University of Chicago Law School
Chicago Unbound

Coase-Sandor Working Paper Series in Law and Economics

Coase-Sandor Institute for Law and Economics

2013

Beccaria's 'On Crimes and Punishments': A Mirror on the History of the Foundations of Modern Criminal Law

Bernard E. Harcourt

Follow this and additional works at: http://chicagounbound.uchicago.edu/law_and_economics

Part of the Law Commons

Recommended Citation

Bernard E. Harcourt, "Beccaria's 'On Crimes and Punishments': A Mirror on the History of the Foundations of Modern Criminal Law" (Coase-Sandor Institute for Law & Economics Working Paper No. 648, 2013).

This Working Paper is brought to you for free and open access by the Coase-Sandor Institute for Law and Economics at Chicago Unbound. It has been accepted for inclusion in Coase-Sandor Working Paper Series in Law and Economics by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

CHICAGO

COASE-SANDOR INSTITUTE FOR LAW AND ECONOMICS WORKING PAPER NO. 648
(2D SERIES)
PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 433

COASE-SANDOR INSTITUTE
FOR LAW AND ECONOMICS
THE UNIVERSITY OF CHICAGO LAW SCHOOL

BECARRIA'S *ON CRIMES AND PUNISHMENTS:* A MIRROR ON THE HISTORY OF THE FOUNDATIONS OF MODERN CRIMINAL LAW

Bernard E. Harcourt

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

July 22, 2013

This paper can be downloaded without charge at the Institute for Law and Economics Working Paper Series: http://www.law.uchicago.edu/Lawecon/index.html and at the Public Law and Legal Theory Working Paper Series: http://www.law.uchicago.edu/academics/publiclaw/index.html and The Social Science Research Network Electronic Paper Collection.

Electronic copy available at: http://ssrn.com/abstract=2296605

Beccaria's *On Crimes and Punishments*:
A Mirror on the History of the Foundations of Modern Criminal Law

* * *

Bernard E. Harcourt
University of Chicago

DRAFT: July 19, 2013

* * *

Forthcoming in
FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW
Markus Dubber, editor

Electronic copy available at: http://ssrn.com/abstract=2296605

Beccaria's *On Crimes and Punishments*:
A Mirror on the History of the Foundations of Modern Criminal Law

Bernard E. Harcourt[1]

> *'In order that punishment should not be an act of violence perpetrated by one or many upon a private citizen, it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law*.'[2]

With these words, penned when he was only 25 years old, Beccaria closed *Dei delitti e delle pene*, a concise treatise that would become the crown jewel of the Italian Enlightenment and a classic text of modern penality. An impassioned critique of the punishment practices of the seventeenth and eighteenth centuries, which Beccaria perceived to be excessive, brutal, arbitrary, and unequal, *On Crimes and Punishments* is a manifesto for legal reform centered on the Enlightenment values of rationality, proportionality, legality, lenience, and the rule of law. It offers a passionate plea against the use of judicial torture to extract confessions, as well as to exonerate guilt, against the use of secret evidence and sealed accusations, against sentencing inequalities based on wealth and social status, and against excessively brutal corporal punishments. The treatise was one of the first and became one of the leading tracts against capital punishment. It calls for reform toward the rule of law, principles of legality and fair notice, as well as more proportional, swift and certain punishments, drawing both on the tradition of the *Philosophes* of the *Encyclopédie* and on utilitarian notions—thus synthesizing deontological Enlightenment principles with core utilitarian insights.

Beccaria's treatise was hugely influential on Blackstone and Bentham, and on the early development of utilitarian thought in penal justice, as well as on later developments during the twentieth century in the economic analysis of crime and punishment. Beccaria's theory and arguments were the target of pointed critiques by Kant and Hegel. The work also forms the keystone to Foucault's genealogy of the prison in *Discipline and Punish*: Beccaria's treatise captured perfectly, in Foucault's words, that 'new strategy for the exercise of the power to punish'[3] at the heart of the eighteenth century reform movement: 'to make of the punishment and repression of illegalities a regular function, coextensive with society; not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality and necessity;

---

[1] Julius Kreeger Professor of Law and Political Science, University of Chicago. Special thanks to Alessandro Fontana, Guyora Binder, Alan Brudner, Markus Dubber, Klaus Günther, Simon Stern, and Mariana Valverde for comments on this essay. Portions of the essay are drawn from B Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (2011).
[2] C Beccaria, *On Crimes and Punishments*, R Bellamy (ed) (1995) 113.
[3] M Foucault, *Discipline and Punish*, A Sheridan (trans) (1979) 81-82.

Electronic copy available at: http://ssrn.com/abstract=2296605

to insert the power to punish more deeply into the social body.'[4] *On Crimes and Punishments* symbolized, for Foucault, a turning point that would ultimately lead to the birth of discipline, of the prison and, more generally, of the carceral sphere.

