "The essential element in tort is the material injury to a material legal condition. Without this there is no tort. Intention has according to this conception merely an incidentally (qualifying) significance. The essential element in crime is guilt, — the tracing of the act to the will as its original source. Without this there is no crime."
14) This had previously ("Grundlagen," p. 44) been stated by me, and furthermore I maintained that criminal justice must use the guilty will as a foundation, while civil justice does not require it (but under some circumstances it may). The criticism made by Heyssel, p. 11, note 6 upon my "Grundlagen des Strafrechts" that it was to be distinguished from
and Binding are thus quite correct in seeking to eliminate guilt from the private law based on the obligation to indemnify, so as to treat this excluded element of unlawful action as the foundation of amenability to punishment. Both writers have the possibility of the correct view. This is so in respect to Heyesler, since he will not acknowledge for the distinction between private wrong and punishable wrong the basis of expediency but rather prefers aprioristic and abstract distinguishing characteristics. Binding believes that guilt may be established exclusively as an element of an offense and not as a possible basis of a duty to indemnify. On one hand, the aprioristic basis advanced by Heyesler is not satisfactory, and on the other hand private wrong is too narrowly conceived as a consequence of human action. But in respect to its effect the conception of action (i.e., as of operation in the external world) cannot be separated from the conception of guilt. So Heyesler finally becomes involved in the contradictory and completely incomprensible maxim: "Guilt for which one is responsible is an offense, guilty private wrong is wrong possessing guilt, but not guilt for which one is responsible." 9

Binding, on the contrary, while he maintains that private law has nothing to do with guilt, arrives at the strange principle that the private law duty of indemnification has its basis in a quasi-contract, a negligent or fraudulent "negociatum gestum." 10 A simple, unauthorial and correct opinion would say that the duty to indemnify in a private wrong, e.g., in a personal injury caused by negligence, is that perhaps not punishable, arise without regard that quoted above only upon close observation because it belongs to those theories, which "merely furnish personal satisfaction to their author," does not seem to have been avoided by Heyesler himself. A more recent attack by Heyesler upon Binding's theory (Gräbel's "Schrift这几年 für die Privat- und öffentliche Rechte" (1870), pp. 337 et seq.) may upon the whole be concurred in. 11

APPENDIX § 109. Violations of Police Regulations. The Three Types. It remains to explain from our standpoint the so-called "police offenses" (i.e., violations of police regulations). This is a simple matter. We previously stated that not only the actual damaging but also even the placing in jeopardy of an object of a right or of a legal relation, could constitute an immoral act punishable by the criminal law. Now it is quite possible that this placing in jeopardy of a right is not that which is foreseen in the mind of the party committing the act. He may be aiming at some ultimate result or course of action. Nevertheless in most or many of the cases his conduct involves danger, e.g., smoking a cigar in the vicinity of explosives entails danger of an explosion. This must be realized by the individual himself upon more careful consideration. Therefore it involves an endangering (of others or their rights) by negligence; and this can always be characterized as an immoral act (although of minor degree), and thus with complete justice subjected to punishment. To be sure, as a general rule, in such cases Hähn cler's principle stated above, since according to Binding the same act is viewed by the civil law as a lawful act giving rise to a legal obligation and is viewed by the criminal law as an act contrary to law and subject to punishment. But Hähn cler, whose latest treatise is very decidedly influenced by the "Normenlehre" ("Ges. deutsches Strafrecht", p. 25), founds the obligation to pay damages in a manner not differing widely from a quasi-contract, since he sees in the injury of another (i.e., of his property) a "permit to make use of one's own property." Not entirely Hähn cler provides that the one doing the injury is not required to have this intention in "consciet." But the law attributes to his act the "equivalent" of such an intention. More simply stated the principle is that the law, since it does not pay attention to the actual intention, compulsorily attaches to the act the result that compensation must be rendered. Hähn cler here simply repeats the old error that the thing which (one or other) is reasonable is always desired by the party suffering thereby, according to this logic, the individual condemned to death always desires to be executed.

332
cases the authorities should have designated the act in question as possessing this dangerous character. The immoral nature of the act is so remote that it should be expressly so declared to the individual.

Furthermore, it is necessary to a certain extent and under certain conditions that the individual make some sacrifices in the interests of the public at large, i.e. that there be some positive contribution on his part. If this performance is not rendered as due, then this constitutes an immoral act, provided however, that the necessity of such a special performance should have been clearly announced, i.e. that it be determined by the authorities to whom the community has entrusted the maintenance of such general interests.

