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In other branches of the law, from the beginning there has been a tradition of willingness, if not eagerness, on the part of judges, legislators, and legal commentators to examine basic premises and to promote doctrinal change if they thought society required it. But the dominant attitude of the American legal profession toward the penal law seems in general to have been that if it needed improvement, it would somehow improve itself. It is not surprising, therefore, that the criminal law long remained one of the least developed, most confused, and, in a sense, most primitive bodies of American law. There are, to be sure, several significant exceptions to this general rule of neglect. From time to time in American history there have been bursts of interest in criminal jurisprudence, and reformers have arisen who have sought in one way or another to humanize the criminal law , to modernize it, or perhaps only to introduce a measure of clarity into it. These efforts have varied enormously in inspiration, in scope, and in caliber, and they have had varying impacts on the course of legal developments. But they have all represented a recognition of the crucial importance of the law of crimes and a readiness to come to grips with at least some of its inherent problems. As such, they stand out as bright landmarks in what is otherwise a rather gray landscape. This article surveys the checkered history of criminal law reform in America. The principal emphasis is on the substantive penal law, by which is meant also the law governing the treatment of criminal offenders. However, there are some observations as well on attempts that have been made to reform criminal procedure and the administration of justice. The colonial period The New England colonies. It is appropriate to begin a discussion of the history of criminal law reform with the colonial period since that era witnessed the first efforts at improvement. All of the American colonies drew principally on the jurisprudence and laws of the mother country in fashioning their criminal law. Obviously, small bands of colonial settlers, few of them with any legal training, do not fabricate criminal codes out of nothing, but from the beginning, the colonists displayed a willingness to experiment with alterations in the English inheritance if their own values seemed to call for them. In the very first body of laws promulgated in British North America , the Plymouth Code of , a notable divergence from the English model in the punishment of serious crimes was already apparent. Although the list of capital offenses in England was long and comprehended almost all serious misdeeds, the death penalty in Plymouth was limited to treason, murder, arson, and several morals offenses. One should not attach too much importance to this document, since it was a rudimentary code of laws in many respects and Plymouth was a tiny settlement that was destined soon to fade into insignificance. Still, its modifications in the criminal law signaled a trend that was later to be followed by other colonies. A much more sophisticated document than the Plymouth Code, The Laws and Liberties of Massachusetts , embodied in addition major changes in the common and statutory criminal law of the mother country. It, too, reduced the number of capital offenses, and in general prescribed more lenient penalties for noncapital offenses than did English law. Its general prohibition against "cruel and barbarous" punishments was itself an innovation. The inspiration for the whole code came as much from the Old Testament as from the English common law. Deuteronomy and other parts of the Pentateuch were repeatedly cited in justification of penal provisions, and this reliance on the Bible had the net effect of making the code less sanguinary than it might have been. Only those offenses for which Scripture clearly prescribed death were made capital offenses. The code included several significant improvements in criminal procedure as well. Conviction of a capital crime required the testimony of two witnesses this requirement, too, was rooted in Scripture , and appeal was a matter of right in all capital cases. Besides the inspiration of Scripture, The Laws and Liberties of Massachusetts was pervaded by a spirit of rationality and a healthy distaste for the many accidental features of English criminal jurisprudence. The device of benefit of clergy , for example, was perceivedâ€”accuratelyâ€”as a result of historical accident, having no foundation in Scripture or reason, and as such was excluded from the code. The significance of these New England criminal codes, especially that of

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Massachusetts Bay, lies as much in the fact that they were codes as it does in the modifications which they made in individual provisions of English penal law. Underlying the codes was the strong belief that the criminal law of a community was too important to be allowed to grow up piecemeal, as, in the opinion of many of these Puritan settlers, had been the case with the English common law. Rather, it was something that ought to be crafted systematically and with deliberation to reflect the deepest moral sense of the community and to further the social purposes for which the community existed This insight was unfortunately lost sight of in later years. Although the criminal law of the American colonies was in general less sanguinary than that of the mother country, it was certainly no less retributive, and was very harsh by any modern standards. Crime and sin were virtually identical in the colonial mind. The criminal was seen as a free moral agent, and punishment was justified as a kind of social revenge or a species of divinely ordained, if humanly implemented, retribution. Schedules of punishments were little more than crude attempts to proportion the penalty to the sinfulness of the offense, and virtually no attention was paid to the individual circumstances of the offender. Exhibiting a very different spirit, however, were