On Crimes and Punishments

In all negotiations of difficulty, a man may not look to sow and reap at once; but must prepare business, and so ripen it by degrees.

Francis Bacon

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The allegorical illustration engraved by Giovanni Lapi for the third edition of 1765. The engraving depicts Justice turning away from capital punishment in horror and looking benignly on the instruments of socially useful hard labour. Reproduced by permission of the Syndics of Cambridge University Library.
To the Reader

A few odd remnants of the laws of an ancient conquering race codified twelve hundred years ago by a prince ruling at Constantinople, and since jumbled together with the customs of the Lombards and bundled up in the rambling volumes of obscure academic interpreters – this is what makes up the tradition of opinions that passes for law across a large portion of Europe. It is as deplorable as it is common that an opinion of Carpzov’s, an ancient custom noted by Claro, or a mode of punishment suggested with vengeful complacency by Farinacci have become the laws so confidently implemented by those who should tremble at the responsibility of ordering the lives and fortunes of men. These laws, which are the residue of the most barbarous centuries, are examined in this book insofar as they relate to the system of criminal justice. This book presumes to set out their confusions for the benefit of those who are charged with the public welfare in a style designed to ward off the unenlightened and impatient run of men. That sincere search for the truth, that independence of vulgar opinion with which this work is written, are the effects of the benign and enlightened government under which the present author lives. The great monarchs, the human benefactors who rule us, love the truths which are expounded by humble philosophers with an unfanatical zeal directed exclusively against those who, eschewing reason, rely on force or machination. Our current abuses, when their circumstances are fully understood, are a mockery and a reproof of past ages and not of the present day and its legislators.
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Whoever might wish to do me the honour of criticising this work, then, must begin by understanding its aim, an aim which, far from diminishing legitimate authority, serves to reinforce it, or should do if persuasion is more efficacious than force with men, and if caring and humanity can justify it in everyone's eyes. The ill-digested criticisms which have been published against the present book are founded on confused ideas and oblige me briefly to interrupt my address to enlightened readers and to put a stop once and for all to the errors of timid zeal or the calumnies of piqued envy.

There are three sources from which the principles of morals and politics which guide men are drawn: revelation, natural law and the conventions arrived at by society. Where its ultimate goal is concerned, there is no comparison between the first and the others; but they are all alike in this, that all three conduce to the happiness of this mortal life. To consider the concerns of the last of them does not exclude concern with the first two. On the contrary, it is because these latter, though divine and immutable, have been so corrupted by men's false religions and by arbitrary notions of virtue and vice are twisted in a thousand different ways by impure minds, that it is necessary to examine in isolation from every other matter those things which derive from purely human conventions, both those that are entered into explicitly and those that are tacitly assumed in the interests of the common need and utility, a notion that necessarily commands the assent of every sect and every system of morals. And it will always be a praiseworthy undertaking to compel even the most wayward and incredulous to conform to the principles which drive men to live in society. There are, therefore, three separate classes of virtue and vice: the religious, the natural and the political. These three classes should never come into conflict with each other, although not all the consequences and duties which flow from the one flow from the others. Not everything commanded by revelation is commanded by natural law; nor is everything commanded by natural law commanded by the purely social law. But it is extremely important to treat separately those things which result from this last convention, that is to say from explicit or tacit compacts among men, because it marks the limit of the force which man may legitimately use against man in the absence of a special dispensation from the supreme Being. So, the
idea of political virtue can fairly be called mutable, without implying any criticism; the idea of natural virtue would always be clear and manifest were it not obscured by the folly or the passions of men; and the idea of religious virtue is forever one and constant because it is revealed directly by God and is sustained by Him.

It would be mistaken, just because someone is discussing social conventions and their consequences, to attribute to him any opposition to the principles of natural law or revelation, because these are not what he is talking about. It would be equally mistaken for anyone discussing the state of war which obtained before the establishment of society to interpret it in a Hobbesian sense, that is, to deny that there were duties and obligations anterior to the establishment of society, instead of interpreting this state as a fact born of human corruption and the lack of any express sanction. It would also be a mistake to accuse a writer, who is pondering the commandments of the social contract, of denying that there are any duties or obligations prior to the contract itself.

Divine justice and natural justice are both essentially unchanging and constant, since the relation between two objects which remain the same is always the same. But human or political justice, being nothing but a relation between an action and the varying state of society, can vary according to how necessary or useful that action is to society. Nor can human justice be well understood except by one who has analysed the complex and ever-changing relations of civil association. As soon as these essentially distinct principles are confused, all hope of thinking clearly about public affairs is lost. It is for theologians to chart the boundaries of the just and the unjust, insofar as the intrinsic good or evil of an action is concerned; but it is for the student of law and the state to establish the relationship between political justice and injustice, that is to say, between what is socially useful and what is harmful. Neither task can ever prejudice the other, for everyone can see that purely political virtue must give way before the unchanging virtue which flows from God.