In conclusion, it is possible that, because of their very insignificance, actual violations of right assume a different character. There is something different in unlawfully picking up an apple and eating it and in stealing a gold coin. The smallest violation of a right is also an immoral act; but to a certain extent it can be placed on a plane with those acts whose immorality, as shown above, only becomes manifest in some more indirect manner.

The circle of the so-called "violations of police regulations" ("Polizeiverstöße") may be closed with these three varieties, viz.: actions that involve danger; the net doing of that which one is bound to do (e.g. giving information or a report to the authorities is such a duty, although perhaps not one upon which there can be placed a money value); and violations of right that are quite insignificant.

The true basis of the propriety of punishment here lies in the immoral character of the act. For this to become obvious, one has only to consider that the preservation of a certain external good order, because of its substantial importance, may be regarded as the equivalent of a moral principle. For it is upon this external order that well-ordered human intercourse depends, and thus it contributes to the progress and development of humanity. It may indeed appear to have nothing to do with morality whether one goes to the left or to the right on a bridge. Yet on account of

1 Many excellent remarks as to this are contained in F. von Hartmann's "Phänomenologie des sittlichen Bewusstseins," pp. 465 et seq.; "Das Moralprinzip der Ordnung," F. von Stein, "Verwaltungshoroskop" (1867), IV, p. 36, says: "If that which the policy regulation provides is an actual essential for the development of the public at large, then the same by the individual is an offense against the public at large."
the former are committed to the courts and to those officials to whom the legal protection of individuals is, for the most part, entrusted. Yet the individual often feels a punishment is of equal severity whether it be inflicted upon him as a criminal punishment or as a sanction of the police system. And so it is often more sophistry to seek an exit from a worn-out theory or a view which does not have the courage to pronounce itself openly upon the liability to or immunity of an act and to regard a judicious sanction of the police system as acceptable.

An act which is not amenable to the criminal law because it is very difficult to ascertain or because its injurious effects are substantially limited to its own author is no more punishable as a "violation of police regulation" than as a crime.

It must however be admitted that the distinction between "violations of police regulations" and criminal offenses which is not "a priori" admissible, has a very great importance from the standpoint of the positive law, since public opinion has difficulty in a large number of offenses in recognizing their immorality. It does not refer these offenses to a defect in character, but rather regards them as something which can now and then happen to anyone without in any way disturbing his social or legal position. The legislator who, in general, should give expression only to the moral convictions of the people must observe this distinction; and doubtless it is substantially upon this that there exists, in positive law, the distinction of crime and "violation of police regulations." 5

General Characteristics of "Violations of Police Regulations."

The only result of combining crimes and "violations of police regulations" would be to create confusion. It is a mistake which modern legislation very properly avails. This is true not only since acts whose immorality is recognized only after considerable reflection, and possibly known only because of the pronouncement of the authorities, are not in a class with those which attack the permanent foundations of human society. The permitting or prohibiting of such acts is far more dependent upon transitory circumstances and possibly upon purely local needs and conditions. These are facts which involve quick changes in the law. The more indispensable and stable portion of the criminal law must be separated from that which is less requisite and more subject to change. Since the immorality of "violations of police regulations" is only an indirect one, the repression in such cases must be milder. Severe penalties must not be applied, and especially not penalties which affect honor. Such penalties would confuse the minds of the people and especially would readily give the impression that law rests a great deal upon changing and even arbitrary commands and prohibitions. The lightness of the penalties also leads to the propriety and indeed the practical necessity of a simpler procedure. Procedure as a means must always be used to maintain a certain relation to its end, punishment. A trial which could have as its conclusion nothing more than a sentence to pay a few marks as a fine, but which had all the machinery which is occasioned by a trial for murder, would be a monstrosity, which could only tend to lessen the effect of criminal proceedings that are actually important. The fact that the procedure is less thorough makes it more possible for an innocent man to be convicted in trials of "violations of police regulations" than in trials for crime. The lesser importance of the cases also makes it conceivable that each and every minor "violation of police regulations" is not investigated with the utmost rigor. The legislator even finds that he is impelled to make no distinction between transgressions that are intentional and those occasioned by negligence, since the result would not justify a very precise investigation. He may also possibly feel impelled to allow the punishment to be imposed upon a party only presumed to be guilty, e.g. the owner or possessor of a piece of land.

It is therefore not difficult to criticize the variant views as to the nature of "violations against police regulations."