the penal laws enacted by Pennsylvania colony in the closing decades of the seventeenth century. There, between and , a most remarkable experiment in criminal law reform was undertaken under the aegis of William Penn and other Quaker notables. Although it came to an unhappy end, it planted seeds that were later to bear fruit. One year after it was established by William Penn under a royal charter, Pennsylvania enacted a complete code of criminal lawsâ€”part of a larger codification known as the Great Law of â€”that was quite unlike anything that had gone before it. The Quaker founders of the colony were opposed in principle to cruelty, to gratuitous bloodshed, and, barring the most unusual conditions, to the taking of human life. They were repelled by the existing English system of penal sanctions and felt compelled to look for alternatives. The alternative they found was the prison. In their code, imprisonment at hard labor or imprisonment coupled with a fine was the prescribed penalty for all crimes save willful and premeditated murder, the length of imprisonment varying according to the offense and the circumstances surrounding its commission. The terms of confinement were in general not severe. Arson merited a year at hard labor and corporal punishment usually whipping according to the discretion of the court. Common assault and battery, as well as manslaughter, were to be punished according to the nature and circumstances of the acts in question. In contrast to the rather mild sanctions accruing to these crimes, sex offenses were sternly dealt with in the Quaker code. Bigamy, for example, was punishable by life imprisonment upon first commission, and rape, upon second conviction. Another remarkable feature of the Pennsylvania code was its approach to religious offensesâ€”a popular category of offense in the criminal law of most jurisdictions. These kinds of crimes were completely abolished, and full freedom of conscience was assured to all inhabitants. The Pennsylvania code of represented Quaker criminal jurisprudence at its purest. More offenses were made punishable by imprisonment, prison terms became longer, and harsh corporal punishments such as branding were introduced for certain crimes. In , however, the Quaker experiment came to an abrupt end. The Revolution and its aftermath The American Revolution stimulated several forays in the direction of criminal law reform, all of them interesting for the new attitudes toward punishment that they revealed, although only one produced any long-term results. Some patriots urged that American criminal law was in particular need of change. Its harsh provisions, they argued, reflected a British rather than an American ethos. These arguments struck a responsive chord in certain state capitals. In New Hampshire , the first state constitution promulgated in exhorted the legislature to do something about the sanguinary penal laws with which the state was saddled. It opined that it was not wise to affix the same punishment to crimes as diverse as forgery and murder, "the true design of all punishments being to reform, not to exterminate, mankind" art. There were parallel developments in Virginia. A few weeks after the signing of the Declaration of Independence , the General Assembly of Virginia passed an act for the revision of the Laws ch. The committee that was entrusted with the task of revision included George Mason and Thomas Jefferson. As part of the revision effort, Jefferson prepared a draft of a bill for a new system of criminal sanctions. This draft was the product of an exhaustive survey of theoretical writings on punishment and on the history of the treatment

of criminal offenders from ancient to modern times. It is widely regarded as a model of literary draftsmanship Boyd, p. Among the theorists Jefferson read, none had so great an impact on him as the great Italian criminologist Cesare Beccaria, whose essay On Crimes and Punishments was stimulating lively discussion in educated colonial circles. This curious theory had first been suggested by Beccaria and had an enormous impact on the course of penological thought in the late eighteenth and early nineteenth centuries. These principles combined to produce a proposed system of punishments that in general was mild and enlightened but that was marred by some rather bizarre features. Jefferson cut drastically the long catalogue of offenses punishable by death under the prevailing law, limiting them to treason and murder, and prescribed much milder sanctions for most of these traditionally capital crimes. But the penalties designated for some offenses had, because of what might almost be called an obsession with analogy and proportionality, a somewhat ghoulish hue. Thus, the punishment for treason was burial alive. Murder by poison was punished by poisoning, rape by castration, and mayhem by maiming the offender. Pennsylvania and the degrees of murder. The first state in which the new advocates of penal law reform were able to translate theory into reality was Pennsylvania, which had earlier experimented with large-scale changes in its penal regime. The ground may have been rendered even more fertile by the fact that during the Revolution many Pennsylvania political offices fell into the hands of a coalition of populist farmers and Philadelphia radicals. In any event, in the state approved a constitution that included provisions concerning the reform of the criminal law very similar to those later included in the New Hampshire Constitution of New Hampshire may well have taken some of its language from the Pennsylvania document. The difference was that Pennsylvania commanded, rather than exhorted, its legislature to reform the penal laws of the state and to make punishments more proportional to crimes. Echoing a favorite theme of the new generation of reformers, the constitution also articulated the view that crime was more effectively deterred by visible punishments of long durationâ€”that is, by imprisonmentâ€”than by intense, bloody, but brief sanctions Pa. The first step toward