



# The 100-plus-Year Old Case For a Minimalist Criminal Law (Sketch of a General Theory of Substantive Criminal Law)

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## THE 100-*plus*-YEAR-OLD CASE FOR A MINIMALIST CRIMINAL LAW (Sketch of a General Theory of Substantive Criminal Law)

Mike C. Materni\*

*Criminal law defines the system of government of which it is the political expression; thus having a normative theory of substantive criminal law is paramount. U.S. criminal law has developed in the absence of such overarching theory, and is now plagued by overcriminalization. This Article advances a model of a minimalist criminal law grounded on strong normative principles that are presented and defended not from the perspective of metaphysics or moral philosophy, but rather in a historical and comparative perspective, as a matter of political choice. Core among those principles is the idea that in a liberal democracy the criminal law should be seen as the extrema ratio, or option of the last resort. After laying out and defending the model, the Article deals with issues related to its implementation, advancing an argument for the constitutionalization of substantive criminal law. The Article argues that, on*

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*the basis of existing yet overlooked constitutional doctrine, criminal laws should be subject to at least strict scrutiny.*

**Keywords:** *criminal law, overcriminalization, strict scrutiny*

## INTRODUCTION: WHAT TYPE OF CRIMINAL LAW?

The prison population in America today, averaging at over 2.4 million inmates,<sup>1</sup> makes the United States the country with the highest incarceration rate in the world.<sup>2</sup> Such a high incarceration rate is intuitively problematic, particularly considering that more than 60 percent of inmates are nonviolent offenders.<sup>3</sup> At the same time, there are today about 4,500<sup>4</sup> federal laws carrying criminal penalties, with “40% of the thousands of federal criminal laws passed since the Civil War [having been] enacted after 1970.”<sup>5</sup> As Douglas Husak put it, “we have too much punishment and too many crimes in the United States today. We overpunish and overcriminalize.”<sup>6</sup>

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1. See, e.g., Peter Wagner & Leah Sakala, *Mass Incarceration: The Whole Pie*, March 12, 2014, available at <http://www.prisonpolicy.org/reports/pie.html>.

2. The United States, with 753 per 100,000 people incarcerated at last calculation, has by far the highest incarceration rate in the world. Russia follows, with 629 per 100,000 people incarcerated, then Rwanda, with an incarceration rate of 593 per 100,000 people. See John Schmitt, Kris Warner & Sarika Gupta, *The High Budgetary Cost of Incarceration*, Center for Economic and Policy Research, June 2010, p. 5, available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>. See also generally WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

3. See, e.g., Veronique de Rugy, *Prison Math*, REASON.COM July 2011, available at <http://reason.com/archives/2011/06/08/prison-math>.

4. This amount, found in Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 539 (2013), is more of an estimate than a certain number. As another commentator has observed, “The number of federal statutes and regulations relevant to criminal conduct is unknown, but likely is immense . . . Some commentators have estimated that there are more than 4,000 statutes and more than 300,000 regulations that define conduct as criminal or otherwise bear on the proper interpretation of laws that do.” See Paul J. Larkin Jr., *Regulation, Prohibition and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 749–50 (2014).

5. Smith, *Overcoming Overcriminalization*, *supra* note 4, at 539 (citations omitted).

6. DOUGLAS HUSAK, *OVERCRIMINALIZATION* 4 (2008). As Husak himself acknowledges, however, “to say that we have *too much* of something implies a standard or baseline by which we can decide whether that amount is too little, not enough, or exactly right.” *Id.* For a detailed overview of the “amount of criminal law” and its consequences see, e.g., *id.* at 3–54, and references therein. It is worth observing that the amount of criminal law has apparently

There is no direct causal correlation between the number of criminal laws on the books and current incarceration rates. Rather, these two phenomena are symptoms of a deeper, broader problem: the lack of an overarching normative theory of substantive criminal law that can offer guidance as to what the proper use, scope, and limits of the criminal law ought to be. U.S. criminal law has developed in the absence of any such explicit normative theory—“unless ‘more’ counts as a normative theory.”<sup>7</sup> This can perhaps at least in part explain why a commentator referred to Anglo-American criminal law as a “mess of confusions.”<sup>8</sup>

Having a working normative theory of substantive criminal law is paramount for a variety of reasons. First, for good or ill, criminal law is the branch of law that, maybe more than any other, defines the system of government of which it is the political expression. Second, criminal law is the branch of law that, maybe more than any other, directly and violently impacts the lives of all those that come in contact with it—be they victims, perpetrators, relatives of either category, or ordinary people. Decisions made on whom and what to punish, how to punish, how much to punish, and the like have real consequences, almost always dramatic, for real people—what we could call the costs, direct and indirect, of punishment.<sup>9</sup> If a good measure for a society is the way it treats its most unwanted and

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grown exponentially and irrespective of actual crime rates, which have been declining since 1992; see, e.g., Paul J. Larkin Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 729–30 (2013). A different argument would need to be made if, for example, increasing the number of criminal statutes and of people in jail lowered the rates of victimization (= the actual crime rates); such correlation, however, doesn’t seem to exist.

7. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001).

8. George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443 (1994).

9. Oliver Wendell Holmes observed that punishment “degrade[es] prisoners and . . . plung[es] them further into crime” and that “fine and imprisonment . . . fall . . . heavily on a criminal’s wife and children.” See Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 470 (1897). In more than a hundred years very little seems to have changed in that regard. As a Human Rights Watch report contends, “prisons do more than deprive their inmates of freedom. The great majority . . . are confined in conditions of filth and corruption, without adequate food or medical care, with little or nothing to do, and in circumstances in which violence—from other inmates, their keepers or both—is a constant threat.” See THE HUMAN RIGHTS WATCH GLOBAL REPORT ON PRISONS xv, quoted in Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BR. J. AM. LEG. STUDIES 263, 293 (2013). On the costs of punishment, see, e.g., HUSAK, *supra* note 6, at 5–6;

despised members,<sup>10</sup> then we go back, full circle, to the first reason why substantive criminal law matters: it defines the system of government of which it is the political expression.

On top of all this, as William J. Stuntz observed, procedure without substance is *insufficient*. It becomes fairly easy to get around procedural limitations and guarantees if they are not anchored to strong, *substantive* principles of criminal law.<sup>11</sup> Substantive criminal law and criminal procedure are two sides of the same coin—each one is, if not useless, certainly extremely weakened without the other. Nonetheless, as Stuntz has observed, the development of American criminal justice has almost exclusively focused on criminal procedure,<sup>12</sup> leaving a general theory of substantive criminal law largely underdeveloped and underexplored.<sup>13</sup> This is not to say, of course, that there is *no literature* focusing on substantive criminal law; indeed there is plenty. Almost all the existing, mainstream literature, however, focuses on *trees* (or groups of trees);<sup>14</sup> with the exception of the discussion of the purposes of punishment,<sup>15</sup> the forest (= the criminal law as an institution) is taken for granted. Even the most brilliant contribution to a general theory of substantive criminal law that I am aware of—George Fletcher’s *Rethinking Criminal Law*—builds its treatment of the general part from an analysis of the purposes of punishment.<sup>16</sup>

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on prison conditions, *see, e.g.*, NILS CHRISTIE, *CRIME CONTROL AS INDUSTRY: TOWARDS GULAGS, WESTERN STYLE* (2000).

10. As Winston Churchill reportedly said, “The true measure of a civilized society is how it treats people accused of crimes.” This perspective is reflected in Dr. Martin Luther King Jr.’s statement, “The ultimate measure of a person is not where he stands in times of comfort, but where he stands at times of challenge and controversy,” as well as in ZYGMUNT BAUMAN, *WASTED LIVES: MODERNITY AND ITS OUTCASTS* (2004).

11. *See* STUNTZ, *supra* note 1, at 79–80.

12. *Id.* at 74–85.

13. Husak observes that the “absence of a viable account of criminalization constitutes the single most glaring failure of penal theory as it has developed on both sides of the Atlantic.” *See* HUSAK, *supra* note 6, at 58.

14. *See, e.g.*, HUSAK, *supra* note 6, at 62–63.

15. The discussion over punishment and its purposes dates back thousands of years. Arguments on the subject are found in the Bible, in works of ancient Greek philosophers such as Plato and Aristotle, and all the way down to modern times. For an overview of the main theories of punishment, *see, e.g.*, Hugo Adam Bedau & Erin Kelly, “Punishment,” *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Spring 2010) available at <http://plato.stanford.edu/archives/spr2010/entries/punishment/>.

16. *See, e.g.*, GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

Discussing the purposes of punishment is, without a doubt, of fundamental importance;<sup>17</sup> there is, however, another pressing question that logically precedes the question of why we punish: What is the *justification* of the criminal law *as a whole*?<sup>18</sup> Criminal punishment is perhaps the most obvious manifestation of the criminal law; however, there needs to be a criminal law in the first place for criminal punishment to be imposed. In this sense, criminal punishment (and, relatedly, its purpose) is a *consequence* of having a criminal law. Asking the question, *Why do we have a criminal law?* (as opposed to the question, *why do we punish?*) means asking the question of what its *justification, scope, and limits ought to be*. These questions have been for a long time left largely<sup>19</sup> unexplored; recent scholarship, however, has picked up the flag of substantive criminal law and, in an attempt to offer an answer to the questions of what the justification, scope, and limits of the criminal law ought to be, increasing attention has been dedicated to exploring issues of *criminalization* and *overcriminalization*.<sup>20</sup>

The purpose of this Article is to contribute to the discussion of the justification, scope, and limits of the criminal law by providing some historical depth and comparative perspective to the topic. In the end, the

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17. I myself made this very point. See Materni, *supra* note 9, at 264.

18. The issues of the justification of the criminal law and the justification of the State's power toward its citizens are not one and the same. Rather, the relationship between the two is that of genus to species: the State's power to govern, broadly intended, is the *genus*, of which the establishment of the criminal law is a *species*.

19. Some exceptions to this trend are H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); SANFORD H. KHADISH, BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW (1987); JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW, Vols. I–IV (1984–1988); and most recently, JONATHAN SCHONSHECK, ON CRIMINALIZATION: AN ESSAY IN THE PHILOSOPHY OF THE CRIMINAL LAW (1994). For all their merits, however, these works adopt an approach that is radically different than the one adopted in this article, and do not produce, in my view, a normative model of substantive criminal law.