I say again that, whoever would favour me with his criticisms, should not begin by attributing to me principles inimical either to virtue or to religion, inasmuch as I have shown that I do not hold such principles. Instead of portraying me as a seditious non-believer, he should try to show me up as a poor logician or a careless
political thinker. Nor should he quake at every proposal which upholds the interests of mankind; he should try to convince me either of the uselessness or of the politically harmful effects which might arise from my principles; he should try to show me the benefits of the accepted customs. I have given public notice of my religion and of my loyalty to my sovereign in the reply to the Notes and Observations. It would be vain to reply to further writings of that sort. But whoever writes in a tone befitting a decent man and shows a sufficient degree of enlightenment to absolve me from the need to start by proving first principles, of whatever kind, will find in me not so much a man striving to respond, as a peaceable lover of truth.\textsuperscript{*}

\textsuperscript{*} The first additions [i.e. those of the third edition] are enclosed in brackets \{ \} and the second additions [i.e. those of the fifth edition] in brackets \{\{\}.}
Introduction

For the most part, men leave the care of the most important regulations either to common sense or to the discretion of individuals whose interests are opposed to those most foresighted laws which distribute benefits to all and resist the pressures to concentrate those benefits in the hands of a few, raising those few to the heights of power and happiness, and sinking everyone else in feebleness and poverty. It is, therefore, only after they have experienced thousands of miscarriages in matters essential to life and liberty, and have grown weary of suffering the most extreme ills, that men set themselves to right the evils that beset them and to grasp the most palpable truths which, by virtue of their simplicity, escape the minds of the common run of men who are not used to analysing things, but instead passively take on a whole set of second-hand impressions of them derived more from tradition than from enquiry.

If we open our history books we shall see that the laws, for all that they are or should be contracts amongst free men, have rarely been anything but the tools of the passions of a few men or the offspring of a fleeting and haphazard necessity. They have not been dictated by a cool observer of human nature, who has brought the actions of many men under a single gaze and has evaluated them from the point of view of whether or not they conduce to the greatest happiness shared among the greater number. Blessed are those very few nations which have not waited for the slow succession of coincidence and contingencies to bring about some tentative movement towards the good from out of the extremities of evil, but
which have sped with good laws through the intervening stages. And that philosopher who had the courage to scatter out among the multitudes from his humble, despised study the first seeds of those beneficial truths that would be so long in bearing fruit, deserves the gratitude of all humanity.

We have discovered the true relations between sovereign and subjects and between nation and nation. Commerce has been stimulated by philosophic truths disseminated by the press, and there is waged among nations a silent war by trade, which is the most humane sort of war and more worthy of reasonable men. Such is the progress we owe to the present enlightened century. But there are very few who have scrutinised and fought against the savagery and the disorderliness of the procedures of criminal justice, a part of legislation which is so prominent and so neglected in almost the whole of Europe. How few have ascended to general principles to expose and root out the errors that have built up over the centuries, so curbing, as far as it is within the power of disseminated truths to do, the all too free rein that has been given to misdirected force, which has, up to now, provided an entrenched and legitimised example of cold-blooded atrocity. And yet, the groans of the weak, sacrificed to cruel indifference and to wealthy idleness, the barbarous tortures that have been elaborated with prodigal and useless severity, to punish crimes unproven or illusory, the horrors of prison, compounded by that cruellest tormentor of the wretched, uncertainty, ought to have shaken into action that rank of magistrates who guide the opinions and minds of men.

The immortal president Montesquieu glossed over this subject. Indivisible truth has set me to follow in the enlightened footsteps of that great man, but the thinking men for whom I write will know how to distinguish my steps from his. I shall be happy if, like him, I can deserve the private thanks of humble and peaceable lovers of reason and if I can arouse that sweet stirring of sympathy with which sensitive souls respond to whoever upholds the interests of humanity.
Chapter 1  The origin of punishment

Laws are the terms under which independent and isolated men come together in society. Weared by living in an unending state of war and by a freedom rendered useless by the uncertainty of retaining it, they sacrifice a part of that freedom in order to enjoy what remains in security and calm. The sum of these portions of freedom sacrificed to the good of all makes up the sovereignty of the nation, and the sovereign is the legitimate repository and administrator of these freedoms. But it was insufficient to create this repository; it was also necessary to protect it from the private usurpations of each individual, who is always seeking to extract from the repository not only his own due but also the portions which are owing to others. What were wanted were sufficiently tangible motives to prevent the despotic spirit of every man from resubmerging society’s laws into the ancient chaos. These tangible motives are the punishments enacted against law-breakers. I say tangible motives because experience shows that the common run of men do not accept stable principles of conduct. Nor will they depart from the universal principle of anarchy which we see in the physical as well as in the moral realm, unless they are given motives which impress themselves directly on the senses and which, by dint of repetition, are constantly present in the mind as a counter-balance to the strong impressions of those self-interested passions which are ranged against the universal good. Neither eloquence, nor exhortations, not even the most sublime truths have been enough to hold back for long the passions aroused by the immediate impact made by objects which are close at hand.
Chapter 2  The right to punish

Every punishment which is not derived from absolute necessity is tyrannous, says the great Montesquieu, a proposition which may be generalised as follows: every act of authority between one man and another which is not derived from absolute necessity is tyrannous. Here, then, is the foundation of the sovereign’s right to punish crimes: the necessity of defending the repository of the public well-being from the usurpations of individuals. The juster the punishments, the more sacred and inviolable is the security and the greater the freedom which the sovereign preserves for his subjects. If we consult the human heart, we find in it the fundamental principles of the sovereign’s true right to punish crimes, for it is vain to hope that any lasting advantage will accrue from public morality if it be not founded on ineradicable human sentiments. Any law which differs from them will always meet with a resistance that will overcome it in the end, in the same way that a force, however small, applied continuously, will always overcome a sudden shock applied to a body.

No man has made a gift of part of his freedom with the common good in mind; that kind of fantasy exists only in novels. If it were possible, each one of us would wish that the contracts which bind others did not bind us. Every man makes himself the centre of all the world’s affairs.

(The multiplication of the human race, however gradual, greatly exceeded the means that a sterile and untended nature provides for the satisfaction of man’s ever-evolving needs, and brought primitive men together. The first unions inescapably gave rise to