the reform of the penal law was taken by the Pennsylvania legislature ten years later, when it eliminated the death penalty for robbery, burglary, and sodomy Act of Sept. In a statute was passed abolishing capital punishment for witchcraft and ending the barbarous practice of branding for adultery and fornication Act of Sept. Notwithstanding these developments, there were signs in the early s that the momentum that had been generated during the Revolution in favor of fundamental and wide-scale reform of the criminal law was beginning to slow down. For example, a new Pennsylvania constitution, promulgated in , failed even to mention the subject. Perhaps with this in mind, a number of very eminent Pennsylvanians began now to speak out publicly and vigorously on behalf of the reformist cause. In , James Wilson , the first professor of law at the University of Pennsylvania , a signer of the Declaration of Independence , and a codrafter of the United States Constitution, delivered a series of lectures in Philadelphia on crime and punishment. Citing with approval the views of Beccaria and that other great eighteenth-century legal theorist, Montesquieu, Wilson argued forcefully that prevention was the sole end of punishment and that anything more severe than the minimum punishment necessary to deter crime ill became a civilized nation. In , Benjamin Rush , professor of medicine at the same university, published a widely disseminated essay entitled "Considerations on the Injustice and Impolicy of Punishing Murder by Death," in which he argued that capital punishment was "contrary to reason and to the order and happiness of society. In a report on the death penalty as a deterrent to crime, prepared at the instance of Governor Thomas Mufflin, Bradford argued that the supreme penalty was totally unnecessary and adduced statistics to show that the penalty of imprisonment, provided by the act of , had proved just as effective in deterring burglary, robbery, and sodomy as had the earlier punishment of death. It was quite unwilling to go the full distance down the path that Bradford, Wilson, and others were urging it to go, but it did agree that the punishment of death ought to be inflicted only when it was absolutely necessary to ensure the public safety. In light of this philosophy, it prepared a bill that for the first time in Anglo-American legal history divided the crime of murder into two degrees. The first degree, punishable by death, referred to homicides perpetrated by lying in wait or by poison, or to any other kind of willful, deliberate, and premeditated killing. There were

echoes here of the act of All other kinds of murder were classified as murder in the second degree, punishable by imprisonment at hard labor or in solitary confinement or both for a term not to exceed twenty-one years. In , Virginia enacted a similar law, to be followed in by Ohio , in by Missouri , in by Michigan , and eventually by the vast majority of American jurisdictions. The antebellum period The passage of the statute on the degrees of murder took much of the wind out of the sails of the Pennsylvania movement for the complete abolition of capital punishment. The movement remained quiescent for several decades but was to revive again in the s as part of a larger anticapital-punishment crusade that flourished on the national scene roughly between and This discussion will be resumed below, but attention must now be shifted to the state of Louisiana and to the work of the most fertile and imaginative of all nineteenth-century penal law reformers, Edward Livingston. Edward Livingston â€” , born in New York State, had a distinguished political career before turning to the work of criminal law reform.

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In the course of time, the focus of reformers shifted from rationalization of existing legislation to more efficient crime control and prevention. From Enlightenment to the rehabilitative ideal: In France , Montesquieu advocated the separation of powers in order to preserve judicial independence from the executive; punishment was to correspond to the gravity of the offense. At the same time, Voltaire vigorously opposed capital punishment and demanded that criminal justice concentrate on the prevention rather than on the punishment of crime. The foundations of modern criminal policy were laid by Italian writer Cesare Beccaria â€" in his famous book Dei delitti e delle pene Like the French authors, Beccaria favored the abolition of the death penalty as well as corporal punishment , supported the principle of proportionality between crime and punishment, and insisted that prevention be the primary objective of criminal policy. These codes, for the first time since the sixteenth century, aimed at providing comprehensive legislation on crimes and punishment based on the rationalistic ideas of the Enlightenment era. In the following decades, Bavaria , Spain , Greece , Norway , Prussia , Portugal , Sweden , Belgium , and the Netherlands adopted criminal codes, and after efforts at national unification were successful, the great codifications of Germany and Italy concluded the consolidation of criminal laws in continental Europe. The criminal codes of Poland , Romania , and Switzerland were late fruits of the codification movement. Some of these codes, since frequently amended, still constitute the basis of criminal law in their countries. Under the ancien regime, criminal sentences were often for corporal punishment , and the prisons that existed were infamous for the maltreatment of prisoners. The move toward a modern penitentiary system with the aim of reforming offenders began as early as in with the foundation of the Amsterdam penitentiary. In a prison providing individualized treatment for prisoners was opened in Ghent. In the nineteenth century, penitentiary reform was strongly influenced not only by the movement of the Enlightement but also by Anglo-American practices. Penology was a field of true internationalism. The first of a series of international prison conferences