20. See, e.g., R.A. DUFF, LINDSAY L. FARMER, S.E. MARSHALL, MASSIMO M. RENZO & VICTOR V. TADROS (eds.), THE CONSTITUTION OF THE CRIMINAL LAW (2013); THE STRUCTURES OF THE CRIMINAL LAW (2011); and THE BOUNDARIES OF THE CRIMINAL LAW (2010). See also DOUGLAS HUSAK, OVERCRIMINALIZATION (2008); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2013); Darryl K. Brown, *Can Criminal Law be Controlled?*, 108 MICH. L. REV. 971 (2010); Andrew Ashworth, *Concepts of Overcriminalization*, 5 OHIO ST. J. CRIM. L. 407 (2007–2008); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); Nils Jareborg, *Criminalization as a Last Resort* (Ultima Ratio), 521 OHIO ST. J. CRIM. L. (2004) (this list is meant to be representative but not exhaustive).

Article aims to offer a general, overarching normative and analytical framework (= the “forest”) against the backdrop of which the discussion over single “trees” of substantive criminal law—from the relevance of resulting harm and the law of attempts to causation, from criminal responsibility for omissions to conspiracy and accomplice liability, to name but a few—can be conducted *rigorously* and *systematically*. This is so because the Article advances and defends a general model meant to inform the elaboration of single institutions of substantive criminal law.

The Article tries to achieve this goal by adopting a comparative perspective because, as one author observed, “There is something about the criminal law that invites comparative analysis.”<sup>21</sup> This “something” very likely lies in the fact that, while individual solutions and details may differ from place to place and in different times, the fundamental questions about the justifications for the criminal law tend to be the same. Karl Popper once wrote, “There are no subject matters, no branches of knowledge—or rather, of inquiry: there are only problems, and the urge to solve them.”<sup>22</sup> If one looks beyond the fact that there are different countries, each with its own legal system, one can see that what remains are “problems, and the urge to solve them.” Thus, studying how different people in different times have dealt with similar issues can help shed light on the problem(s) at hand. In this spirit, adopting a comparative and historical perspective, this Article will go back to the origins of modern criminal law and illustrate the core tenets of the classical model of liberal criminal law, developed by the Italian Classical School in the second half of the nineteenth century. The illustration will be done primarily through the writings of the leader and chief exponent of the Classical School, the Tuscan jurist Francesco Carrara (1805–1888), whose work appears to be almost entirely unknown to Anglo-American scholarship.<sup>23</sup>

Several reasons warrant reading Carrara’s work. To begin with, rather than looking at the positive law of his time, Carrara *develops a systematic*

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21. Stuart P. Green, *The Universal Grammar of Criminal Law*, 98 MICH. L. REV. 2104 (2000).

22. KARL RAIMUND POPPER, REALISM AND THE AIM OF SCIENCE 5 (1983).

23. To the author’s knowledge, the work of Francesco Carrara has not, to date, been translated into English, nor has it been divulged in Anglo-American literature, save for an unpublished (or unavailable) doctoral thesis by Patrick Anthony Cavaliere, *Crime and Punishment in Fascist Italy*, repeatedly referenced in PATRICK ANTHONY CAVALIERE, IL DIRITTO PENALE POLITICO IN ITALIA DALLO STATO LIBERALE ALLO STATO TOTALITARIO. STORIA DELLE IDEOLOGIE PENALISTICHE TRA ISTITUZIONI E INTERPRETAZIONI (Roma, 2008).

*model* of criminal law—one of the first in the modern era—based on *prescriptive first principles*, chief among which is the principle of the criminal law as the *extrema ratio*, or option of the last resort. This makes reading Carrara’s work extremely relevant for the United States *today*, when the criminal law is in desperate need of *normative* and *limiting* principles beyond the procedural protections that the Supreme Court has recognized over time. Secondly, Carrara writes at a time when the memory of the horrors of the unrestrained criminal law that characterized the *ancien régime* was still fresh. Thus, he develops *political* principles informed by the memory of the past—a past that needed not be repeated. Thirdly, Carrara also writes at a time of political turmoil and increasing state power (after about fifty years of insurrections and revolutions, the several States of the Italian peninsula were unified into the Kingdom of Italy in 1871; Carrara’s writings span the years roughly between 1859 and 1889), when the necessity of keeping that power in check was very real. Today, the United States is experiencing increasing requests, from both the political left and right,<sup>24</sup> as well as influential constitutional scholars,<sup>25</sup> for clearer limitations of the power of government. The parallelisms between the spirit in which Carrara wrote and the current political climate in the United States make reading Carrara’s work a worthy enterprise.

These three reasons alone would make a compelling case for an interest in Carrara’s writings. What further justifies the extensive treatment of his work, however, is the analytical framework adopted in the present Article: that substantive criminal law matters because it defines the system of government of which it is the political expression.<sup>26</sup>

Breaking with previous scholarship on the subject, the analytical framework proposed in this Article will be grounded neither in existing law<sup>27</sup> nor in moral philosophy,<sup>28</sup> but rather in basic *political* principles of which

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24. See, e.g., Jonathan Weisman, *Liberals and Libertarians Find Common Ground in House*, N.Y. TIMES, July 15, 2014, available at [http://www.nytimes.com/2014/07/16/us/politics/left-and-libertarians-unite-to-amend-house-spending-bills.html?\\_r=0](http://www.nytimes.com/2014/07/16/us/politics/left-and-libertarians-unite-to-amend-house-spending-bills.html?_r=0).

25. See, e.g., RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (2014).

26. See *supra*, as discussed in the third paragraph of this Introduction.

27. Which is what Husak, for the most part, does. See HUSAK, *supra* note 6.

28. Which is what brilliant theorists, such as Joel Feinberg and Michael Moore, have done. See, e.g., JOEL FEINBERG, *HARM TO OTHERS*, Vols. I–IV (1987–1990); MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* (2010).



ordinary people can have an intuitive understanding. The normative claim made in this Article is that the core of Carrara’s classical model of liberal criminal law (from now on, “classical model”) remains, today, a strong candidate for the model of substantive criminal law that should be adopted by a liberal democracy.

This begs the question of what is meant by “liberal democracy.” There are no pretenses whatsoever, in this Article, to go into political theory in any sort of depth or sophistication; rather, the Article will only lay out as much as it is necessary (and sufficient) to develop and support the arguments advanced therein. Thus, the Article proposes a functional (and readily agreeable upon) definition of “liberal democracy”: a type of government that is seriously committed to the individual rights and liberties of its citizens (and whose criminal law is informed by those same values).<sup>29</sup>

Although the model analyzed and defended in this Article is thought to be adoptable by any “liberal democracy” (as defined above), the Article is meant primarily to illustrate first principles that could provide a sound and

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29. This definition is fairly simple and straightforward, and it can gather consensus from across the political spectrum. Put another way, what is proposed here is an *a contrario* interpretation of “liberal democracy,” where the term “liberal” is to be construed in reaction and opposition to repressive, abusive systems such as those experienced both in the (somewhat) distant past (the *ancien régime*, which sparked the Enlightenment revolution) and in the more recent past (authoritarian and totalitarian forms of government, such as Fascist Italy, Nazi Germany, and Soviet Russia). Although it is of course a matter of degree, this *negative* definition of “liberal democracy”—negative in the sense that it is crafted in opposition to these systems, which can be taken as a paradigm of what we *do not want* a liberal democracy to look like—allows the (pro)positive definition that I have advanced. It is within these confines—and no further—that the term “liberal” shall be construed throughout the article. After all, “liberal” is how the school whose work will be analyzed in this article defined itself, at a time when “liberal” meant far less than the more politically charged term means today. On the evolving (and expanding) meaning of the term “liberal,” see, e.g., Gerald Gaus and Shane D. Courtland, “Liberalism,” *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., Spring 2011), available at <http://plato.stanford.edu/archives/spr2011/entries/liberalism>. As a matter of methodology, constructing concepts *a contrario* from examples of what we empirically know does not work or we do not want (e.g., Nazism, Stalinism, etc.) is a very useful and fruitful technique. After all, we do not live in a vacuum—we have thousands of years of recorded history to look at. Moreover, while it may be harder for reasonable people to agree on *positive* criteria or “the good,” I think it will be far easier to agree on *negative*, limiting criteria, or “the bad.” For this general approach, see, e.g., ALAN M. DERSHOWITZ, *RIGHTS FROM WRONGS: A SECULAR THEORY OF THE ORIGIN OF RIGHTS* (2004), and *THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN LAW* (2000).

much needed general normative framework to U.S. criminal law. Thus, the part of this Article that deals with issues of enforcement of the normative principles presented herein advances a solution—judicial review, particularly by the Supreme Court—that is designed to satisfy the structure and needs of the American legal system. Constitutionalization of substantive criminal law is long overdue, and the proposal set forth in this Article offers a plausible way to achieve it.

The Article will develop as follows. Part I will illustrate at length the classical model of criminal law. Part II will indicate (historical) reasons why the classical model and the principles on which it is built are worth protecting. The claim that the classical model offers a compelling normative theory suited for a liberal democracy will be advanced. Part III will discuss both practical and theoretical issues that adoption of the classical model will encounter today. Section A will analyze the issue of the enforcement of the model, setting forth a plausible theory for the constitutionalization of substantive criminal law grounded in existing constitutional doctrine. Section B will discuss whether the classical model, developed around the mid-1800s, is suitable to face the challenges that our legal system encounters today. The conclusion will tie up the Article, defending the proposition that the core principles of the classical model offer a strong normative theory of substantive criminal law suitable for a liberal democracy.

## **I. FROM THE ANCIEN RÉGIME TO THE CLASSICAL MODEL OF LIBERAL CRIMINAL LAW: FRANCESCO CARRARA AND THE CLASSICAL SCHOOL**

Every story must start somewhere. A good place for this story to start is Cesare Beccaria and the publication, in 1764, of his masterpiece, *On Crimes and Punishments*.<sup>30</sup> *On Crimes and Punishments* constitutes a momentous “watershed”<sup>31</sup> in the history of criminal law, as well as the foundation of modern penology.<sup>32</sup> Before Beccaria’s “cri de coeur,”<sup>33</sup> the criminal law

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30. CESARE BECCARIA, *DEI DELITTI E DELLE PENE* (Milano, 1764). The edition referred to throughout this article is CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* (Aaron Thomas ed., Aaron Thomas & Jeremy Parzen trans., 2008).

31. JOHN HOSTETTLER, *CESARE BECCARIA: THE GENIUS OF ON CRIMES AND PUNISHMENTS* ix (Waterside Press, 2010).

32. *See, e.g.*, Materni, *supra* note 9, at 271 (citations omitted).

33. *Id.*

was little more than the armed hand of the absolute will of the sovereign; its administration was characterized by utter arbitrariness, violence, brutality, torture, inefficiency, and injustice.<sup>34</sup> It is against this system that Beccaria stands up.