Over the centuries, Beccaria's *On Crimes and Punishments* has become a placeholder for the classical school of thought in criminology and deterrence-based public policy, for death penalty abolitionism, as well as for liberal ideals of legality and the rule of law. As Richard Bellamy suggests, Beccaria's eighteenth century treatise has entered that 'category of works which are much cited and little read.'[5] But it is precisely in the diversity of citations—in the wide-range of receptions and appropriations, positive and negative—that we can read afresh, with new eyes, this foundational text in criminal law theory. An object of praise among utilitarians, a source of inspiration for classical English jurists, a target of pointed critiques by retributivists, the subject of histories and genealogies, the object of derision by the first *économistes*, rehabilitated and appropriated by the Chicago School—these ricochets and reflections on Beccaria's treatise are precisely what reveal and allow us to fully appreciate the multiple and rich intellectual dimensions of *On Crimes and Punishments* and to outline a history of the foundations of modern criminal law.

I. *Early reception by the* Philosophes

The young aristocrat, Cesare Beccaria Bonesana, Marquis of Gualdrasco and Villareggio[6] (1734-1794), wrote the manuscript that would become *Dei delitti e delle pene* between March 1763 and January 1764 while an active member of a small Milanese intellectual circle known as the "Accademia dei pugni," or the "Academy of fisticuffs"—so named, reputedly, because so many of their discussions and debates ended in fist fights. The academy, self-consciously modeled after the circle of the *Philosophes* of the *Encyclopédie*, was the brainchild of Count Pietro Verri and his brother, Alessandro Verri. Fittingly, the academy of fisticuffs lasted only four years, from 1762 to 1766, but from this group emerged the most influential works of the Italian Enlightenment, including, in addition to Beccaria's treatise, Pietro Verri's *Meditazioni sulla felicità* (*Reflections on Happiness*) and his *Meditazioni sulla economia politica* (*Reflections on Political Economy*), as well as other works published in the journal of the academy, *Il Caffè*.[7] Beccaria was coaxed, encouraged, and assisted in the editing of his manuscript by Pietro Verri.[8] The treatise was first published in Italian in Livorno on April 12, 1764. It

[4] Ibid 82.
[5] Bellamy, 'Introduction,' *in* Beccaria (1995) ix.
[6] There is debate over Beccaria's proper title of nobility and, thus, his name. He is often referred to as the 'Marquis of Beccaria,' including in the *Encyclopædia Universalis* and the *Larousse*; however, recent research suggests that the title of nobility that his grandfather obtained in 1711 was for Gualdrasco and Villareggio. *See* R Zorzi *Cesare Beccaria. Il dramma della giustizia* (1995) 53 ; M G Vitali-Volant, *Cesare Beccaria, 1738-1794: cours et discours d'économie politique* (2005) 9 ; P Audegean, 'Introduction,' *in* C Beccaria, *Des délits et des peines. Dei delitti e delle pene* (2009) 9.
[7] See generally F Venturi, *Utopia and Reform in the Enlightenment* (1971) 100.
[8] To this day, there continues to be debate about the extent of Pietro Verri's contribution to the treatise, with some claiming that it was written primarily by Verri. See generally G Newman and P Marongiu, 'Penological reform and the myth of Beccaria' (1990) 28 *Criminology* 330-331.

originally appeared anonymously for fear of repercussions given its strong egalitarianism and its secular foundations.

The immediate reception of Beccaria's little treatise was surprising. It was met at first with mixed reviews. It was panned in the Parisian *Gazette littéraire de l'Europe* as a simple restatement of Rousseau's *Social Contract* and attacked in Italy as the work of a "*socialista*"—some historians contend that this was the first use of the term "socialist."[9] More classical jurists found the treatise threatening and dangerous. Pierre-François Muyart de Vouglans, the author of several classical penal treatises,[10] went so far as to call Beccaria's tract 'a pleading in favor of that miserable portion of the human species, that is its curse and scourge, that dishonors it, and sometimes even seeks to destroy it.'[11] Muyart de Vouglans warned readers of 'all the dangers of the potential consequences, especially with regard to the government, the mores, and the religion of this country.'[12]

However, Beccaria's little book soon caught the attention of the *Philosophes* of the *Encyclopédie*. André Morellet, abbé of the Sorbonne, recalls in his *Mémoires* that it was the statesman, de Malesherbes, who first showed interest in Beccaria's essay. Malesherbes had a few guests over for dinner—Turgot, at the time *Intendant* of Limoges, d'Alembert, the philosopher and co-editor with Diderot of the *Encyclopédie*, Morellet and a few others—and, having just received Beccaria's tract from Italy, discussed the new work with his guests. 'Try to translate this, de Malesherbes told me,' Morellet recalls. 'I went into his library, and returned with a translation of the first passage. It seemed satisfactory, and I was encouraged to continue. I took the book with me and published it in French six weeks later.'[13]

Morellet's account may have been embellished,[14] but his translation of Beccaria's treatise nevertheless appeared rapidly and was made public at the end of December 1765. By January 1766, Morellet sent the young Beccaria the compliments of Diderot and d'Alembert, the philosopher Helvétius, the naturalist de Buffon, the baron d'Holbac, as well as David Hume who was at the time living in Paris—all of whom, Morellet wrote, had read and greatly enjoyed the translation. And Morellet invited Beccaria to Paris.[15]

Beccaria arrived in October 1766 and in short order met them all, as well as other notable thinkers, such as Diderot and Trudaine, and courtesans, such as the marquis de Chastellux, Mme. Necker (the wife of Jacques Necker, the future finance minister), and