was held in in Frankfurt under the chairmanship of the liberal German jurist Carl J. Mittermaier, and in the International Penal and Penitentiary Commission was founded. Reforms of the criminal law in the nineteenth century. The main goal of early reformers was the establishment of a rational system of criminal justice built mainly on the ideas of retribution and general deterrence. In the second half of the nineteenth century, the advances of natural sciences, the rise of psychology, anthropology, and sociology as new sciences, and the advent of philosophical positivism led to a change of paradigms in criminal justice. Punishment was no longer meant simply to visit an evil upon the offender in retribution for the crime he had committed, but criminality was viewed as a "moral disease. In Germany, Franz von Liszt, departing from the traditional idealist notion of justice, was the founding father of an influential "sociological" approach to criminal justice, regarding the reform or, with respect to "incurable" criminals, the incapacitation of offenders as the goal of the sanctioning system. The reform demands of this organization included the introduction of probation, the abolition of short-term imprisonment, the long-term incarceration of professional criminals, the creation of a special criminal law for juveniles, and the substitution of other sanctions for deprivation of liberty. Many of these proposals have since been introduced by legislation. The crisis of the rehabilitative ideal. Beginning in the early s, the idea that criminal sanctions can reform and rehabilitate offenders was challenged from two sides: These insights led in many countries to a reorientation toward retribution "just desert" and incapacitation as the foundations of the system of criminal law. Sanctions of indeterminate duration, in particular, came to be regarded as misplaced in the criminal justice system. Although European legal systems did not go as far as some United States jurisdictions in establishing by statute fixed sentences or narrow sentence ranges for individual offenses, the s and s saw a clear movement away from the earlier medical paradigm of crime

control and toward greater strictness. At the same time, some writers criticized imprisonment, which had since the nineteenth century become the backbone of the sanctioning system. Imprisonment was denounced as a fundamentally desocializing sanction, and reformers called for its replacement by noncustodial sanctions restitution, fines, community service, probation or at least for more open forms of corrections including furloughs and work release Morris, pp. Many legislatures followed up on these demands and enacted laws promoting the use of alternatives to traditional prison sentences. Criminal law reform in continental Europe Several European countries have reformed their criminal laws since the s. Many of the recently enacted codes, most notably those of Austria, France, Germany, Poland, Portugal, and Spain, share certain tendencies: Although modern criminal laws on the European continent have these and many other features in common, each country has its own style and methods in dealing with crime. These different styles reflect variances in policy, history, and national culture. For example, some legal systems e. It is thus necessary to look at each country separately in order to fully comprehend European legal reform. For this article, France, Germany and its German-speaking neighbors, Italy, the Netherlands, Poland, Spain, and Sweden have been selected as examples of recent developments on the Continent. After many partial revisions of the code, finally in a completely new penal code entered into force see Lazerges; Pradel. Contrary to the ancient legislation, the new code places the protection of individual rather than state interests at the top of the list of offenses, which begins with the prohibition of genocide Art. Since the abolition of the death penalty in , the most severe sentence is life imprisonment, which is reserved for the most serious offenses. The code also eliminates all minimum penalties Tomlinson, p. Other notable features of the new code include the criminal liability of legal entities Art. These and other changes have brought French criminal law to the forefront of European criminal policy and theory. Reform efforts in Germany began at the start of the twentieth century. Piecemeal changes, especially a larger field of application for fines, were achieved in the s, but the Nazi regime and World War II prevented the further adoption of liberal reform ideas. After the war, an official reform commission produced a rather conservative draft law in This provoked a response from a group of younger and more liberal law professors, who presented an "Alternative Draft" Alternativ-Entwurf of the general and sanctions part in see Darby. In parliament, a compromise was achieved between these two drafts, with liberal ideas prevailing in the sanctions part and more conservative solutions adopted with respect to general theories of the criminal code. In the course of the reform, outdated offenses, especially in the area of sex crime, were abolished. Based on the parliamentary compromise, a largely revised version of the Penal Code came into force in The revised code retained the traditional orientation toward individual responsibility based on subjective blameworthiness. This orientation has deep roots in German philosophy dating back to the idealist philosophers Kant and Hegel. Individual blameworthiness not only determines criminal liability but also the punishment an offender receives. The reform legislation has retained and even extended this dualistic system of sanctions. As regards penal policy, the most important aspect of the reform law was its emphasis on restricting the use of imprisonment. The new law decreed that prison sentences of less than six months were to be imposed only under exceptional circumstances, and the court should always consider suspension of the sentence as a preferred option. At the same time, fines were made more