To the unbridled power of the sovereign exercised through the violent hand of the criminal law Beccaria imposes the constraints of rationality. From the rationales that justify the power of the state to impose criminal punishment Beccaria derives limitations to define and restrict the scope of an overreaching criminal law. Quoting Montesquieu, Beccaria claims that “every punishment that does not derive from absolute necessity is tyrannical.”<sup>35</sup> Beccaria believes that such necessity is to be found in “the necessity to defend the depository of the public welfare from individual usurpations.”<sup>36</sup> Embracing the Enlightenment theory of the social contract as the origin of society, Beccaria argues that, tired of living in the Hobbesian “state of nature” where liberty was always at risk on account of lack of security, people decided to come together and voluntarily give up a portion of their liberty so as to be able to enjoy in peace and security “the remainder of their liberty,” thus forming civil society.<sup>37</sup>

The sum of all those portions of liberty is what justifies the power of the sovereign, to whom those portions are surrendered precisely so that the sovereign will guarantee the effective enjoyment of the remaining portions of liberty to each and every citizen.<sup>38</sup> Since this surrender is not voluntary, but rather it is the product of necessity, every individual must be taken to have surrendered “only the least possible portion” of his or her liberty.<sup>39</sup> As this “core of liberties” also constitutes the foundation of the right to punish, it follows that every punishment that goes beyond what is necessary

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34. When the essay was published, gallows, torture, branding, mutilation, and the wheel were common forms of punishment; the death penalty was implemented even for the most trivial of crimes, such as, for example, stealing a handkerchief. *See, e.g.,* Materni, *supra* note 9, at 271. For an exemplary description of the situation, *see, e.g.,* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF PRISON* 3–5 (Alan Sheridan trans., Pantheon Books, 1977) (1975); JOHN HOSTETTLER, *A HISTORY OF CRIMINAL JUSTICE IN ENGLAND AND WALES* (2009).

35. BECCARIA, *supra* note 30, at 11.

36. *Id.*

37. *Id.* at 10.

38. *Id.*

39. *Id.* at 12.

to preserve the freedom of individuals within society “is abuse, not justice; it is a matter of fact, not of right.”<sup>40</sup>

Beccaria thus lays out the essence of the utilitarian approach to punishment: “men are born free and therefore they will give up ‘only the least possible portion’ of their liberty; deprivation of this liberty through punishment cannot be justified with transcendent ends, but only by the utility to society.”<sup>41</sup> For Beccaria, utility to society is to be found in “the greatest happiness *shared among* the greatest number.”<sup>42</sup> Combining the common good with the respect of the citizen’s originary freedom,<sup>43</sup> it follows that penalties must be mild but certain, and that the purpose of punishment needs to be forward-looking, aiming at deterring citizens from committing “fresh harm” (and not trying the impossible task of “undoing a harm that is already done”).<sup>44</sup>

Beccaria’s work deeply influenced several proponents of criminal law reform, including, most notably, Jeremy Bentham,<sup>45</sup> John Adams, and Thomas Jefferson.<sup>46</sup> Perhaps even more importantly, Beccaria’s work led directly to substantial criminal law reform throughout Europe.<sup>47</sup> As Francesco Carrara masterfully put it, Cesare Beccaria, “immortal captain” of the

40. *Id.*

41. Materni, *supra* note 9, at 270 (citations omitted).

42. HOSTETTLER, *supra* note 31, at 28 (emphasis added). Richard Bellamy, referenced in Hostettler, *cit.*, observes that this, and not “the greatest happiness of the greatest number,” was Beccaria’s actual view. See RICHARD BELLAMY ED., *BECCARIA: ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS*, xviii–xix (Cambridge University Press, 1995).

43. See, e.g., Materni, *supra* note 9, at 270.

44. BECCARIA, *supra* note 30, at 26.

45. See A.P. d’Entrèves, Introduction to ALESSANDRO MANZONI’S *THE COLUMN OF INFAMY: PREFACED BY CESARE BECCARIA’S ON CRIMES AND PUNISHMENTS* xi (Oxford University Press, 1964), quoted in HOSTETTLER, *supra* note 31, at 28.

46. See, e.g., David H. Flaherty, *The Enlightenment and the Reform of American Criminal Law*, in LUIGI BERLINGUER & FLORIANA COLAO EDS., *ILLUMINISMO E DOTTRINE PENALI* 508–509 (1990).

47. For example, *On Crimes and Punishments* inspired the drafting of the French penal code, adopted in 1791, and Empress Catherine II of Russia gave instructions to draft a new code pursuant to Beccaria’s teachings. See, e.g., FRED A. ADLER, GERHARD O.W. MUELLER & WILLIAM S. LAUFER, *CRIMINOLOGY* 57 (2010). Moreover, Frederick the Great abolished torture; Maria Theresa of Hapsburg outlawed witchburning and torture; and Leopold II, Duke of Tuscany, abolished the death penalty altogether in 1786—the first state in the Western world to do so. See, e.g., Materni, *supra* note 9, at 271 and references therein. For more details on Beccaria’s influence on modern criminal law, see, e.g., NICOLAS CATELAN, *L’INFLUENCE DE CESARE BECCARIA SUR LA MATIÈRE PÉNALE MODERNE* (PUAM, 2004).

group that rebelled “against the dreadful edifice of the old criminal law . . . threw his book into Europe, and the little rock that rolled down the mountain to hit the foot of the dreadful giant, shattered it to pieces.”<sup>48</sup> Indeed, it was Francesco Carrara, the recognized leader of the Classical School of criminal law who, perhaps more than anyone else, embraced and developed the theories of Beccaria.

Born in the town of Lucca in 1805, Carrara earned his law degree and doctorate at the then University of Lucca, where he taught criminal law and commercial law until 1859. He was then awarded the Chair in Criminal Law at the University of Pisa.<sup>49</sup> Carrara also practiced as a criminal defense attorney for over forty years.<sup>50</sup> Elected to the Parliament in post-unification Italy, Carrara strongly influenced the drafting of the Italian penal code of 1889, known as the “Zanardelli code” after the name of the then–Minister of Grace and Justice, Giuseppe Zanardelli. One of the most influential liberal jurists throughout nineteenth-century Europe and beyond,<sup>51</sup> it is mostly through his work that the classical model was developed into a coherent system of criminal law.

#### A. Carrara’s General Principles of Criminal Law

To begin with, Carrara aims to ground his model on solid first principles, which he sees as the only way to prevent the degeneration of the criminal law into an instrument of violent oppression and control. Carrara sustains his argument by pointing to the history of the criminal law. “The fundamental principles of criminal law—Carrara maintains—have been for forty centuries tampered with” by three different principles: private vengeance (the “individual principle”), divine vengeance (the “superstition principle”), and sovereign autocracy (the “despotic principle”).<sup>52</sup> The “tearful aberrations” that have afflicted the criminal law throughout history all derive from the

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48. FRANCESCO CARRARA, I OPUSCOLI DI DIRITTO CRIMINALE 197 (Lucca, 1870).

49. For these biographical notations, see Aldo Mazzacane, *Carrara, Francesco* in MICHAEL STOLLEIS ED., JURISTEN: EIN BIOGRAPHISCHES LEXIKON; VON DER ANTIKE BIS ZUM 20. JAHRHUNDERT 120 (München, 2001).

50. See, e.g., FRANCESCO CARRARA, IV OPUSCOLI DI DIRITTO CRIMINALE 302 (Lucca, 1870).

51. See, e.g., PAOLO PITTARO ED., SCUOLA CLASSICA E CODICI PENALI LATINO-AMERICANI. FRAMMENTI DI UNA RICERCA (EUT, 2008), illustrating the influence of Carrara and the Classical School on the drafting of penal codes throughout Latin America.

52. CARRARA, I OPUSCOLI, *supra* note 48, at 174.

alternation of one or more of those principles, each of which is “equally wrong” and “subversive of human liberty.”<sup>53</sup>

The individual principle, Carrara argues, encourages feelings of revenge, rendering people wilder and hostile toward one another; it perverts the moral sense, legitimizing hatred; it weakens the preventive function of the criminal law, because the strong can hope to escape punishment after attacking the weak, and might makes right.<sup>54</sup>

The superstition principle causes any offense to be seen as an offense against God: “[C]riminal trials become religious ceremonies; imaginary crimes are punished such as witchcraft, divination, and spells; and there are no limits to the cruelty in punishing someone who, without causing harm to anyone, has nevertheless sinned.”<sup>55</sup>

Finally, the despotic principle is flawed because it assumes that people can, at their whim, make and unmake justice.<sup>56</sup> Under the despotic principle, the sovereign can turn justice into an instrument of oppression and violate rights under the pretense of protecting them. Then, even the slightest disrespect to the sovereign is punished by death; words and thoughts are the subject of persecution, and persecuted “beyond the grave” are also the enemies of the throne, so that the sins of the fathers fall upon the children.<sup>57</sup> Anything the sovereign wills becomes law, for the mere fact that the sovereign wills it so.<sup>58</sup> Punishments have no other measure but the whim or the fear of the sovereign, and “the need to consolidate in blood a scepter used to plague the nation. The scaffold becomes the pillar upon which the throne rests.”<sup>59</sup>

The only way to avoid these degenerations—these “tearful aberrations”—is to anchor the criminal law to solid first principles. The first who tried to do so was Beccaria—his principles “echoed throughout Europe,” sparking a radical revolution.<sup>60</sup> Those principles would “strike at the foundations of the old edifice of inquisition and torment, of privileged evidence, exorbitant tortures, aberrant punishments, and whatever else, obtuse or

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53. *Id.*

54. *Id.* at 175–76.

55. *Id.* at 178–79.

56. *Id.* at 179.

57. *Id.* at 180–81.

58. *Id.*

59. *Id.*

60. See *supra*, notes 46–47 and accompanying text.

cruel, constituted the paraphernalia of the public prosecution,”<sup>61</sup> and they would ultimately “overthrow a system of criminal procedure founded upon the unfair principle of suspicion, and a system of criminal law founded upon the draconian principle of intimidation.”<sup>62</sup> Once it was acknowledged that criminal law’s only legitimate goal was the protection of rights, in fact, the criminal law “ceased to be the instrument of private revenge, of the needs of priests, of the fears of kings.”<sup>63</sup>

In line with the core teachings of the Enlightenment, Carrara believes—like Beccaria—that the criminal law has its foundation not in human laws, but rather in the “principles of rationality in the light of which the punishment of evildoers must be carried out.”<sup>64</sup> These, Carrara continues, are first principles; they “pre-exist the criminal law,” whose duty is to discover and apply them.<sup>65</sup>

These principles, according to Carrara, are to be found in natural law.<sup>66</sup> It is natural law, in fact, which provides the justification for the state’s power to punish: natural law endowed men with certain rights; therefore, it must necessarily also have intended for those rights to be protected. The only way to effectively protect those rights was to “arm society with the coercive power of the criminal sanction.”<sup>67</sup> Criminal law, then, is justified by the need to protect everyone’s rights from breaches at the hand of others. In other words, the core justification for the criminal law is to be found in the “principle of the legal protection of rights.”<sup>68</sup>

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61. CARRARA, I OPUSCOLI, *supra* note 48, at 20.