---

[9] F Venturi, *Italy and the Enlightenment: Studies in a Cosmopolitan Century* (1972) 52-6, 102.
[10] Muyart de Vouglans, *Institutes au droit criminel, ou Principes généraux en ces matières* (1757); Muyart de Vouglans, *Institutions criminelles selon les lois et ordonnances du royaume* (1762)
[11] Muyart de Vouglans, *Réfutation des Principes hasardés dans le Traité des Délits et Peines, traduit de l'Italien* (1767) 5.
[12] Ibid., 17.
[13] A Morellet, *Mémoires inédits de l'abbé Morellet, sur le dix-huitième siècle et sur la Révolution* (1967), volume I, 163. *See generally* B Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (2011) 54-56.
[14] *See* Harcourt (2011) 252 n.3.
[15] C Beccaria, *Scritti e lettere inediti*, E Landry (ed) (1910) 119.

Mme. Geoffrin.[16] Beccaria began to attend salons, but his stay in Paris was abbreviated. He fled Parisian society in less than two months—perceived by many in Paris as a simpleton—but his visit was important. He caught the attention of Voltaire, who wrote an anonymous pamphlet commenting and praising his work. Voltaire's commentary, *Commentaire sur le livre des délits et des peines,* would be printed regularly as a preface to Morrelet's translation in all subsequent French editions, propelling Beccaria's short tract to a much larger readership.[17]

Voltaire confessed, in his preface, that he was 'ashamed to write about these matters after what has been said by the author of *On Crimes and Punishments*.'[18] Voltaire added: "I should limit myself to hope that we all and often reread this great work by this lover of humanity."[19] In a letter dated May 30, 1768, Voltaire personally thanked Beccaria "with all my heart. These sentiments are those of the entire Europe… You toil on behalf of reason and humanity, both of which have been quashed for so long. You revive those two sisters, beaten for over sixteen hundred years. They are finally beginning to walk and talk; but as soon as they do, fanaticism again rears its ugly head."[20]

Beccaria's short tract soon became known as *the* Enlightenment text on punishment. Within several years, as Franco Venturi notes, 'the triumph of Beccaria's work could not have been more complete in Parisian intellectual circles.'[21] And its influence extended swiftly well beyond Europe. Beccaria's work was lauded by the Empress Catherine II of Russia, who invited him to rewrite the Russian penal code. Thomas Jefferson copied whole pages of the work into his diary and drew on it in his effort to abolish the death penalty.[22] Beccaria's book entered the cannon of political theory.[23]

II. *The Second Wave: Blackstone and Bentham*

Beccaria's treatise was translated into English in 1767 and immediately had a profound impact on both Blackstone and Bentham. Blackstone's discussion of punishment in Volume 4 of his *Commentaries on the Laws of England*, published only two years later in

---

[16] Beccaria (1910) 168-169 [Chastellux letter to Beccaria dated 1/1/1770]; C. Beccaria, *Opere*, S Romagnoli (ed) (1958) 878-892 [Beccaria letter to his wife dated 10/19/1766]; Morellet (1967) Vol I, 167.
[17] Venturi (1972) 106-109.
[18] Voltaire, *Commentaire sur le livre Des délits et des peines, par un avocat de province* (1766), *in* Voltaire, *Œuvres complètes* (1853), Volume 5, 411.
[19] Ibid.
[20] Beccaria (1910) 153-154 [Letter attributed to Voltaire].
[21] Venturi (1972) 158.
[22] Venturi (1972) 160.
[23] The success of the book also led to significant recriminations regarding the true author of the manuscript. As noted earlier, Pietro Verri claimed that he had written the book and that Beccaria had merely served as a namesake; and several years later, the French publicist and attorney Linguet suggested in his review, *Annales politiques et littéraires*, that the French *Philosophes* of the *Encyclopédie* were the true authors and masterminds of the little treatise, which was so miserably executed by Beccaria that André Morellet had to essentially rewrite it in translation. *See* B Pautrat, 'L'autre Beccaria,' *in* C. Beccaria, *Recherches concernant la nature du style*, 185-206 (2001) 187-188.

1769, referred to Beccaria 'more than any other authority,'[24] and Blackstone drew especially on Beccaria's treatise to ground his arguments in favor of proportionality and certainty in punishment, preventive rather than punitive justice, and against capital punishment.[25] As Simon Stern documents, Blackstone became comfortable with the idea of introducing reform proposals in his fourth volume of the *Commentaries*—in contrast to the earlier volumes published in 1765—primarily because of Beccaria's treatise, which 'supplied Blackstone with a basis for normative appraisal of the law that suffuses the criminal law.'[26]