attractive as sanctions even for serious crime by the introduction of the day-fine system. As a result of these reforms, the rate of prison sentences has declined markedly, from more than one-third of all convictions before the reform to More than two-thirds of sentences of imprisonment 68 percent in are suspended, which means that only 6 percent of convicted offenders are sentenced to serve time in prison. This rate has remained almost stable over the years since However, the rate of lengthy prison sentences of more than two years has increased since then. Austria, in close cooperation with Germany, revised its ancient criminal code in , adopting many provisions that parallel the new German legislation, including the day-fine system, a preference for fines over imprisonment, extensive decriminalization of sexual offenses and abortion, and such preventive measures as separate institutions for mentally disturbed criminals and dangerous recidivists. Switzerland, on the other hand, has retained its criminal code of Typical features of this code are its strong reliance on various forms of imprisonment,

including short-term imprisonment, as the main sanction, and the distinctionâ€”as in Germanyâ€”between penalties and security measures as reactions to crime see Bauhofer. In , a reform draft was presented, which would replace short-term imprisonment by noncustodial sanctions see Schweizer Kriminalistische Gesellschaft. This draft has not yet been passed into law at the beginning of the twenty-first century. The Italian Penal Code stems from the Fascist area; it was adopted in and reflected the dominant authoritarian ideology of its time. After the end of World War II , numerous efforts were made to replace the Codice Rocco of by more modern and liberal legislation, but only with very limited success. The death penalty was abolished as early as in , and the Constitution of incorporated the principles of personal criminal responsibility and rehabilitation as the goal of imprisonment. Based on these principles, the Constitutional Court released several landmark decisions affecting criminal law. For example, the court declared that imprisonment for nonpayment of fines constituted unconstitutional discrimination against the poor, and in another decision required criminal courts to recognize an inevitable mistake of law as a valid excuse. In the field of corrections, parole was introduced in , and later legislation provided for probation, community service as a substitute penalty, and work release of prisoners. The most comprehensive attempt to introduce a new criminal code was undertaken in , when a draft code was presented by a commission consisting mainly of academics. This draft aimed at reducing the number of petty offenses and at consolidating the criminal law by integrating offenses proscribed in other legislation into the penal code Pisani. The draft was discussed by the government but not acted upon by the Italian parliament. In the Netherlands, German and French influences on penal legislation are noticeable, but criminal policy is quite autonomous and independent. In , the French penal code was imposed on the Dutch. After World War II , Dutch criminal policy was well-known for its leniency and for the sparing use courts made of imprisonment. Many minor offenses do not even reach the courts but are disposed of by prosecutorial "transaction," that is, a fine to be paid by the culprit without trial and conviction. Since the s, however, rates as well as duration of imprisonment have risen sharply, mostly due to more severe treatment of an increasing number of violent and drug offenses Junger-Tas. Another noteworthy development is the frequent use made of community service sanctions. Penalties included capital punishment. The courts relied heavily on long-term imprisonment, especially in the s when the government attempted to repress popular demands for greater freedom and democratic reforms. In the brief period between the onset of the Solidarity movement in and the imposition of military rule in late , two independent commissions began work on a reform of the criminal law, yet their efforts seemed to lead nowhere when the political climate changed toward repressiveness and stagnation. It took until for the representatives of the reform movement to be able to participate again in the work of a commission installed two years earlier by the socialist government with the mandate of developing guiding principles for a new criminal code. In the efforts of this commission, which included conservatives and liberals but was dominated by the latter, eventually led to adoption, by the Polish parliament, of a new criminal code for an overview see E. The code of retained some features of its predecessor but in many ways went back to the traditions of the code and tried to integrate those with modern developments and criminal policy. With respect to sanctions, Poland distinguishes between penalties, probationary measures, and security measures. The latter include commitment to an institution for the insane or for addicts arts. If the offender was criminally responsible at the time of the offense and therefore receives a criminal penalty, his sentence is reduced for time spent in an institution. Penalties include fines to be imposed according to the day-fine system , imprisonment, and, as a holdover from the code, restriction of freedom arts. In an important general directive for sentencing, art. Such alternative sanctions include not only fines and restriction of freedom but also probation and the conditional dismissal of prosecution arts. Reform efforts began in Spain immediately after the restoration of democracy in Capital punishment was abolished by the constitution of , which also declared rehabilitation to be the goal of custodial punishment. It took until , however, to replace the authoritarian and outdated criminal code of by modern legislation. The new Penal Code of modernized the general part of the criminal law for an overview see Cerezo Mir.

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