62. *Id.*

63. *Id.* at 189.

64. *Id.* at 133.

65. *Id.*

66. Besides natural law, many references to God are found in Carrara’s writings. Indeed, “some . . . writings have suggested that Carrara’s legal theories were based on a Catholic natural law tradition that contained a rich historic and theological pedigree.” See CAVALIERE, *supra* note 23, at 7 (citations omitted). Irrespective of the (religious) natural law justifications that Carrara puts at the foundations of his system (and which today cannot be successfully defended by anyone: as John Hart Ely observed, “The advantage [of natural law] is that you can invoke [it] to support anything you want. The disadvantage is that everyone understands that.” See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 50 (Harvard University Press, 1980)), there is still a lot to be said in favor of Carrara’s model, which can be sustained even without resorting to natural law, but rather as a matter of *political choice*.

67. CARRARA, I OPUSCOLI, *supra* note 48, at 139.

68. See, e.g., FRANCESCO CARRARA, *CARDINI DELLA SCUOLA PENALE ITALIANA* 4 (Lucca, 1875).

The principle of legal protection finds its “empirical basis” in the observation of free people exercising their freedom, which cannot be limited unless it breaches the freedom of others.<sup>69</sup> In this perspective, the criminal law is necessary so that everyone can enjoy their freedom without fearing aggression to their rights; thus, the criminal law is the protector, not the restrictor, of human freedom.<sup>70</sup> Moreover, “crime” must be intended as a legal (as opposed to moral or metaphysical) entity; only external conduct that empirically “threatens or offends” someone else’s rights can be qualified as “criminal.”<sup>71</sup>

Pursuant to the principle of the legal protection, the punishment of offenders becomes a simple consequential matter. It is, indeed, a matter of logical necessity because, without punishment for offenders, the legal prohibition established to safeguard a given right would have no meaning.<sup>72</sup> The argument goes as follows. Once it has been established that the essence of a crime is the violation of someone’s right, punishing crime is legitimate for two reasons. First, logic teaches us that any right, as a right, must have within it the faculty to defend itself—“Otherwise it would be not a right, but a joke.”<sup>73</sup> Any prohibition would be established in vain if its violation didn’t have, as a consequence, the imposition of punishment.<sup>74</sup> Second, the threat of punishment, also established to protect the right, aims at deterring violations of the right. Thus, criminal punishment is but the emanation of the right—which is why it also finds its limits within the right itself, and not in the arbitrary will of the judge or jury.<sup>75</sup>

The right being the reason and limit of punishment, it follows that punishment must be proportionate to the concrete harm (whether in the form of actual injury or endangerment) caused to the right in protection of which the prohibition was established. Thus the criminal law, violating the rights of offenders in consequence of their offense, *protects rights*, as long as punishment doesn’t go beyond what is needed for such protection: “Anything more is not protection, it is violation of the right; anything more is

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69. CARRARA, I OPUSCOLI, *supra* note 48, at 174.

70. *Id.* at 252–58.

71. FRANCESCO CARRARA, I PROGRAMMA DEL CORSO DI DIRITTO CRIMINALE, PARTE GENERALE 13 (Pisa, 1859).

72. CARRARA, I OPUSCOLI, *supra* note 48, at 278.

73. CARRARA, I PROGRAMMA, *supra* note 71, at 14

74. *Id.* at 14–15.

75. *Id.* at 15.



tyranny. Anything less is a betrayal of the mission of public authority.<sup>76</sup> Simply put, the punishment of offenders provides concrete substance to the law establishing the prohibition, by making the criminal sanction follow the violation of the prohibition.<sup>77</sup>

The principle of the legal protection thus defined has several important corollaries. A first corollary is that, if the foundational principle of the criminal law is the legal protection of rights, then when there is no violation of rights, there can be no intervention by the criminal law. Unless someone has violated a right, they cannot be touched by the criminal law, lest the criminal law itself be unjust.<sup>78</sup> The violation of the right is the reason and limit of the criminal law; any exercise of it beyond this limit is arbitrary and abusive.<sup>79</sup> A second corollary is that, since a right cannot be violated except by external conduct in the empirical world, the principle of the legal protection forbids the prohibition and punishment of what does not occur in the empirical world—thoughts, wishes, and the like—and that, therefore, does not violate anyone’s rights. In Carrara’s words, “The government cannot punish vices and sins that, however severe they may be in the eyes of God, caused no harm to others.”<sup>80</sup>

It is worth mentioning, briefly, that the principle of the legal protection has implications also for criminal procedure. The principle, in fact, is meant to safeguard individual rights against both other individuals *and* the government. The defendant, whether innocent or guilty, does not lose his rights in front of the sovereign—including the right not to be punished beyond what’s fair.<sup>81</sup> The science of the criminal law—Carrara argues—proceeds to offer this protection through two different and complementary branches: substantive criminal law and procedural criminal law.<sup>82</sup> Both branches aim to protect rights against abuses by the government, but they focus on different aspects. Substantive criminal law, establishing crimes and punishments at the general level, starts from the assumption of having to deal with a guilty offender, and protects him from abuse by fixing the amount of his responsibility (= no more punishment than what is fair in

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76. *Id.* at 16–18.

77. CARRARA, I OPUSCOLI, *supra* note 48, at 279.

78. *Id.* at 200.

79. *Id.* at 291; *see also id.* at 273.

80. *Id.* at 274–76.

81. CARRARA, V OPUSCOLI DI DIRITTO CRIMINALE 12 (Lucca, 1870).

82. *Id.*

proportion to what harm the offender has caused). Procedural criminal law, on the other hand, assumes the opposite—that the defendant is innocent. Therefore, while substantive criminal law is mainly aimed at protecting the rights of the guilty, procedural criminal law is mainly aimed at protecting the rights of the innocent.<sup>83</sup>

Carrara thus clearly identifies the tension that is inherent in criminal trials, and that we still experience today: in a criminal proceeding, investigations are conducted and charges are brought against someone who is suspected of having committed the crime. However, contrary to this suspicion, the defendant has, on his side, the presumption of innocence. Thus, procedural criminal law protects the defendant against abuses and errors by the public prosecution by presuming his innocence until his guilt has been proven according to the procedures and forms prescribed by law.<sup>84</sup>

It is on the basis of these normative principles that Carrara builds his model of criminal law, which is illustrated in the next section.

## B. The Classical Model of Liberal Criminal Law

A first, overarching principle on which Carrara's classical model is built is the principle of the *extrema ratio*. This principle establishes that the criminal law should be the *option of the last resort*—that the government is legitimized to use the criminal sanction only as a matter of *necessity*. The idea sees its first formulation in Beccaria who, advancing a contractual theory of the power of government, writes that, given the state of nature, the surrender of individual freedom to the state is not a matter of choice, but rather it is a matter of *necessity*.<sup>85</sup> Citizens trade *some* of their liberty in exchange for security;<sup>86</sup> since this trade-off is the product of the necessity, however, the freedom that is surrendered is “only the least possible portion.”<sup>87</sup>

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83. *Id.* at 13.

84. *Id.* at 16–17. In Carrara's passionate words: “[T]his presumption of innocence is taken up by the criminal science, which makes this presumption its flag and opposes it to the public prosecutor, in order not to stop him from carrying out his duties, but rather to restrict his conduct by imposing upon it a series of precepts that can slow down arbitrariness, that can be an obstacle against errors and, as a consequence, a protection to the defendant.”

85. See *supra*, notes 35–41 and accompanying text.

86. *Id.*

87. See BECCARIA, *supra* note 30, at 12–13.

Carrara welcomes the principle, which he sees as a safeguard against government overreach,<sup>88</sup> and argues that “the growing civilization of a people, and their expanded freedom, should be powerful reasons to gradually diminish the number of actions that constitute *crimes*.”<sup>89</sup> According to Carrara, the principle of the *extrema ratio*—a principle of civilization—means that criminal punishment is justified only for those actions that violate or tend to violate other people’s rights, when there is no other way to protect those rights, and punishment does not cause more harm than leaving the conduct unpunished.<sup>90</sup>

Carrara believes the only conduct that can be made a crime is that which disturbs the external social order in such a way that order can only be restored by repression through the criminal law.<sup>91</sup> Moreover, “crime” must be constructed as a “legal entity.”<sup>92</sup> “By crime—Carrara writes—we mean: *the violation of a law of the state that was enacted to protect the security of citizens, violation which is the result of an external harmful act of the agent, positive or negative, and for which the agent is morally reprehensible.*”<sup>93</sup> Carrara’s unpacking of this seemingly simple statement illustrates several core tenets of the model.

- I. “***Violation of the law of the State that was enacted to protect the security of citizens***”: This establishes the principle of legality in criminal law. “No one—Carrara argues—can be said to intend to violate a law which doesn’t exist or which he doesn’t know. Therefore, conduct cannot be criminal if there isn’t a law which prohibits it.”<sup>94</sup> The law, of course, needs to be *enacted*: “Moral law is shown to men by conscience. Religious law is revealed by God. For civil law to be mandatory, it must be promulgated. To demand that citizens conform to a law they do not know would be absurd.”<sup>95</sup>

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88. See, e.g., CARRARA, I PROGRAMMA, *supra* note 71, at 57–58.

89. *Id.* at 57 (emphasis in original).

90. *Id.* at 58 (internal citations omitted).

91. *Id.* at 56.

92. See *supra*, note 71 and accompanying text.

93. CARRARA, I PROGRAMMA, *supra* note 48, at 71 (emphasis added).

94. *Id.* at 60. “The *general* idea of a crime—Carrara argues—is that of a violation of the law: because no man can be blamed for a conduct forbidden by no law. An act becomes a crime only insofar as it goes against the law. An act can be harmful, evil and dangerous, but if it is not prohibited by law, it cannot be reproached as a crime against he who committed it.” *Id.* at 63.

95. *Id.* at 64.