Bentham wrote the main manuscript of his first work on the same topic, *Rationale for Punishment*, a few years later in 1775 when he was, in H.L.A. Hart's words, 'fresh from the study of Beccaria's already famous book.'[27] Beccaria's tract had a powerful influence on Bentham's work on punishment, as well as, beyond that, Bentham's philosophical outlook and approach. 'It was from Beccaria's little treatise on crimes and punishments that I drew as I well remember the first hint of the principle by which the precision and clearness and incontestableness of mathematical calculations are introduced for the first time into the field of morals.'[28] Beccaria had, to be sure, emphasized the importance of mathematical rigor, noting that all the questions surrounding punishment—i.e. what is the appropriate punishment, is the death penalty necessary, are torture and brutal punishment just, how to prevent crime, etc.—'need to be answered with a mathematical rigour which will cut through the cloud of specious reasoning, seductive eloquence and diffident doubt.'[29] These passages spoke to Bentham, and, as Hart explains, Beccaria's treatise became the cornerstone of Bentham's famous conception of a 'moral arithmetic,' which was at the heart of the utilitarian philosophy that he would develop.[30] In fact, Bentham traced to Beccaria and Priestley his most central insight—namely, 'the sacred truth that the greatest happiness of the greatest number is the foundation of morals and legislation.'[31]

Bentham and Beccaria agreed on the major outlines of their arguments: they both critiqued the brutalizing effect of excessive punishment and endorsed marginal deterrence as a limiting principle on punishment; they both favored speedy and certain punishments as a way to reinforce the associations of punishment with crime; and more generally, they agreed on the need for formal law and 'legality' as giving legitimacy to the criminal justice system and the sovereign. Naturally, Bentham did have some reservations about Beccaria;[32] but on the whole, those pale in comparison to the debt Bentham acknowledged—and acknowledged openly. Bentham took pains to express how much Beccaria had contributed to his own development:

---

[24] Simon Stern, *William Blackstone*, this volume, __.
[25] Ibid., __.
[26] Ibid., __.
[27] Hart (1982) 45.
[28] Ibid. 40.
[29] Beccaria (1995) 30.
[30] Hart (1982) 40; *see generally* G Binder, *Bentham*, this volume, __.
[31] Hart (1982) 40.
[32] Hart (1982) 48-52.

> 'Oh my master, first evangelist of Reason, you who have raised your Italy so far above England, and I would add above France, were it not that Helvétius, without having written on the subject of laws, had already provided you with your fundamental ideas; . . . you who have made so many useful excursions into the path of utility, what is there left for us to do? —Never to turn aside from that path.'[33]

III. *A Theoretical Amalgam*

As a classic expression of deterrence theory and the quintessential illustration of the classical school of thought in criminology, it might come as a surprise that Beccaria opens his treatise in the language of social contract theory—what most utilitarians, such as Bentham and John Stuart Mill, would later refer to as unnecessary fiction or, more simply, as 'pestilential nonsense' or 'nonsense upon stilts.'[34] Not so for Beccaria.

a. *Foundations in Social Contract Theory*

On Crimes and Punishments rests, from the very first chapter, on a social contract foundation: state sovereignty, Beccaria writes, is the sum total of the freedom that individuals relinquish in exchange for a measure of security, and, in this sense, the political sovereign is vested with the legitimate right to provide security and to embody the public well-being. In fact, Beccaria begins his treatise with a bow and a wink to Hobbes—echoing in part, but also drawing a slight distinction: 'Wearied by living in an unending state of war and by a freedom rendered useless by the uncertainty of retaining it,' Beccaria writes, echoing Hobbes up to that point, 'they sacrifice *a part of that freedom* in order to enjoy what remains in security and calm.'[35]

The first clause is clearly drawn from the *Leviathan*,[36] and Beccaria would make explicit reference to Hobbes in the preface to the fifth Italian edition of *Dei delitti e delle pene*. But although Beccaria agreed with Hobbes that the state of nature was a state of war and that the desire for security led individuals to form 'the sovereignty of the nation,'[37] Beccaria nevertheless disagreed with Hobbes that individuals relinquished *all* liberty to the Leviathan: on Beccaria's theory, individuals only relinquished the smallest part necessary to achieve security, or, in his words, 'the smallest possible portion consistent with persuading others to defend him.'[38] And it is this limitation on the bequest that would serve to limit the exercise of sovereign power.

---

[33] Quoted in Young (1983) 318; also in E Halévy, *The Growth of Philosophical Radicalism*, M Morris (trans) (1955) 21.

[34] J Bentham, 'Anarchical Fallacies,' *in Nonsense upon Stilts: Bentham, Burke, and Marx on the Rights of Man*, J Waldron (ed) (1987) 53 (referring specifically to the natural rights discourse, which often grounds social contract theory).

[35] Beccaria (1995) 9 (emphasis added).

[36] Hobbes, *Leviathan*, Part II, Chapter XVII.

[37] Beccaria (1995) 9.