There is hardly a material difference between the view of Hugo Meyer and the view here represented. He says: "The true distinction between the two kinds of punishable wrong lies in this: The violation of police regulations injures the useful elements of the legal system, while crime injures the necessary elements. But as the conceptions of usefulness and necessity overlap, so there are many kinds of offenses as to which one can only conjecture whether they belong to the province of crimes or should be included.
among 'violations of police regulations'.' The permanent and more unchanging fundamental rules of human society are also the necessary rules and the temporary or less permanent or those exhibiting greater local differences are merely the useful rules. 6

On the other hand, other opinions incorrectly emphasize some element as being exclusively the distinguishing one. Thus, the older view, represented especially by Feuerbach, regarded a crime as being only that which violates a subjective right. This distinguishes, as it were, the core of the matter, but a very considerable margin extends on each side. This also applies to the view which regards crime as a violation of a right and a 'violation of police regulations' as an endangering of a right. And the same may be said of the view which conceives a crime as a substantial and a 'violation of police regulations' as merely a formal wrong. 7 This last view gives too much prominence to that element of obedience to an external formal order, to the authorities. To this element we also have given some consideration. But we must absolutely dissent from the distinction of that later view which finds in 'violation of police regulation', not punishment in its proper sense, but rather 'discipline.' The individual should be disciplined by the punishment for the violation just as little (or just as much, if one prefers this last expression) as by the criminal punishment; less perhaps, if one considers the real nature of the punishments actually inflicted for the violations (fine, short imprisonment). Certainly punishment for 'violations of police regulations' cannot be placed on the same plane as discipline (school punishment, or even parental punishment). Real disciplinary punishment, while possibly not excluding the purpose of reformation and the well-being of the one punished, has as its first purpose his correction. This is not the case with punishment inflicted by the State, and most certainly not the case with punishment for 'violation of police regulations.' It is of more importance that this idea should be repudiated, since it is calculated to introduce a certain element of despotic into the infliction or non-infliction of punishment in the police or for purely individual considerations. When it is considered how closely these punishments for 'violation of police regulations' touch the individual's sphere of rights, such despotic appears intolerable and at total variance with the conception of 'government based on rights' ('Rechtstaat').

§ 111. Disciplinary Punishments. That theory of that class of punishments known as 'Disciplinary punishments' ('Disziplinsstrafe'), while at the present time of the utmost importance, can not be exhaustively treated here. Its relation to ordinary punishment inflicted by the State should however be expounded. It must first be distinguished from the so-called 'Public Order' penalties ('Ordnungsstrafe') in the proper sense, i.e. punishment specially threatened in individual cases for compelling one or more specific acts. 'Disciplinary punishment' is essentially a means of coercion. If the purpose attended at by the appropriate officials or the government in the threatening of this punishment is in some way or other achieved, the action of the punishment may frequently be foregone, without disadvantageous results. For in these punishments a very subordinate position is taken by moral reprobation of the act, although

1 Cf. especially Höffler, in "Neues Archiv des Criminalrechts" (Vol. 13, 1850), pp. 48 et seq.; Kritzele's "Lehrbuch" (11th ed.), § 477, Notes I and IV; Bales in Bluntschli's and Brobes's "Staatskrimin.; Vol. IX, p. 140; Posse in the same, Vol. IX, pp. 338 et seq.; Petz in von Holstein's "Handbuch des deutschen Strafrechts", III, pp. 542 et seq.; and in "Handbuch der deutschen Reclien", I, pp. 447-450. The work of Hoffler is of especial importance and also the exposition of Laband. 2 Inappropriately indifferent punishments prescribed especially for the non-compliance of merely formal provisions are also called 'Ordnungsstrafe.'
some thought of the same, which is reflected in the principle of
guilt herein prevailing, is not entirely lacking. Consequently, it
is generally conceded, in these coercive punishments, the officials
who inflict these punishments, whether they be against sub-
ordinates or private persons, have the right, if the object is realized,
to dismiss or remit the same.

Lack of Definiteness. — The law imposing "disciplinary pun-
ishment" is an imitation of the criminal law for a limited circle of
persons within the State united by a special course of life. There
is however the modification that the special purpose of the associa-
tion must also have its influence upon this special criminal law.
For example, where education is the purpose of the association,
consideration of the individual receives more attention than can be the case in public punishment, or in the disciplinary pun-
ishment of State officials, where, at the most, reformism is but an
incidental feature. 9 The minimum of morality required is in ex-
cess of that minimum which finds its expression in the criminal
statutes of the State. From officials of the State, those who
attend higher public institutions of learning, possibly from military
persons, etc., more is demanded than from the general public at
large. 8 Along with their very special duties, they have the duty
to conduct themselves in harmony with their position, conspicuous
as it is in one way or other. To a certain extent, it is possible
for the requirements of this conduct to be precisely fixed by custom
and statute. But a general provision is useful which provides that
who is subject to disciplinary punishment should not show
himself unworthy of that special position which he holds, or
that he should so conduct himself (as it was expressed in the old
cathes of allegiance) as "becomes a man of good standing, etc."