2. “**External, harmful act**”: This establishes the harm principle and the externality principle, which are closely interrelated. The purpose of the criminal law is the legal protection of rights; since “the rights of men cannot be offended with an internal act,”<sup>96</sup> the government “has no right to prosecute internal acts.”<sup>97</sup> “The government’s duty—Carrara explains—is to protect order on earth; the protection of internal order is the province of God.”<sup>98</sup> This is because—as we have seen *supra*—the criminal law is established to protect certain rights from harm at the hand of a third party.<sup>99</sup> Rights, however, can only be harmed by means of external conduct; thus “ideas and wishes cannot be regulated, and thoughts cannot be declared crimes but through abuse . . . because men cannot be made to answer for acts that *do not cause any harm*.”<sup>100</sup> Harm can occur either as actual infringement of the right or as endangerment of the right.<sup>101</sup> Moreover, harm can be *immediate and direct* or *mediated and reflected*; the first is suffered by the victim of the crime, whereas the second is suffered by society at large as a consequence of a crime being committed.<sup>102</sup> The corollary of the principle that the government cannot punish thoughts is that “we take away from the criminal law the series of moments that compose the internal act—thought, wish, project, intention, until the execution begins.”<sup>103</sup>
3. “**Positive or negative**”: Very pragmatically,<sup>104</sup> Carrara acknowledges that “to protect rights it may be necessary to forbid some conduct and to impose, under certain circumstances, some type of conduct . . . therefore both actions and omissions can constitute a crime.”<sup>105</sup>

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96. *Id.* at 67.

97. *Id.*

98. *Id.*

99. See *supra*, notes 79–81 and accompanying text.

100. CARRARA, I PROGRAMMA, *supra* note 48, at 71 (emphasis added).

101. *Id.* at 120–26. Carrara goes into a lot more detail illustrating the several degrees and variations that can qualify both injury and endangerment; for our purposes, however, the more concise illustration presented here shall suffice.

102. *Id.* at 128.

103. *Id.*

104. Which is not the approach that several scholars have taken in recent years with regard to the (supposedly problematic) action-omission distinction. See, e.g., MICHAEL MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR THE CRIMINAL LAW 277 (1993), finding criminal responsibility for omissions problematic because omissions are “literally nothing at all” and thus “they do not *cause* anything” (emphasis in original).

105. CARRARA, I PROGRAMMA, *supra* note 71, at 68.

4. “*Morally reprehensible*”: This establishes the culpability principle. According to Carrara, moral responsibility is “the indispensable prerequisite of political responsibility.”<sup>106</sup> Thus, no one can be held politically responsible for an act for which he is not morally responsible.<sup>107</sup> There are four basic elements that found such moral responsibility. Those are (1) knowledge of the law (in the general sense that what one is doing goes against the law); (2) prevision of the consequences of one’s conduct; (3) freedom to choose whether to act or not; and (4) intention to act.<sup>108</sup> Thus, an agent can be reprimanded for his conduct provided that such conduct was conscious and voluntary.<sup>109</sup> The voluntariness requirement itself can take either of two forms. The action will be *intentional* if the agent foresees and intends the consequences of his action (the *degree* of intent will be *purpose* or *knowledge*).<sup>110</sup> If, however, the agent fails to foresee consequences that he *should have been able to foresee*, his conduct will be *negligent*, with negligence defined as “the failure to foresee the possible and probable consequences of one’s actions.”<sup>111</sup> Depending on the degree of foreseeability, the degree of negligence also will vary;<sup>112</sup> thus, “the essence of negligence is foreseeability.”<sup>113</sup> If a harmful event occurs which was unforeseeable, it is to be considered akin to chance, and the agent cannot be held responsible for it.<sup>114</sup>

Reading these tenets alongside the general principles that, according to Carrara, should inform a liberal substantive criminal law<sup>115</sup> leads to the six substantive principles upon which the classical model is founded. These principles were thought by their developers to be not only political, but also moral and natural principles aimed at limiting an otherwise absolute power

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106. *Id.* at 69. In this context, “political responsibility” means responsibility in front of the State and the community.

107. *Id.*

108. *Id.* at 96.

109. *Id.* at 96–98.

110. *Id.* at 99–110. Once again, Carrara goes into a lot more detail illustrating the several degrees and variations that can qualify intent in a given course of action; for our purposes, however, the more concise illustration presented here shall suffice.

111. *Id.* at 111.

112. *Id.* at 117–18.

113. *Id.* at 113–14.

114. *Id.* at 115. It is what in Anglo-American law is referred to as an “act of God.”

115. See *supra*, notes 68–78 and accompanying text.

of the government through the criminal law.<sup>116</sup> They are hereby ordered so that every principle is implied by the preceding principle and, in turn, implies the principle that follows it:

- Consequentiality principle → no punishment without a crime being committed (*nulla poena sine crimine*)
- Strict legality principle → no crime without a law that establishes it (*nullum crimen sine lege*)
- Necessity principle → no criminal law without necessity (*nulla lex poenalis sine necessitate*)
- Harm principle → no necessity without harm (*nulla necessitate sine iniuria*)
- Externality principle → no harm without external conduct (*nulla iniuria sine actione*)
- Culpability principle → no (imputable) conduct without culpability (*nulla actio sine culpa*).<sup>117</sup>

These principles provide a *compelling normative framework* for a minimalist criminal law. The framework is compelling not only in terms of logic, but also, as it will be argued in Part II *infra*, as a matter of *political choice*. These principles recognize that protection of given interests by means of the criminal law comes at a very high cost; thus, the criminal law ought to represent the option of the last resort. Any society that sincerely values individual freedom (and American society does, by all means, value such freedom) should give serious consideration to the proposal of adopting these principles as the foundations upon which to develop its substantive criminal law.

Alongside these substantive principles, the classical model requires, for its full implementation, the following, complementary principles of criminal procedure:

- Jurisdiction principle → no criminal responsibility if it is not ascertained by means of a criminal trial (*nulla culpa sine iudicio*)
- Adversarial system principle → no criminal trial without separation between prosecution and judge (*nullum iudicium sine accusatione*)
- Burden of proof principle → no criminal charges without their proof (*nulla accusatio sine probatione*)

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116. See, e.g., LUIGI FERRAJOLI, DIRITTO E RAGIONE: TEORIA DEL GARANTISMO PENALE 69 (Laterza, 1997)

117. For this catalogue, see *id.* at 69–70. On the same principles, see also HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 72–73 (1968).

- Right to defense and cross-examination principle → no proof without the right to defend against the charges (*nulla probatio sine defensione*).<sup>118</sup>

Thus, a full implementation of the classical model of liberal criminal law requires, on the procedural side, what is now commonly known as the adversarial system.

## II. WHY THE CLASSICAL MODEL IS WORTHY OF PROTECTION: A LESSON FROM HISTORY

The Classical School was not the only school of criminal law at the time—a new, rival school was soon to emerge.

Cesare Lombroso's publication of *L'Uomo Delinquente* (*The Criminal Man*) in 1876 is considered to be the origin of the Positive School of Criminology.<sup>119</sup> At the core of *The Criminal Man* was the idea that criminals were a lower class of human beings identifiable through a series of anthropological characteristics; those who possessed the relevant characteristics were “born criminals” and thus bound to offend.<sup>120</sup> This idea led Lombroso to believe that criminal activity was foreseeable and thus that the criminal law, rather than punishing crime, should focus on preventing it.<sup>121</sup>

Lombroso saw two elements to crime prevention. The first element would require studying and addressing the broad, general causes of certain crimes; the second element consisted in a narrow focus on the individual criminal (or class of criminals).<sup>122</sup> Observing with Cicero that *a natura hominis discenda est natura iuris*,<sup>123</sup> Lombroso concluded that some criminals “ought never to be liberated.”<sup>124</sup> He believed that “the preventive

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118. FERRAJOLI, *supra* note 116, at 69.

119. *See, e.g.*, ADLER, MUELLER & LAUFER, *supra* note 47, at 24.

120. *See, e.g.*, CESARE LOMBROSO, *L'UOMO DELINQUENTE* (Torino, 1876).

121. CESARE LOMBROSO, *CRIME, ITS CAUSES, AND REMEDIES* 245 (Henry P. Horton trans., Little-Brown & Co., 1911). The following paragraph is taken from Materni, *supra* note 9, at 295–96.

122. *See* Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Crime*, 123 U. PA. L. REV. 297, at 308–309 (1974–1975).

123. LOMBROSO, *supra* note 121, at 386 (“the nature of law is to be learned from the nature of man”).

124. *Id.* at 423. *See also* Dershowitz, *Indeterminate Confinement*, *supra* note 122, at 309.

imprisonment of the . . . criminal [is analogous] to the confinement of the insane";<sup>125</sup> what justifies both is "society's right to defend itself."<sup>126</sup> Lombroso argued that only one rationale justifies the criminal law: "It is just because the principle of punishment is based upon the necessity of defense that it is really not open to objection."<sup>127</sup> The Positive School thus advanced a new rationale for the criminal law: not the principle of the legal protection of rights, but rather the principle of *social defense*, is what justifies the criminal law.<sup>128</sup>

The principle of social defense was embraced and developed by Lombroso's disciples, most notably Enrico Ferri. A brilliant jurist, lawyer, and member of the Italian parliament, Ferri advanced the work of the Positive School, arguing that "[e]very crime, from the smallest to the most atrocious, is the result of the interaction of these three causes, the anthropological condition of the criminal, the telluric environment in which he is living, and the social environment in which he is born, living and operating."<sup>129</sup> Rejecting ideas of free will and moral guilt,<sup>130</sup> Ferri believed that "scientific truth [will] transform penal justice into a simple function of preserving society from the disease of crime,"<sup>131</sup> since science could prove that crime is committed not because of free will, but rather because of a variety of deterministic factors.<sup>132</sup> Rules of criminal procedure, "which are intended . . . for the defense of society against criminals,"<sup>133</sup> need to be revised in light of this goal. Ferri acknowledges that "[the code] of penal

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125. Dershowitz, *Indeterminate Confinement*, *supra* note 122, at 309.

126. *Id.* and references therein.

127. *Id.* at 381.

128. Because of this perspective, Lombroso rejected other traditionally recognized purposes of criminal punishment. "Crime and insanity—Lombroso writes—are both misfortunes; let us treat them, then, without rancor, but defend ourselves from their blows." See LOMBROSO, *supra* note 121, at 421. Utility to society is key to the Lombrosian theory: "formerly, punishment, which was made to correspond to the crime and like it had an atavistic origin, did not attempt to conceal the fact that it was either an equivalent or an act of vengeance"; those, however, were "the theories of . . . Kant . . . and Hegel, [nothing more than] the ancient ideas of vengeance and the *lex talionis* disguised in modern dress." See *id.* at 381–83.

129. ENRICO FERRI, *THE POSITIVE SCHOOL OF CRIMINOLOGY* 59 (Ernest Untermann trans., Chicago 1913).

130. *Id.* at 15–22.

131. *Id.* at 22.