[38] Beccaria (1995) 11. Although individuals preserve a right of self-defense on Hobbes's account, they nevertheless relinquish more rights and powers to the sovereign. For a discussion, *see* A Ristroph, 'Respect

For Beccaria, the principal means of enforcing the social contract was punishment—the State-imposed penal sanction. It is punishment that keeps individuals from trying to seize back that small part of freedom that they relinquished, a constant struggle given that men are by nature, according to Beccaria, so self-interested and passionate. But having bequeathed only the smallest portion of their freedom necessary to ensure their security, there is an inherent limitation to the extent, mode, and scope of punishment: 'The sum of these smallest possible portions constitutes the right to punish,' Beccaria emphasized; 'everything more than that is no longer justice, but an abuse; it is a matter of fact not of right.'[39] The social contract itself, then, would place limits on the sovereign's right to punish. Notice the political theory dimension of Beccaria's analysis—as opposed to a possible religious or natural law foundation. Beccaria's work was a contribution to *politics*, not, as he explained, to theology or natural law.[40] In this sense, Beccaria was one of the first theorists who treated punishment as a matter of state legitimacy and political obligation, rather than from a moral or religious point of view—what evil people or sinners deserve. This is precisely what led Beccaria, naturally, to fear persecution and to publish the first edition anonymously.

b. *'The greatest happiness shared among the greater number'*

Grounded in social contract theory, Beccaria nevertheless embedded a utilitarian core into his analysis. The limitations on the right to punish—justified only to the extent necessary to produce security and order—are precisely what allow individuals to enjoy the greatest possible liberty that is left to each and every one of them. 'The juster the punishments,' Beccaria emphasized, 'the more sacred and inviolable is the security and *the greater the freedom which the sovereign preserves for his subjects*.'[41] The metric of just punishments and of just laws—the metric of justice—is precisely the greater good of the individuals, or, as Beccaria writes in his very Introduction, 'whether or not [the laws] conduce to *the greatest happiness shared among the greater number*.'[42] Justice, Beccaria emphasizes to his reader, is 'what is socially useful,'[43] and it is in this manner that Beccaria weaves together contract theory and utilitarianism.

Beccaria was an early proponent of the idea that pleasure and pain are the metrics and motives of human action. 'The proximate and efficient cause of actions is the flight from pain, their final cause is the love of pleasure.'[44] The notion of maximizing social welfare was central to Beccaria's work, and the notion of social utility that Beccaria developed in *On Crimes and Punishments* drew heavily on the work of his compatriot

---

and Resistance in Punishment Theory,' 97 *California Law Review* 601, 609-610; A Ristrophe, *Hobbes*, this volume.

[39] Beccaria (1995) 11.

[40] Beccaria (1995) 4 ('There are three sources from which the principles of morals and politics which guide men are drawn: revelation, natural law and the conventions arrived at by society… To consider the concerns of the last of them does not exclude concern with the first two.')

[41] Beccaria (1995) 10 (emphasis added).

[42] Beccaria (1995) 7.

[43] Beccaria (1995) 5.

[44] Beccaria (1995)157.

and fellow fisticuff, Pietro Verri. In his *Reflections on Happiness*, published a year earlier in 1763, Verri articulated the keystone to their new philosophical approach: the central concept of happiness. 'The end of the social pact,' Verri wrote in 1763, 'is the well-being of each of the individuals who join together to form society, who do so in order that this well-being becomes absorbed into the public happiness or rather the greatest possible happiness distributed with the greatest equality possible.'[45]

Beccaria's and Verri's conception of social welfare was somewhat unique in its emphasis on equality. Beccaria's text was very much a rejection and reaction against the privileges of the aristocracy and notions of natural hierarchy. A major theme running through the book is that the nobility, the rich and the powerful should be subject to the same forms of punishment and should not be able to buy their way out of justice. It is a constant refrain—barring which, as Beccaria writes, "wealth feeds tyranny."[46] The resulting conception of utility focuses, as Richard Bellamy correctly suggests, on the goal of maximizing *equally* the happiness of each individual.[47]

The notion of maximizing social welfare is thus at the heart of Beccaria's work; however, the relationship between his utilitarian analysis and the retributive elements in his writings is a source of continuing debate and it would be naïve to label Beccaria purely utilitarian.[48] By placing the right to punish squarely within a social contract framework, Beccaria had drawn on notions of rights and duties that provide independent limits and constraints on the sovereign's power to punish—along lines that are more familiar to retributive theory. For Beccaria, the two frameworks—social contract and utilitarianism—overlap, coincide, and there is no theoretical tension or potential conflict between the different principles and rationalities. They work together, harmoniously, to justify and support his arguments.

c. *Limits on Punishment*

The right to punish, for Beccaria, is limited to what is absolutely necessary to defend the public well-being. It is, in this sense, a necessary evil, necessary insofar as it is the only way to restrain the passions—for, as Beccaria, writes, 'experience shows that the common run of men do not accept stable principles of conduct.'[49] Anything further—any punishment beyond what is strictly necessary to restrain men—is 'tyrannous': 'Any punishment that goes beyond the need to preserve this bond is unjust by its very nature.'[50] At the same time, punishment must be related to the harm associated with the criminal offense, and the metric of harm, for Beccaria, is to be measured by the harm to society, not, as it is for retributivists, by the *mens rea* or the evil intent of the offender: 'the one true measure of criminality is the damage done to the nation and … therefore,

[45] Quoted in R. Bellamy, 'Introduction,' *in* Beccaria (1995) xiv.
[46] Beccaria (1995) 50.
[47] Bellamy *in* Beccaria (1995) xix.
[48] D B Young, 'Cesare Beccaria: Utilitarian or Retributivist?' 11 *Journal of Criminal Justice* 317-326 (1983).
[49] Beccaria (1995) 9.
[50] Beccaria (1995) 10 and 11.

those who believe that the true measure of criminality lies in the malefactor's intention are mistaken.'[51]