Therefore in disciplinary punishments in institutions of learning, the
punishment may to a certain extent be foreseen, if it would be especially
injurious to the education, or the advancement of the one punished.
The smaller the institution, the more attention can be given to considera-
tions of the individual.

This position may indeed be termed "disadvantageous", a "privi-
legium odiosum", just as e.g. the position of convicts in penal institutions.
The convict as a matter of fact has more compulsory duties than one at
liberty. He has the duty of industry, service, order, of respect and of obedience
to the prison officials.

Cf. of the Prussian Statute of July 21, 1852, concerning breach of duties
by non-judicial officials: "An official who (1) violates a duty incumbent
upon him, or (2) in his conduct in or out of his office shows himself un-
worthy of the citizen, respect, or confidence which his calling demands,
is liable to the provisions of this statute." Cf. also §§ 72 and 10 of the
German Imperial Statutes of March 31st, 1879, concerning the legal
status of imperial officials.

This lack of definiteness is explained by the fact that the range of
these duties is nearly coextensive with that of the purely moral
duties, which latter it is very difficult to comprehend within single
principles. Therefore it is never possible to completely eliminate
this defect of lack of definiteness, and for this reason in this
disciplinary law, much depends upon the composition of the dis-
ciplinary tribunals, a matter in which we in our present
discussion have no interest.

Relation of Disciplinary Punishment to the Public Criminal
Law. — There are various relations which may be held by this
disciplinary law towards the public criminal law. 5 The attitude
may be taken that every public offense in which a person subject
to this disciplinary law is concerned, shall be regarded only as an
offense subject to the disciplinary law, although the rules for
decision are substantially those of the public criminal law. 6 For
the discipline derived from the general statutes of the States is
also binding upon the individual within the special disciplinary
circle. This conception of the relation of the disciplinary law and
public criminal law more readily obtains, where the individual
is regarded, as it were, as merged in the disciplinary circle,
where belonging to the disciplinary circle is considered of over-
shadowing importance. Such was the case in the law of the Middle
Ages (the Canon law) in respect to crimes of the clergy, and such
is the case to-day in the law of the German Empire and Continen-
tal Europe generally, in respect to offenses of military persons.

It is possible to proceed from the opposite side, and to regard
the breach of the general criminal law and the breach of the dis-
ciplinary law comprehended within the same act, as matters to be
quite separately considered. The common law adopts this attitude
in respect to offenses of public servants, and (of late years)
the abolition of the so-called "academic" jurisdiction by
the introduction of the legislation of the Empire 8) in respect to
offenses of students in the German Universities. According to

Moreover it is possible that a breach of a duty as a public servant may
because of the special importance of the office, constitute a criminal of-
ence, thus particularly violation of a duty as a judicial officer.

Although the non-military offense of military persons are according
to § 1 of the "Military-duty-of-suspension", for the German Empire of June 20,
1872, to be judged according to the general criminal law, yet the juris-
diction in such cases belongs to the military officials, i.e. thus to the dis-
ciplinary officials.

"Deutschland (Gesetzverfassungsgesetz", § 13, Prussian Statute
of May 29, 1879, dealing with the legal status of students, etc.

540
this view, the disciplinary law is in principle something entirely independent of the general criminal law. There is nothing to prevent the same act from being punished according to both laws. For it is possible for an act to entail a very slight punishment, or indeed no punishment at all, according to the general criminal law, and at the same time when considered from the disciplinary viewpoint, i.e. from the standpoint of maintaining the honor and morality of a class to merit the severest reprobation. For example, an injury, under § 196 of the German Criminal Code, might be inflicted by a public official, being due to negligence or some other cause, and yet the judge of the disciplinary board might order the official to be dismissed. Or it might be because of the influence of some compensation or settlement, or of the moral reparation, go unpunished by the disciplinary court, but the same act — e.g. a public brawl among students or officials — might from the disciplinary standpoint deserve a very severe penalty.