132. See, e.g., ENRICO FERRI, *CRIMINAL SOCIOLOGY* 52–59 (W.D.M. trans., New York, 1909).

133. *Id.* at 145.



procedure is a code for honest people, who are placed on their trial but not yet found guilty”;<sup>134</sup> nevertheless he finds it “necessary to restore the equilibrium between individual and social rights.”<sup>135</sup>

It would appear that, according to Ferri, in order to achieve this equilibrium it is necessary to basically do away with the adversarial system.<sup>136</sup> The defendant’s rights and procedural guarantees ought to receive “equal recognition” to society’s right to try him; therefore “[t]he presumption of innocence, and [the] general rule *in dubio pro reo* [although] obligatory during the progress of the trial . . . should cease [when] proof to the contrary is evident.”<sup>137</sup> Once the “connection of the accused and the crime is . . . established . . . there is no place for [the] grotesque . . . contests between the prosecution and the defence”;<sup>138</sup> the only issue over which prosecution and defense can debate is over the class of criminal to which the defendant belongs.<sup>139</sup> Likewise, not only should the defendant have the right to appeal a guilty sentence, but also, the prosecutor should have the right to appeal a sentence of acquittal. The appellate court should be able to correct the lower court by imposing not only a lower sentence but also, when appropriate, a higher one.<sup>140</sup> All these measures will ensure that there will be “no more of those combats of craft, manipulations, declamations, and legal devices [that constitute] the succession of guarantees for the individual against society”<sup>141</sup>—the guarantees developed and defended by the Classical School.

Another major exponent of the Positive School, Raffaele Garofalo, went even further than Ferri. Arguing that existing criminal law and procedure “seem to exist for the purpose of protecting the criminal against society rather than society against the criminal,”<sup>142</sup> Garofalo claimed that individual cases should be “decided by the requirements of social defense.”<sup>143</sup>

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134. *Id.* at 145–46.

135. *Id.* at 147.

136. *Id.* at 163–72.

137. *Id.* at 148.

138. *Id.* at 164.

139. *Id.*

140. *Id.* at 150–52.

141. *Id.* at 164–65.

142. RAFFAELE GAROFALO, *CRIMINOLOGY* 338 (Robert Wynes Millar trans., Boston, 1914).

143. *Id.* at 368.

According to Garofalo, the publicity of every stage of the trial, including investigations, and the right to counsel at every step of the process, including the first interrogation of the accused, are “dangerous” since “in the greater number of cases, strict secrecy is required for the ascertainment of truth.”<sup>144</sup> With respect to the “empty and absurd principle of the presumption of innocence,”<sup>145</sup> Garofalo asserted that “often times . . . the sentence is pronounced in advance by the court of public opinion”;<sup>146</sup> public opinion in fact “demands that the [offender], when there is *reasonable probability* of his guilt, shall be immediately separated from society . . . without waiting for the fact of his guilt to be legally determined.”<sup>147</sup> The calculation is simple: if the reason for the criminal law is the principle of social defense, then everything that stands in the way needs to be eliminated.

As one can imagine, the Classical School didn’t hesitate to fight back. Luigi Lucchini, an exponent of the Classical School, in a pungent, sarcastic essay entitled *The Oversimplifiers (Anthropologists, Psychologists, Sociologists) of the Criminal Law*,<sup>148</sup> rejected the principle of social defense, denouncing the Positive School for dismissing oral and public proceedings, the adversarial system, equal treatment of defense and prosecution, the presumption of innocence—all as “cabals” invented by the Classical School to protect offenders and miscreants, as “academic whims” directed toward “disarming the social defense.”<sup>149</sup> “Talking about the rights of the defendant”—Lucchini continues—“recognizing his right to counsel, allowing him to discuss the evidence are academic ingenuities [that are] at the very least laughable.”<sup>150</sup> The presumption of innocence is seen as absurd: “It must have been the invention of a sleek criminal disguised as legislator.”<sup>151</sup> In short, Lucchini argues, in the name of social defense the Positive School pushed for a “return to the Inquisition.”<sup>152</sup>

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144. *Id.* at 344.

145. Raffaele Garofalo, *La Detenzione Preventiva*, quoted in FEDERICO STELLA, GIUSTIZIA E MODERNITÀ: LA PROTEZIONE DELL’INNOCENTE E LA TUTELA DELLE VITTIME 72 (Milano, 2003)

146. *Id.*

147. GAROFALO, CRIMINOLOGY, *supra* note 142, at 233–34 (emphasis added).

148. LUIGI LUCCHINI, I SEMPLICISTI (ANTROPOLOGI, PSICOLOGI E SOCIOLOGI) DEL DIRITTO PENALE (Torino, 1888).

149. *Id.* at 245–47.

150. *Id.*

151. *Id.*

152. *Id.* at 247.

Francesco Carrara also positions himself firmly against the principle of social defense. Carrara argues that a system founded on social defense would be dangerous, as it would render citizens mere instruments in the hands of society, and use them to intimidate other citizens: “it makes one a martyr to persuade the others not to break the law.”<sup>153</sup> Moreover, Carrara continues, if individual rights are sacrificed to the common utility—if a person is stripped of their rights so that others may be intimidated—then it follows that, to reach these goals, it is not necessary that the defendant be guilty.<sup>154</sup> If a crime remains unpunished, that will be a social evil worse than any other, as it undermines the very essence of social defense: “If a homicide remains unpunished, that encourages ten, twenty more; and ten and twenty citizens will be sacrificed to the knife of those encouraged by the impunity of the first murder.”<sup>155</sup> “There is therefore a calculation that doesn’t fail”:<sup>156</sup> if the defendant is a despised citizen, if public opinion believes him to be guilty, let him be sacrificed even if there is no clear evidence of his guilt.<sup>157</sup> Even better: let him be sacrificed even knowing that he is innocent!<sup>158</sup> It is in fact better to sacrifice someone who is innocent but despised than to let “twenty honest and innocent citizens fall under the knife of a killer.”<sup>159</sup>

These are, according to Carrara, the “capital sins” of social defense.<sup>160</sup> This doesn’t mean that Carrara was against punishing offenders: “I praise and commend the noble efforts that are made to punish the guilty—Carrara writes—and I declare that civil governments forsake a sacred duty if they do not dedicate all of their efforts to that goal.”<sup>161</sup> However, Carrara continues, this is a “fault of omission,” whereas actively sending the innocent to prison is an “extremely severe fault of commission [and] the second fault is much worse than the first.”<sup>162</sup>

As for the criticism that the Positive School moved against the system developed by the Classical School, Carrara does acknowledge that, in the

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153. See, e.g., CARRARA, I OPUSCOLI, *supra* note 48, at 276.

154. *Id.*

155. *Id.* at 277.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. CARRARA, IV OPUSCOLI, *supra* note 50, at 304.

162. *Id.* at 305.

short run, all procedural rules, as well as all the substantive doctrinal elaborations in terms of, for example, limitations over the degree and type of crime, the quantity and quality of punishment, and so on and so forth, produce “concrete, immediate and sensible benefits” in favor of the guilty.<sup>163</sup> However, Carrara maintains, in the long run all progress in the field of criminal law and procedure is going to be advantageous to all humankind.<sup>164</sup>

This sentiment is brilliantly captured by H.L. Mencken’s quip, “The trouble about fighting for human freedom is that you have to spend so much of your life defending sons of bitches; for oppressive laws are always aimed at them originally, and oppression must be stopped in the beginning if it is to be stopped at all.”<sup>165</sup> And indeed all too often—Carrara concludes—those who fight for the rights of criminal defendants are accused of being friends and protectors of criminals.<sup>166</sup> This accusation, however, “is nothing but sophistry; it is false and slanderous.”<sup>167</sup> Arguing for the rights of criminal defendants, arguing for the government to follow prescribed procedural forms doesn’t aim to protect crimes nor criminals; rather, it is meant to safeguard honest men and women and to prevent persecution of the innocent.<sup>168</sup> Carrara’s heartfelt exhortation, written more than a century ago, rings true to this day:

Cease then the advocates of arbitrariness, cease the advocates of privileges for the prosecution; cease they from insinuating that are the enemies of good men and dangerous to civil society those who work for the sacred goal that the criminal law does not become the scourge of the innocent; and that in a city a handful of inquisitors do not become more dreadful to good men than are wrongdoers . . . A truly sad justice would be the one that, for the fear of letting one guilty person go, will deliver honest citizens to the mercy of men who are suspicious by nature; to the mercy of false informers and hostile prosecutions, without the sacred procedural forms to shield them against the poisonous arrows of slander, against the fanatical zeal of worried minds, against fatal errors.<sup>169</sup>

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163. CARRARA, V OPUSCOLI, *supra* note 81, at 15–17.

164. *Id.*

165. The quote is found in ALAN M. DERSHOWITZ, *THE BEST DEFENSE* 416 (1982).

166. CARRARA, V OPUSCOLI, *supra* note 81, at 20.

167. *Id.*

168. *Id.*

169. *Id.* at 21.

Rejecting accusations of laboring to protect criminals, Carrara defends the principles developed by the Classical School, and the procedural guarantees that accompany them, as a means to safeguard honest and innocent citizens against governmental overreach and abuse. The Classical School was able to secure a temporary victory in the debate—in 1889, just a year after Carrara’s death, Italy enacted its first liberal criminal code, the Zanardelli code, on whose drafting Carrara had been heavily influential, and which adopted the principles of the Classical School. The victory, however, was short-lived.

In 1922, the Fascist Party seized power and subsequently abolished the liberal Zanardelli code of 1889, substituting for it the authoritarian Rocco code of 1930 (effective July 1, 1931).<sup>170</sup> While the Rocco code did not reflect all of the Positive School’s teachings, rejecting in particular the latter’s denial of moral responsibility and free will,<sup>171</sup> the code did take the principle of social defense as the main task of the criminal law—thus, after the General Part, Title I of Book II (i.e., the beginning of the Special Part) reads, “Crimes against the Personality of the State.”<sup>172</sup> The new crimes established in the title, such as, among others, “publication of prohibited news, anti-national activity abroad, [and] seditious associations,”<sup>173</sup> aimed to protect “all the entirety of fundamental political interests represented by the State’s personality.”<sup>174</sup> Social defense is entrusted to the criminal law on account of the fact that “[t]he theory of government is reflected particularly in the penal law, because that is the most powerful legal means which the government has at its disposal to achieve its political objectives.”<sup>175</sup>

In line with the Positive School, Fascist jurists despised the legality principle and the presumption of innocence. Following a line of arguments reminiscent of that of the Positive School,<sup>176</sup> Fascist jurists argued that the

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170. See, e.g., *Regio decreto 19 ottobre 1930, n. 1938—Approvazione del testo definitivo del codice penale (con attuazione dal 1 luglio 1931)*.