On these grounds, the proper amount of punishment, on Beccaria's account, becomes simply what is necessary to prevent future similar acts of criminality—what we would call today 'specific deterrence' of a particular individual from committing future crimes and 'general deterrence' of other possible individuals. The purpose of punishment is not backward looking, Beccaria emphasizes: it is not to undo a crime already committed. 'The wailings of a wretch,' Beccaria writes, cannot 'undo what has been done and turn back the clock.'[52] There is no way to undo harm—nor, through punishment, to balance out or even out the past harm. In this respect, Beccaria is assuredly not a retributivist in the Kantian or Hegelian mold. The purpose of punishment to Beccaria 'is nothing other than to prevent the offender from doing fresh harm to his fellows and to deter other from doing likewise.'[53]

The result is a strict limitation on the extent of punishment the sovereign can meet out. Beccaria embeds, in his treatise, a limiting principle that operates simply as follows: "If a punishment is to serve its purpose, it is enough that the harm of punishment should outweigh the good which the criminal can derive from the crime, and into the calculation of this balance, we must add the unerringness of the punishment and the loss of the good produced by the crime. Anything more than this is superfluous and, therefore, tyrannous.'[54]

d. *Proportionality of Punishment*

This limitation on punishment injects a strong element of proportionality into the analysis—a distinctive and characteristic feature of Beccaria's treatise. It is the element of proportionality that ensures the proper functioning of punishment—namely, to create that 'lasting association in the human mind between the two ideas *crime* and *punishment*.'[55] Although it has a utilitarian pedigree, Beccaria infuses the notion of proportionality with a retributive character. Beccaria argues that there should be a 'fit' between the crime and punishment and that this fit is necessary to reinforce the association: 'The punishment should, as far as possible, fit the nature of the crime;' this, he adds, 'serves admirably to draw even closer the important connection between a misdeed and its punishment.'[56] The fit helps reinforce the relationship between the two. (Notice that this idea of reinforcing the association between crime and punishment is heavily influenced by David Hume and his theory of the association of ideas).

It is precisely the existence of proportionality between the severity of the crime and the severity of the punishment that reflects, for Beccaria, the level of civilization and

[51] Beccaria (1995) 22.
[52] Beccaria (1995) 31.
[53] Ibid.
[54] Beccaria (1995) 64.
[55] Beccaria (1995) 49.
[56] Beccaria (1995) 49.

humanity of a county. Beccaria proposes creating 'a scale of wrong actions' and 'a corresponding scale of punishments running from the harshest to the mildest,' and then suggests that 'If there were an exact and universal scale of crimes and punishments, we should have an approximate and common measure of the gradations of tyranny and liberty, and of the basic humanity and evil of the different nations.'[57]

e. *Marginal Deterrence and Other Rules*

Beccaria also sets forth, in *On Crimes and Punishments*, the principle of marginal deterrence that will later become a cornerstone of the economic model of crime and punishment: 'If an equal punishment is laid down for two crimes which damage society equally, men will not have a stronger deterrent against committing the greater crime if they find it more advantageous to do so.'[58] He also sets out a number of other rules that strongly influenced Bentham and later economic theorists. For instance, Beccaria suggests in his work that:

1. the certainty of punishment should take priority over the harshness of the punishment—a familiar thesis today.[59] As Beccaria wrote, 'One of the most effective brakes on crime is not the harshness of its punishment, but the unerringness of punishment… The certainty of even a mild punishment will make a bigger impression than the fear of a more awful one which is united to a hope of not being punished at all.'[60]
2. The harsher the punishment, the more likely the criminal will commit more crimes to avoid it—or, as Beccaria wrote, 'the more anxious the criminal is to avoid it, and it makes him commit other crimes to escape the punishment of the first.'[61]
3. The brutality of punishment will adversely affect the savageness of criminality, or as he wrote, "As punishments become harsher, human souls. . . become hardened."[62] Individuals in society, he suggested, get accustomed even to the harshest of punishments.[63]
4. Attempt should be punished less severely than a completed crime in order to give an incentive to the culprit not to complete the crime[64]—again, a notion of marginal deterrence that was highly influential on subsequence economic theorists.[65]
5. Prison should be reserved for those who cannot pay fines, again a familiar thesis in modern economic analysis.[66] Beccaria wrote: 'Thefts without

[57] Beccaria (1995) 20.
[58] Beccaria (1995) 21.
[59] A M Polinsky and S Shavell, 'The Theory of Public Enforcement of Law,' in *Handbook of Law and Economics*, Volume I, Polinsky and Shavell (eds.), Chapter 6, 405-450.
[60] Beccaria (1995) 63.
[61] Ibid.
[62] Ibid.
[63] Ibid., 64.
[64] Ibid., 95.
[65] Posner (1985) __.
[66] Posner (1985) __; Becker (1968) __.