However, the disciplinary punishment should not be made too independent of the ordinary punishment. Unless one would, as it were, constitute the class in question a State within the State, there must be adopted the general attitude that the ordinary punishment constitutes a sufficient repression for the members of all the classes in the State, but that the judge, as far as his range for the exercise of discretion extends, is not prevented from taking into consideration the rank of the accused and his corresponding duties. One would have a sense of injustice if in the same case a public officer or a student, for example, were subject to the same punishment, although an effective appeal could not be made to the rule of procedure "Ne bis in idem", since judgment is only passed on that for which the judge in question is competent. (The purely disciplinary phase of the matter cannot be passed upon by the ordinary judge.) Frequently the party to whose hands the disciplinary punishment has been entrusted, has no incentive to inflict a special penalty, since the public punishment at the same time serves the ends of discipline. This is of importance where there is an acquittal by the ordinary judge. If the judge acquits the accused because that which is proven against him does contain the facts necessary for a public offense, it may well be that a state of facts exists which would justify the infliction of a very severe disciplinary penalty. For example, the criminal judge may be of the opinion that an injury in the legal sense, a fraud, etc., has not occurred, and yet there may exist facts constituting a lack of the respect due to a superior, sharp practice, etc. In this case the acquittal does not form the slightest obstacle to disciplinary punishment. But quite a different condition obtains if the criminal judge denies the existence, as far as the accused is concerned, of that state of facts which could render the accused amenable to even the disciplinary penalty — if for example, the judge found it not proven that the accused took part in the act, e.g. the brawl, with which he is charged. In such a case it is natural that those to whom the infliction of disciplinary penalties is entrusted should respect the acquittal. If the criminal judge, to whom the State has granted means of investigation at least as effective (and in most cases more effective), as those of the disciplinary officials, could not arrive at a conviction, the disciplinary officials may not advance the claim that they have greater powers of discernment. It is in no sense the function of the disciplinary procedure to make amends, in a manner more or less arbitrary, for the failure of the ordinary criminal administration to obtain results.

Effect of Conviction by the Public Criminal Law. — A conviction by the ordinary criminal judge is not conclusive for the disciplinary judge as indicating the guilt of the accused. If the statutory law does not make special provision to the contrary, the arriving at a positive opinion as to guilt must be unhampered, and an accused is entitled to this also before the disciplinary judge. And why should a man who is possibly innocent undergo a double penalty because he has once been formally convicted? On the other hand, in regard to its actual results the conviction is very often conclusive. For example, where a man has been convicted of a dishonestable crime or sentenced to severe punishment, it will be said immediately that we can no longer tolerate him in the circle to which we belong. There can also be the penalty of exclusion (expulsion from the public institutions of learning or dis-
This is especially so in the case of public servants.\textsuperscript{13} It would be possible to refer the question of expulsion or of unfitness to a civil tribunal.\textsuperscript{14} If for other reasons this was not done, and even where a disciplinary official rendered the decision, nevertheless the actual question remains the same.\textsuperscript{17} There exists here by force of a positive legal provision a connection between the disciplinary law, peculiar to itself, and a portion of the law which, while related to it, is not of the same character.

From this viewpoint disciplinary punishment can in the cases mentioned become subject to a certain limitation. If the individual renounces his adherence to the favored class in question and also renounces all the special advantages resulting therefrom, e.g. the title, etc., then any infliction upon him of disciplinary punishment seems useless and irrational. Since he has departed from the special class, it knows him no more. Punishment of a prior act in violation of the disciplinary law would cause this act to assume the character of a public crime.\textsuperscript{18} Such a punishment can be justified only where a money fine fixed prior to the offender's departure is thereafter enforced on the ground that it constitutes a "judatum", a property right, of the holder of the disciplinary power. This latter could be based upon the consent of the parties interested to the rules laid down for their government.

\textsuperscript{13} Together with the question of lack of merit, consideration must also be given whether the conduct of the official has caused an impression on the public. The State is not concerned in things which are not publicly commented upon. A stringent investigation of the morality of its officials would be more injurious than beneficial. The "infamia" upon which the former Canon procedure laid so much stress, always had its significance in this respect. For this reason the transfer to the disciplinary procedure of all the cumbersome methods of the public criminal procedure is not proper, and it can not be admitted that the disciplinary officials apart from special statutory provision possess the rights of a public criminal judge.

As to this, Heffer, p. 178, and Pfeiffer, "Prakt. Ausführungen", III, pp. 411 et seq.

\textsuperscript{14} However, if in many cases in which a man, without having committed a grave crime, shall have been deprived of his office as a matter of discipline, he must retain a portion of his compensation. As to this, cf. also Herm. Schütz, "Das preuss. Staatsrecht", I, p. 346, and Luger, "Spr."