171. See, e.g., Giulio Battaglini, *The Fascist Reform of the Penal Law in Italy*, 24 AM. INST. CRIM. L. & CRIMINOLOGY 278, 281–84 (1933–1934).

172. See, e.g., *Regio decreto 19 ottobre 1930, n. 1938—Approvazione del testo definitivo del codice penale (con attuazione dal 1 luglio 1931)*, Libro Secondo, Titolo Primo, *Dei delitti contro la personalità dello Stato* (artt. 241–313).

173. Battaglini, *supra* note 171, at 278.

174. *Id.*

175. *Id.*

176. See *supra*, notes 133–47 and accompanying text.

legality principle was incompatible with the totalitarian state and thus, “if a new fact . . . were to produce a crime *substantially but not formally* because there is no law establishing the crime . . . the totalitarian state will command its judges to punish, creating themselves the missing law.”<sup>177</sup> The judge will never be wrong in punishing offenders; in case of doubt, “the principle *in dubio pro republica* takes the place . . . of the old principle *in dubio pro reo*.”<sup>178</sup> Vincenzo Manzini, the chair of the commission that developed the Rocco code, would write in his *Institutes of Criminal Procedure* that “nothing more incongruous and paradoxical can be imagined than the presumption of innocence . . . if a presumption indeed needs be, that should be a presumption of guilt.”<sup>179</sup>

Similarly, in the Soviet Union the criminal law was tasked with social defense as well. It was the duty of the criminal law to protect “the Soviet order, socialist property, the character and rights of citizens and the entire social law and order”;<sup>180</sup> and offenders were punished to “reform and re-educate [them] in the spirit of honest attitude towards work [and] verbatim adherence to laws and respect of the rules of the socialist way of life.”<sup>181</sup>

With respect to the rights of the accused, procedure, and the rule of law, the “glorious accuser” Nikolai Krylenko would write that “VTsIK pardons and *punishes*, at its own discretion *without any limitation whatever*.”<sup>182</sup> According to Krylenko, courts were “at one and the same time both *the creator of the law . . . and a political weapon*.”<sup>183</sup> Krylenko then goes on to argue that criminal courts don’t have to “act exclusively on the basis of existing written norms.”<sup>184</sup> The old idea of guilt is dismissed as *bourgeoise*;

177. Giuseppe Maggiore, *Delitto Penale Totalitario nello Stato Totalitario*, RIV. ITALIANA DI DIRITTO PENALE, XI 140 (1939), quoted in STELLA, *supra* note 145, at 69.

178. *Id.* at 70.

179. VINCENZO MANZINI, ISTITUZIONI DI DIRITTO PROCESSUALE PENALE 54 (Padova, 1941).

180. Jaan Sootak, *Theories of Punishment and Reform of Criminal Law*, 68 JURIDICA INTERNATIONAL 72 (2000).

181. *Id.*

182. NIKOLAY KRYLENKO, ZA PYAT LET (1918–1922). Prosecution speeches in the most important trials held before the Moscow and the Supreme Revolutionary Tribunals, quoted in ALEKSANDR SOLZHENITSYN, THE GULAG ARCHIPELAGO 1918–1956: AN EXPERIMENT IN LITERARY INVESTIGATION I–II, 307 (Thomas P. Whitney trans., Harper Row, 1973).

183. *Id.* at 307–308 (emphasis in original).

184. *Id.* at 308.

in its place, the only criterion to evaluate a defendant is that of “*class expediency*.”<sup>185</sup> “In our revolutionary court—Krylenko continues—we are guided not by articles of the law and not by the degree of extenuating circumstances; in the tribunal we must proceed on the basis of considerations of expediency.”<sup>186</sup> From which follows the dreadful conclusion: if “this expediency should require that the avenging sword should fall on the head of the defendants, then no . . . arguments can help.”<sup>187</sup>

The United States today does not run the risk of becoming anything like Fascist Italy or Soviet Russia. The United States does have, however, an oversized and overreaching criminal law devoid of any strong normative foundations.<sup>188</sup> And when new problems arise—and people get scared—the first instinct is to run to the criminal law for help,<sup>189</sup> with the corresponding contraction of civil liberties.<sup>190</sup> It is suggested here that, at least in light of recent<sup>191</sup> history, the fact that authoritarian and totalitarian systems of government (systems in opposition to which the definition of “liberal democracy” proposed in this Article is construed)<sup>192</sup> openly rejected Carrara’s principles and adopted models of criminal law and procedure that were diametrically opposed to the one advanced by the Classical School should score at least an intuitive point for the latter. There is a desperate need for a normative theory of substantive criminal law,<sup>193</sup> and Carrara’s model offers one that seems to be in line with the principles that, in light of history and experience, a liberal democracy should prefer: a minimalist substantive criminal law and a criminal procedure that are seriously committed to protecting the individual rights and liberties of *all* individuals.

The next section of the Article will be dedicated to a brief discussion of some of the issues that confront Carrara’s model today.

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185. *Id.* (emphasis in original).

186. *Id.* at 309 (citations omitted).

187. *Id.* at 308.

188. *See supra*, notes 1–6 and accompanying text.

189. *See, e.g.*, Klaus Lüderssen, *Übernahme der Aufgaben des Strafrechts durch andere Rechtsgebiete*, quoted in STELLA, *supra* note 145, at 14, arguing that other disciplines, when problems become complicated, “pass the baton” to the criminal law.

190. An emblematic example is the passing of legislation such as the Patriot Act after 9/11. On the topic *see, e.g.*, ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 191–92 (Yale University Press, 2002).

191. But also not so recent: *see supra*, note 29 and accompanying text.

192. *See supra*, note 29 and accompanying text.

193. *See supra*, notes 7, 8, 13 and accompanying text.

### III. ADOPTING THE CLASSICAL MODEL TODAY: PROSPECTS AND PROBLEMS

George Santayana wrote, “Those who cannot remember the past are doomed to repeat it.”<sup>194</sup> Francesco Carrara seemed to be aware of that, and he developed a model that he hoped could prevent a re-occurrence of the “tearful aberrations” of the past.<sup>195</sup> When that model and the principles on which it was based were abandoned, new “tearful aberrations,” similar in kind and perhaps worse in degree, occurred.<sup>196</sup>

Since those principles were developed as a safeguard to protect individual liberties against governmental overreach and abuse, they (and the model built on them) qualify as the best candidates for a normative theory of substantive criminal law. There are, however, several issues that must be acknowledged. Broadly speaking, the issues can be classified as either practical or theoretical. Each group will be discussed in turn.

#### A. Practical Issues

The main practical issue with Carrara’s model (as well as with any other model that may be proposed) lies in its enforcement.<sup>197</sup> In other words—once we have a model, who is going to ensure its adoption and implementation? There are two options, courts (especially the Supreme Court, which will be the focus here) and legislatures, and they are both problematic.<sup>198</sup>

##### 1. Legislatures: An Argument for “We, the People”

As a default, legislatures are very unlikely to exercise self-restraint when it comes to enacting criminal laws. Legislatures are supposed to reflect popular will, and their very survival is inextricably linked to popular support

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194. GEORGE SANTAYANA, *LIFE OF REASON: REASON IN COMMONSENSE* 284 (1905).

195. See *supra*, notes 52–59 and accompanying text.

196. The horrors of Nazi Germany, Fascist Italy, and Soviet Russia, to mention but three examples, are well known. In all three cases, one of the first steps after seizing power was, of course, changing the law to enshrine the new order in it and give the government an *appearance* of legitimacy—at least *formally*.

197. See, e.g., Brown, *supra* note 20.

198. Brown observes that a probable reason why there isn’t any sort of rigorous limitation on crime creation is that “Courts cannot do it, and legislatures cannot either.” Brown, *supra* note 20, at 979.



(if a legislature enacts laws that the public doesn't like, it will be voted out at the next electoral round).<sup>199</sup> No legislature wants to be perceived as being “soft” on criminals; indeed for decades being “tough on crime” has been at the center of any successful political campaign.<sup>200</sup>

These observations notwithstanding, Darryl Brown makes an interesting case for why legislatures and the democratic process hold more hope to reverse the trend of overcriminalization than they are given credit for.<sup>201</sup> The core of his argument seems to be that hope lies in de-politicizing somewhat the lawmaking process by originating criminal bills in specialized commissions, insulated from majoritarian pressures.<sup>202</sup> Although Brown may be right, there is another basic argument to be made that may resonate not only among legal theorists, but also with ordinary people.

Imagine a spectrum: on one end we have the classical model, largely reflected by what Herbert Packer has described as the “Due Process” model.<sup>203</sup> On the other end of the spectrum we have the positivist model, largely reflected by what Packer called the “Crime Control” model.<sup>204</sup> Then ask the following question: Why would anyone be anything other than a positivist?<sup>205</sup>

On a gut level, once *we* feel secure *from* the criminal law, which is targeted at *them*—drug dealers, mobsters, gangsters, terrorists, etc.: a discernible class of *others*—it is only normal to instinctively pick the system that would seemingly better guarantee our safety against those perceived *external* threats. This security against *others* seems to be exactly what the Crime Control model affords. And this is precisely the key: the current state of the criminal law, developed without any normative principle or theory, has almost entirely blurred the line between *us* and *them*.<sup>206</sup> The current amount of criminal law is so large and confusing that “[o]rdinary people do not have the time or training to learn the contents of criminal

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199. *Id.* at 793, observing that legislatures will operate not based on principled, but rather on majoritarian decision making.

200. *See, e.g.*, STUNTZ, *supra* note 1, at 236–43.

201. Brown, *supra* note 20.

202. *Id.* at 980.

203. *See* PACKER, *supra* note 117, at 149–246.

204. *Id.*

205. The question, as well as the reflections that follow, were developed during a conversation with Phil Heymann.

206. *See, e.g.*, HUSAK, *supra* note 6, at 24.

codes; indeed, even criminal law professors rarely know much about what conduct is and isn't criminal in their jurisdictions."<sup>207</sup> In short, it is virtually impossible to predict with any kind of accuracy whether *prima facie* innocent conduct will, in fact, constitute a violation of the criminal law.<sup>208</sup> Clearly, then, once the *us-them* line disappears, the security allegedly provided by the Crime Control model disappears with it.

On the other hand, the classical model is what we could call a Rawlsian model: any reasonable person, not knowing whether they will, at some point, be targeted by the criminal law, should want to have a model inspired by the principles from which the classical model was developed. If this argument were to get traction among ordinary people—voters!—then legislatures would have a green light to reduce the amount of criminal law currently on the books. A more promising avenue, however, is perhaps the one offered by judicial review.