> violence should be punished with fines… [S]ince this is generally the crime of poverty and desperation, the crime of that unhappy section of men to whom the perhaps 'terrible' and 'unnecessary' right to property has allowed nothing but a bare existence… the most fitting punishment shall be the only sort of slavery which can be called just, namely the temporary enslavement of the labour and person of the criminal to society…'[67]

f. *Legal Formalism*

Overarching all of these rules is a principle of legal formalism. Beccaria was wedded to the rule of law and advocated strongly in favor of judging by syllogism. 'The judge should construct a perfect syllogism about every criminal case," Beccaria emphasized; 'the major premise should be the general law; the minor, the conformity or otherwise of the action with the law; and the conclusion, freedom or punishment.'[68] Beccaria was weary of realist arguments and approaches to the law. He anticipate and cautioned against the American Legal Realist insights about judging,[69] and argued that 'Nothing is more dangerous than the popular saw that we ought to consult the spirit of the law.'[70]

Beccaria's legal formalism was premised on notions of universalism, equality, and respect—on deontological principles—but also on utilitarian premises. He argued that the certainty of syllogistic reasoning is what produces, among citizens, a sense of justice that is so important to the legitimacy of the sovereign. Happiness depends on the subject thinking that he is not being exploited by his sovereign, and happiness thus calls for rational punishment, proportionality, and leniency. It is also what ensures the competitive edge of the sovereign nation and the fidelity of its people: 'The surest way to bind men to their homeland is to raise the relative well-being of everyone of them. . . . [S]o the sovereign's and the nation's highest interest lies in ensuring that, compared with neighbouring countries, the total amount of happiness in the nation be greater than elsewhere.'[71]

g. *Beccaria on Capital Punishment*

Beccaria's precocious argument against the death penalty is in large part what propelled his treatise to fame. His argument sounded, again, in social contract: individuals only give the slightest bit of freedom to the sovereign in order to achieve security, and this could never include the right of the sovereign to kill a subject. Life is the greatest good of all, not some small measure of freedom. It would make no sense, Beccaria argued, to give this right to the sovereign. 'Who has ever willingly given up to

---

[67] Beccaria (1995) 53.
[68] Beccaria (1995) 14.
[69] Beccaria in fact anticipated the American Legal Realists in suggesting that a freewheeling judge might be led to decide cases based on 'the state of his digestion.' Beccaria (1995) 15; *see* Jerome Frank, *Law and the Modern Mind* (1930) 34 (suggesting that a judge's decision might turn on what he ate for breakfast).
[70] Beccaria (1995) 14.
[71] Beccaria (1995) 84.

others the authority to kill him?'[72] Men do not even have the right to commit suicide, Beccaria suggested, how could they give to another the right to punish them with death?

The death penalty, according to Beccaria, did not fall in the domain of the right and just, but in the domain of war, which had its own rules of necessity and utility. Even in that realm, though, Beccaria argued that capital punishment was neither necessary nor useful. Not necessary because long-draw-out punishments, such as penal servitude or slavery for life, are more effective and fear-inducing than the fleeting shock of death: 'Much more potent than the idea of death, which men always regard as vague and distant, is the efficacious because often repeated reflection that *I too shall be reduced to so dreary and so pitiable a state if I commit similar crimes*.'[73] Not useful because capital punishment has a brutalizing effect on society, 'because of the example of savagery it gives to men.'[74]

Bentham agreed with Beccaria's argument, and, in fact, went so far as to state that Beccaria had said everything that needed to be said. As Bentham wrote, 'the more attention one gives to the punishment of death the more he will be inclined to adopt the opinion of Beccaria—that it ought to be disused. This subject is so ably discussed in his book that to treat it after him is a work that may well be dispensed with.'[75] Blackstone as well favored Beccaria's argument and drew on it when he proposed that non-capital punishments were 'more suited to the genius of the English law.'[76]

By contrast, both Kant and Hegel criticize Beccaria's argument harshly. Kant, who defended the right to capital punishment as a core pillar of his retributive theory of punishment and the idea of *lex talionis*, accused Beccaria's in *The Metaphysics of Morals* of 'pure sophistry and distortion of the principles of right.'[77] Kant focused his venom on Beccaria's argument from social contract. While Kant agreed with Beccaria that a citizen cannot wish his own punishment or dispose of his own life, he disagreed that this is what is called for by the social contract. All that is called for is that each individual agree to submit to the laws, including penal laws. Kant wrote: 'To say: "I wish to be punished if I murder anyone" means nothing more than "I submit along with the rest of the people to the laws, which, if there are criminals among the people, will naturally include penal laws."'[78] Those laws, Kant argued, are then enforced not by the individual, but by the courts and administrators of justice. In no case does the individual take his own life: it is not the criminal himself, but the court of public justice that applies the law and executes its sentence.

Hegel attacked Beccaria's conception of the sovereign state, whose purpose, Hegel explained, was not to protect or provide for the individuals. In the *Philosophy of*

---

[72] Beccaria (1995) 66.
[73] Beccaria (1995) 67.
[74] Beccaria (1995) 70.
[75] H L A Hart, 'Bentham and Beccaria,' in *Essays on Bentham: Jurisprudence and Political Theory* (1982) 41.
[76] W Blackstone, *Commentaries on the Laws of England*, Volume 4 (1769) 138; Stern, *Blackstone*, __.
[77] I Kant, *Political Writings*, Hans Reiss (ed.) (1970) 158; *see generally* M Dan-Cohen, *Kant*, this volume.
[78] Ibid.