\textsuperscript{15} Spec. 400, n. 31.

\textsuperscript{16} However, an offense previously committed can constitute an exclusion from the group in question. For this reason, § 64 of the German Ordinance of July 3, 1879, dealing with solicitors, very properly provides: "There can be an investigation as to the fitness of a solicitor on account of acts committed before he became such, only when the acts are such as would exclude him from his profession. For example, the officials of a German university can expel persons who have obtained admission by fraud and e.g. have previously committed a common crime."
Other Varieties of Disciplinary Punishment. — In conclusion, it is possible that a kind of disciplinary law can be founded in private relations through contract, e.g. if the workers in a factory subject themselves to factory rules established by the owner and to definite penalties for the breach of these rules. Such a disciplinary law juristically falls entirely under the conception of contract. If the factory worker is not satisfied, e.g. with the reduction of wages established by the owner of the factory as a penalty, then in the absence of other provisions, recourse may be taken to the civil courts. There is therefore precluded from this punishment every disadvantage which can not be specifically determined in the contract in advance. Therefore all imprisonment is precluded, at least deprivation of freedom would become illegal and criminally punishable from the moment the prisoner would declare that he desired to no longer be deprived of his freedom.

Where Church and State are actually separated, this also is applicable to those punishments which the clerical power inflicts upon its adherents. The privilege of using imprisonment as an actual punishment is thus obviously always a concession from the State to the Church.

It is not possible to advance a universal and sufficiently definite theory of disciplinary punishment. It all depends upon the purpose of the group to which the disciplinary law applies. Merely its general outlines may be given and its relation to the general criminal authority of the State.

§ 112. Summary. — In conclusion, we desire to reduce our theory of criminal law to the following brief principles:

Criminal law is founded upon that moral disapprobation, to a certain extent inevitable, of actions which are immoral, i.e. which are detrimental (or dangerous) to those conditions upon which depend the existence and progress of human society. This disapprobation is inevitable to the extent that morality is generally founded and built upon a certain concurrence in the moral opinions of all. This general principle, however, furnishes no answer to the question as to what individual acts should be subject to the organized disapprobation of the State. This is determined by numerous considerations of utility. These are identical with justice (which in criminal law can only be relative, i.e. historical).

only in so far as they are in harmony. That which we usually call punishment is only an external means of emphasizing moral disapprobation: the method of punishment is in reality the amount of punishment.

Confirmation of our view that punishment ("Strafe") is nothing other than moral disapprobation is furnished by the German language itself.

The word "Strafe" as signifying public punishment is of comparatively recent origin. It does not occur until the time when, on the one hand, the old private vengeance and composition and, on the other, the more despotic treatment of those who were not free had completely disappeared. Originally it had no meaning other than that of censure, or disapprobation.

The original meaning of the word "strafen" most certainly was not to inflict pain or to torment. When criminal law abandoned the old characteristics of private law, and its moral idea acquired a clearer expression, the language with rare discrimination retained the original word.

1 C.f. Grimmer, "Deutsche Rechtsalterthümer", pp. 680, 681; Weitzel, "Deutsches Wörterbuch"; Lehrs, "Mittelhochdeutsches Wörterbuch"; Schiller and Lühken, "Mittelhochdeutsches Wörterbuch"; Schmoller, "Bayrisches Wörterbuch", under "Strafe" and "Strafen." The original and true meaning of "strafen" is: "To compare something with a standard, to make a judgement on it, or to bring it to its proper condition. Thus the carpenter "straffs" the wood. "Straffen" a copy with its original. To hold in good "Straff."
INDEX