## 2. Courts: An Argument from Existing Constitutional Doctrine

The other venue for implementation of the classical model would be through the courts, and particularly the Supreme Court. Constitutionalization of substantive criminal law seems to be a lost cause—even the cases that imposed some level of constitutional screening onto substantive criminal law<sup>209</sup> did so “in other ways, without a theory of criminal law’s general normative limits.”<sup>210</sup> Yet, with the ingenuity that characterizes his whole book, Husak proposes a way to change this state of affairs.<sup>211</sup>

First, he establishes a “right not to be punished,” and qualifies it as fundamental.<sup>212</sup> Then he compares this right to other fundamental liberties, such as the right to free speech and the right to marry, whose breaches by the government are subject to strict scrutiny.<sup>213</sup> Finally, considering strict scrutiny to be politically unfeasible (and perhaps even undesirable, as

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207. William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871 (2000).

208. See, e.g., HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).

209. See, e.g., *Lambert v. California*, 355 U.S. 225 (1957); *Robinson v. California*, 370 U.S. 660 (1962); *Powell v. Texas*, 392 U.S. 514 (1968); *Papachristou v. Jacksonville*, 405 U.S. 156 (1972).

210. Brown, *supra* note 20, at 983.

211. See HUSAK, *supra* note 6, at 120–59.

212. *Id.* at 92–103.

213. *Id.* at 123.

it could leave us with too little criminal law), Husak takes a step back, proposing that criminal legislation be subjected to intermediate scrutiny as per *Central Hudson*.<sup>214</sup> There is, however, a more direct route, grounded in *existing* constitutional doctrine, to enforce a normative theory of substantive criminal law while reducing its current disproportionate size—should the Supreme Court choose to follow it.

Begin with Husak’s establishment of a “right not to be punished:” Husak thinks that this is, somehow, a “special right”;<sup>215</sup> but how is it different, in nature, from a broader right to be free from undue government interference? Isn’t the right not to be punished just a specification of the former, broader right? Husak makes an argument that criminal law is different; while that is indeed true, the issue could be more simply seen as one of degree.

There is one basic right—the right to individual liberty.<sup>216</sup> Individual liberty can be infringed by the government, and indeed, it is infringed on a regular basis. What is relevant for our analysis, however, it is not the infringement *per se*—very few people would seriously argue that the government has *no* power to regulate individual conduct, and even fewer would pay attention to such claims—rather, what is relevant is the *degree* of the infringement. In this perspective, the greater the infringement, the more stringent the criteria and the justification for the infringement need to be. Most criminal laws provide for imprisonment as a consequence of their violation; thus, criminal law constitutes the highest infringement of individual liberty—it comports the loss of liberty itself.

The Supreme Court has long recognized that the “liberty” that an individual targeted by the criminal law sees “at stake” is an “interest of immense importance”<sup>217</sup> and of “transcending value.”<sup>218</sup> This is so because the infliction of criminal punishment infringes upon liberty intended “not merely [as] freedom from bodily restraint”<sup>219</sup> but also, in its deepest and broadest meaning, as

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214. *Id.* at 128, 157–159. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

215. *Id.* at 96.

216. “Liberty” is not by chance one of the three “unalienable Rights” that Thomas Jefferson chose to enumerate in the Declaration of Independence, immediately after “life” and before the “pursuit of happiness,” of which “liberty” is the logical premise.

217. *In re Winship*, 397 U.S. 358, 363 (1970).

218. *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

219. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>220</sup>

Although since *Meyer* some things have changed (for example, despite somewhat complicated procedural and legal hoops, inmates can now get married; and they are, at least on paper, allowed to practice their religion), these changes are more a matter of degree than of substance. It remains true that criminal punishment impairs “the right to make basic decisions about the future; to participate in community affairs; to take advantage of employment opportunities; to cultivate family, business, and social relationships; and to travel from place to place.”<sup>221</sup> Criminal punishment produces “a wrenching disruption of everyday life”<sup>222</sup> and “seriously interfere[s] with the defendant’s liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.”<sup>223</sup>

In light of the interests of “immense importance” and “transcending value” just described, the Court has repeatedly required strong procedural protections before those interests can be infringed;<sup>224</sup> however, there is no principled or logical reason why that same reasoning should not be applied to the substantive criminal law. Following such line of reasoning, when the government wants to regulate conduct through the most restrictive means at its disposal, and in such a way that the very core of liberty is affected, it needs to have a compelling interest to do so, coupled with the absence of less restrictive means to achieve that interest—in other words, criminal legislation should be subject to *strict scrutiny*.

It is true, as Husak observes, that the government has a rational basis for regulating almost all the conduct that it regulates.<sup>225</sup> Husak’s focus, however, is misplaced. The issue is not regulating conduct; rather, it is *how* conduct is regulated. Since the criminal law, by imposing the criminal

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220. *Id.*

221. *Albright v. Oliver*, 510 U.S. 266, 294 (1994) (Stevens, J., *dissenting*).

222. *Young v. U.S. ex rel Vuitton and Fils S.A.*, 481 U.S. 787, 814 (1987).

223. *U.S. v. Marion*, 404 U.S. 307, 320 (1971).

224. *See, e.g., Albright*, *supra* note 217, at 295, and references therein.

225. *See* HUSAK, *supra* note 6, at 123–24.

sanction, breaches a host of individual rights that the Supreme Court has *already* recognized as fundamental, it should follow that for the government to regulate *any* conduct by means of the criminal law (as opposed to tort law, administrative law, etc.) there needs to be a compelling state interest (and thus strict scrutiny). In other words, it is not, as Husak assumes, the *type of conduct* the government proscribes, but rather *how it proscribes (or regulates) it* that should matter for constitutional analysis. The way of regulating conduct which, in its execution, infringes upon fundamental individual liberties needs to be subject to strict scrutiny. The analysis would be, on its face, quite simple. The Court would have to ask: Isn't there any other way (= any less restrictive means) that the government can use to protect a given interest other than resorting to the criminal law? Framing the question this way would be in line with the principle of the criminal law as the *extrema ratio*, laid out by Beccaria and enshrined by Carrara at the core of his model.<sup>226</sup>

To be fair, Husak may very well be right that adopting strict scrutiny would be politically unfeasible;<sup>227</sup> however, if the argument laid out above is accepted, once it is recognized that substantive criminal law *should* be subject to strict scrutiny, then *a fortiori* it should be subject to *at least* intermediate scrutiny. This can be done without resorting to “creating” a new, special right not to be punished; but rather by acknowledging that not only criminal procedure, but also substantive criminal law infringes upon rights that the Supreme Court has *already* deemed of “immense importance.” This is the road that the Supreme Court should take. It is not likely that it will; legal scholarship, however, can do little more than indicate a plausible path for the Court to follow. At any rate, enhancing the level of scrutiny on the criminal law would slow down, if not halt, the current level of overcriminalization, and put us on the path toward a minimalist criminal law.

It is also worth mentioning that this approach provides stronger protections than the long-standing but now disfavored<sup>228</sup> interpretative guideline known as the “rule of lenity,” which several commentators have invoked as a means of limiting the criminal law.<sup>229</sup> The rule of lenity, in

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226. See *supra*, notes 85–91 and accompanying text.

227. See HUSAK, *supra* note 6, at 157–59.

228. See, e.g., Larkin, *supra* note 6, at 770–71.

229. See, e.g., Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885 (2004); Larkin, *supra* note 6.

fact, doesn't offer normative criteria to challenge the wisdom—let alone the constitutionality—of a given piece of criminal legislation, but simply requires that interpretative doubts be resolved in favor of the defendant. Thus, as one commentator observed, the rule “serves much the same purpose as the aphorism, drawn from the Bible, that it is better that ten guilty men go free than that one innocent man be convicted,”<sup>230</sup> making the protection, as a practical matter, closer to a procedural than to a substantive one. Conversely, the way to strict scrutiny defended in this Article opens a sensible path to the constitutionalization of substantive criminal law and, thus, to stronger protections.

### B. Theoretical Issues

There is one major theoretical issue with Carrara's model, which will be addressed here very briefly: Is a model developed around the mid-1800s still suitable for today's world?

There are challenges today, ranging from mass terrorism to large-scale economic crimes to environmental crimes (to name but three examples), that were most likely un-thought of (if not unthinkable) at the time Carrara wrote. The interests that these crimes endanger may very well be interests that may be effectively protected only by resorting to the criminal law. If that is the case—and whether that is, in fact, the case still remains to be determined—Carrara's model can still be of guidance.

Carrara recognized that rights (or interests) can be infringed not only through an actual harm or injury, but also by endangering them.<sup>231</sup> Thus, the legal protection could be anticipated to the moment of the endangerment.<sup>232</sup> The great challenge of today (and of tomorrow) will be to craft a jurisprudence of prevention and preemption in the substantive criminal law that does not obliterate the fundamental characteristic that the criminal law of a liberal democracy should have—being the option of the last resort.<sup>233</sup> The principles and model advanced by Carrara and the Classical School are a good starting point and can offer precious guidance in the undertaking of such effort.

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230. Larkin, *supra* note 6, at 770 (citations omitted).

231. *See supra*, note 101 and accompanying text.

232. *Id.*

233. Trying to work out the principles of such jurisprudence is a longer-term project that the author is currently engaged in.

## CONCLUSIONS

Over a century ago, Francesco Carrara cautioned against the “foolishness of all governing by means of criminal processes.”<sup>234</sup> His warning seems to have gone unheeded. There is, today, too much criminal law, coupled with the lack of “any plausible normative theory [of substantive criminal law]—unless ‘more’ counts as a normative theory.”<sup>235</sup>

This Article has presented a model grounded upon solid normative principles, core among which is the principle of the *extrema ratio*, which is a principle of civility—as Oliver Wendell Holmes Jr. put it, “[N]o civilized government sacrifices the citizen more than it can help.”<sup>236</sup> These normative principles, and the model of criminal law built upon them, have been presented and defended not because they are morally or metaphysically correct—indeed, these principles are not perfect, and some of their foundations, such as natural law or divine law, have rightfully been rejected.<sup>237</sup> Rather, those principles and the model of criminal law built upon them have been presented and defended as a matter of *political choice*.

Criminal law, more than any other branch of law, defines the system of government of which it is the political expression. Of a liberal democracy, history demands allegiance to those principles; and the current state of the criminal law demands their implementation.

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234. CARRARA, I PROGRAMMA, *supra* note 71, at 59.

235. Stuntz, *supra* note 7, at 508.

236. OLIVER WENDELL HOLMES JR., THE COMMON LAW 30 (1881) (the edition cited is the ABA edition, 2009).

237. See, e.g., DERSHOWITZ, *supra* note 29, at 23–39.