Abduction, 164, 169.
Abegg, his criminal theory, 471.
Abortion, 166, 167.
"Absolute" theories of criminal law, 379, n. 2; changes in, 451; combination of absolute and relative purposes, 452; in Abegg, 471; in Heffer, 472; in Freytag, 473, n. 8; in Hulst, 474; in Haun, 486; controversy between relative theories and absolute principle, 492; defects of, 498.
Accessories to crime, in Roman criminal law, punishment of, 41; in primitive Germanic law, 68; in Scandinavian law, 129; in medieval French law, 159; in Rousseau's treatise, 267.
Accessorial system, in Roman criminal procedure, 25, 47, 58; in medieval Germanic law, 118; in medieval French law, 159; in the Code of the North German Confederation, 300, 301.
"Act," 113, n. 3.
Act and author, disapprobation of, 301.
"Admonition" theory of punishment, 439.
Adultery, 163, 161, 170, 184, 228, 230.
Aesthetic judgment, Herbart's retribution theory of, 433. Afflitive punishments, 279.
Ahrens, writer on criminal law, 445.
Allegories, the, 130.
Analogies, use of, in defining and punishing crime, 250, 252, 390.
Anathema, punishment of the Church, 124.
Animals, criminal prosecutions against, 154.
Aquinas, Thomas, 306.
Arbitrariness of the law in the Middle Ages, 106.
Aristotle, 380.
"Arsis, the carrying of," 285.
Arson, 122, 126, 128, 171, 387.
"Asylum, right of, 88; violation of right of," 112, n. 2.
Atkerson, criminal law of, 6, n. 7, 19.
Attempts at crime, punishment of, 41, 130; no theory of, in Chartulariums of the Middle Ages, 157.
"Aufklärung", the, 269, 311.
Augsburg, Statutes of, 268.
Austrian, "Theesia", 249; Code of Joseph II of 1787, 311; Code of 1803, 357; legislation since 1748, 364.
Author and act, disapprobation of, 301.
Azie, glorifier, 266.
Baesso, Code of, of 1645, 349.
"Bammergische Halbgerichteordnung", 208, 304; relation of, to the Italian legal learning, 208; the penalties of, 211; relation of, to the local law, 215; intrinsic merit of, 214; recognition of, outside of Bamberg, 214; comparison of the Carolina and, 217.
Ban, public, 63, n. 17; royal, 73.
Banishment, in France in the later Middle Ages, 190; for life, 270. See Exiles.
Bankruptcy. See Frauds.
Bar, C. L. von, his exposition of the theory of moral disapprobation, 497-547.
Bartholomeus de Salerno, 296.
Batzker, 167.
Bauer, the "admonition" theory of, 439.
Bavaria, Feuerbach as legislator for, 526.
Bavarian Code, of 1751, 248; of 1813, 330, 343; of 1861, 352.
INDEX

reception by the Netherlands, 362.

Roman, conception of the relation of the individual to the State, 17.

Roman philosophy and criminal law, 339.

Rost, his theory of criminal law, 453.

Rousseau, J. J., 412.

Royal box, 78.

Rumeli, 323, n. 9.

SACKLER, 279.

Sagony, Criminal Code of the King-

dom of, 345.

Scandinavia, early customary law, 119; primitive offenses and venge-

ance, 120; private fines, 121; system of public and private fines, 129; limitation of private vengeance, 122; Church canons, 124; the provincial Codes, 125; growth of public authority, 125; procedure, 127; accessories, 128; elements of the money forfeiture, 130; outlawry, 134, 141, 253; other public penalties, 137; penal legislation (1300-1500), 139; market-town laws, 140; in the 1500's, 291; private vengeance prohibited in 201; penalties in the 1500's, 295; legislation in the 1600's, 294. See Denmark, Finland, Norway, Sweden.

Scepticism, 389.

Scheidemann, 457.

Schoenhusen, 457, 515.

Schroeder, R. 207.

Schulze, G. E., 441.

Schwarzberg, Freiherr Johann von, 208, 364.

Seber, 501, n. 3.

Severe in crime, 70.

Self-defense, 97, 125, 144, 152, 415, 430, 479.

Self-help, 143.

Self-redress, 97, 133, 144.

Servile labor, 274.

Servin, his theory of criminal law, 418.

Settlement, 234, n. 3.

Simpson, 220.

"Snipe", the, 65.

Soerens, 322.

Sodomy, 123.

Soldatius, Von, 416.

Solus reyus, 45.

Sophistes, the, 281.

Sprock, 45, 183, 279.

Sorbillage, 279.

Spots, criminal law of, 6, n. 7.

'Special protection' theory, 410, 420, 427.

Spee, Friedrich von, 243.

Spinoza, 364.

Spiritual treason, 278.

Stahl, F. J., 466.

State, relation of the individual to, the Roman conception, 17; relation of the individual to, the Germanic conception, 18; administration of justice through officials of, 47; punishment a right of society rather than of, 510; transference of right of punishment to, 510.

State, his theory of criminal law, 341.

States, the, 288.

Stowe, Professor, 375.

Subdivision of the individual, 5.

Suicide, 184, 187, 266.

Suspension of the writ of assize, 57.

Suspension, church punishment, 91.

Suspension of sentence, 432.

Sweden, 368.

Treason, common law of the latter Middle Ages, 142; feudal peace and communal peace, 143; crimes, 144; penalties, 144; the Reformers, 207; the 1700's, 298; traditional ideas of Swiss penal law surviving in the 1800's, 299; Codes in the 1800's, 370.

"TARGOING" (114, 230).

Talbot", in Twelve Tables, 13.

Tomas, 45, 183, 279.

Tort, 457.

Tort and crime, 524; Hegel's dis-
tinction, 525; Hohfeldian's dis-
tinction, 526; Menkian's distinc-
tion, 526; theory of, 459.

Torture, 117, 153, 203, n. 3.

Tous Codex, 140.

Tradition, conformation of, in pun-
ishing, 513, 520.

Transferences, 254, n. 3.

Transgressions, according to the Prussian Code of 1851, 300.

"Traite", 547.

Treaty, in medieval German law, 101; in medieval French law, 101; crimes of temporal, 281; serious offense, 293. See also Masons, suspensions of.

Tredelenburg, 470.

Twelve Tables, law of, 11, 13, 14, 15, 16, 22.

Uncertainty, 228, 244.

Uniforms, the, 248.

Unwary, 184, 288.

VAGRANCY, 175.

Vagabonds, case of criminal law, 5, 479; servant of higher ideal, 6; blood of, 6, n. 120; early suscep-
tions to, in Roman criminal law, 11-16; prominence of, in prin-
itive Germanic criminal law, 57; limitations of, 120, 122; in prov-
vincial Codes of Scandinavia, 125; punisheable crimes, in modern French law, 120; private, prohibited in Scandinavian, 291; Grooten's theory of, 399; as expression of degeneration, 500.

"Verfasser", 112.

Vest, Job, 307.

Vogt, J. H., 308.

Volfare, 511.

Voort, Professor, B., 207.

Vougaux, M., 264, n. 12.

Wagner, 447.

Waging, form of punishment, 99.

Wach, Von, 455.

Wald, E. C., 419.

Walter, Johannes, 210.

Writs, 45, 183, 279; trials, 298; judicial suppression of, 1700's, 293; in Scandinavian, 184; in modern French, 294, 295, 298; in the Netherlands, 303; Wolf, Christoph, 411.

Workhouse, 277.

"Worger Reformation" the, 207.

Woots, 133, 167.

Wrong, Hegel's discussion of, 462; Kallio's discussion of, 474; dis-
favoured theory, 468.

Wurstenshaw, 411.

INDEX

Tibaut, 433, 519.

Thomsen, Chr., 243, 311, 411.

"Threat of law, difference through", theory of, 429.

Thuringian Code, 346.

Tort and crime, 524; Hegel's dis-
tinction, 525; Hohfeldian's dis-
tinction, 526; Menkian's distinc-
tion, 526; relation of, 528.

Torture, 117, 153, 203, n. 3.

Tous Codex, 140.

Tradition, conformation of, in pun-
ishing, 513, 520.

Transferences, 254, n. 3.

Transgressions, according to the Prussian Code of 1851, 300.

"Traite", 547.

Treaty, in medieval German law, 101; in medieval French law, 101; crimes of temporal, 281; serious offense, 293. See also Masons, suspensions of.

Tredelenburg, 470.

Twelve Tables, law of, 11, 13, 14, 15, 16, 22.

Uncertainty, 228, 244.

Uniforms, the, 248.

Unwary, 184, 288.

VAGRANCY, 175.

Vagabonds, case of criminal law, 5, 479; servant of higher ideal, 6; blood of, 6, n. 120; early suscep-
tions to, in Roman criminal law, 11-16; prominence of, in prin-
itive Germanic criminal law, 57; limitations of, 120, 122; in prov-
vincial Codes of Scandinavia, 125; punisheable crimes, in modern French law, 120; private, prohibited in Scandinavian, 291; Grooten's theory of, 399; as expression of degeneration, 500.

"Verfasser", 112.

Vest, Job, 307.

Vogt, J. H., 308.

Volfare, 511.

Voort, Professor, B., 207.

Vougaux, M., 264, n. 12.

Wagner, 447.

Waging, form of punishment, 99.

Wach, Von, 455.

Wald, E. C., 419.

Walter, Johannes, 210.

Writs, 45, 183, 279; trials, 298; judicial suppression of, 1700's, 293; in Scandinavian, 184; in modern French, 294, 295, 298; in the Netherlands, 303; Wolf, Christoph, 411.

Workhouse, 277.

"Worger Reformation" the, 207.

Woots, 133, 167.

Wrong, Hegel's discussion of, 462; Kallio's discussion of, 474; dis-
favoured theory, 468.

Wurstenshaw, 411.