Right, Hegel targeted Beccaria especially: 'the state is not a contract at all nor is its fundamental essence the unconditional protection and guarantee of the life and property of members of the public as individuals. On the contrary, it is that higher entity which even lays claim to this very life and property and demands its sacrifice.'[79] The concept of right, for Hegel, encompasses the criminal's right to be punished in accordance with his crime and pursuant to reason-governed logic, and, thus, to be treated with honor as a rational being.[80] Despite this disagreement, though, Hegel applauded Beccaria for focusing attention on the death penalty and for helping to bring about a more rational appreciation of this extreme punishment. After criticizing Beccaria, Hegel added: 'However that may be, Beccaria's endeavor to have capital punishment abolished has had beneficial effects. Even if neither Joseph II nor the French ever succeeded in entirely abolishing it, still we have begun to see which crimes deserve the death penalty and which do not. Capital punishment has in consequence become rarer, as in fact should be the case with this most extreme punishment.'[81]

Beccaria's central arguments against capital punishment—namely, that the brutalizing effects of executions outweigh their deterrent effect and that more effective deterrence can be achieved by means of life sentences—were empirical in nature; despite the lack of any empirical evidence, though, Beccaria would follow his intuitions, as would Bentham, and oppose the death penalty. By contrast, more than two hundred years later, still in an empirical vacuum, their heirs at the University of Chicago—Gary Becker and Richard Posner—would express contrary intuitions and espouse capital punishment.[82] 'To summarize once again my position on this controversial question,' Becker would affirm in 2005, 'I favor capital punishment because and only because I believe it has 'sizeable' deterrent effects.'[83]

IV. *Modern Appropriations of Beccaria*

Despite this remarkable difference on capital punishment, the Chicago School of law and economics would enlist Beccaria's name and writings in their project to extend, as Beccaria himself had, the rational actor model to crime and punishment. Beccaria's theoretical approach would shape the sensibilities of modern economic theory—in several respects. First, regarding to the use of mathematics. Beccaria is perhaps the first to ever have deployed mathematical modeling to analyze criminality. He published an article on smuggling in 1764—the same year he released his famous treatise—that set forth, with the use of mathematical equations and algebra, the expected relationship between tariffs, contraband, and sovereign revenue. It appeared originally as an essay in volume XV of *Il Caffè*—the review that Beccaria and the Verri brothers were publishing, in the image of the *Spectator*. The article, *Tentativo analitico su i contraband* (*A Sketch*

[79] G W F Hegel, *Philosophy of Right*, T M Knox (trans) (1981) 71 (para. 100).
[80] A Brudner, *Hegel*, in this volume, __[around p. 36 of draft].
[81] Ibid., 247 (note to paragraph 100).
[82] G S Becker and R A Posner, *Uncommon Sense: Economic Insights, from Marriage to Terrorism* (2009), p. 253-258; *see generally* G S Becker, F Ewald and B Harcourt, '"Becker and Foucault on Crime and Punishment" A Conversation with Gary Becker, François Ewald, and Bernard Harcourt: The Second Session, The University of Chicago – May 15, 2013' *Carceral Notebooks* Volume 9 (2013).
[83] Becker, *Uncommon Sense*, 258.

of a Formal Model on the Question of Contraband) is remembered today only for its method—for using mathematical equations to solve an economic question, especially at such an early date. Joseph Schumpeter, in his magisterial review of the history of economic thought, recognized only three precursors to modern econometrics: Daniel Bernouilli for a 1731 article on probabilities; Achille Nicolas Isnard for a treatise in 1781; and Beccaria for this article published in 1764.[84]

Beccaria's endeavor, in that 1764 article, was to figure out the amount of potential contraband that a merchant had to smuggle in order for the merchant to come out even—to retain the same amount of capital as he originally had in his merchandise—given different rates of tariff imposed by the sovereign authorities and given that he would likely lose some of his contraband. Beccaria was essentially trying to figure out, for the sovereign, how to fix the tariff at the most advantageous level to maximize the return to the treasury. 'We are trying to determine how much a merchant ought to defraud the king's right, in terms of the value of any given commodity, such that, even if he loses the rest, he ends up with the same amount of capital as before thanks to the profit from smuggling.'[85]

In order to resolve this question, Beccaria went through a sequence of algebraic equations and drew from them a general theorem: 'given equal spatial capacity, a steady surveillance, and maximum industriousness by the merchants, the *nisus* to offset the tariff with the contraband will be equal to the square of the value of the merchandise, divided by the sum of that value and the tariff.'[86] This research, Beccaria added, should help the authorities set tariffs at the optimal level in order to maximize its revenues and balance trade. 'Determining such values in a general sense can elucidate how to design a tariff,' Beccaria claimed.[87] And he concluded from his study: 'The advantage of this research, for the drafter of tariffs, will be to know how much smuggling to expect from the merchants even after a certain number of seizures.'[88] Beccaria's study would be a precursor to the law and economics movement, especially as applied to criminal law.

Second, and at a more general level, Beccaria heavily influenced the theoretical framework of the modern economic approach to crime and punishment pioneered in the mid-twentieth century by scholars such as Gary Becker in economics and Richard Posner in law at the University of Chicago. The modern economic model of crime is premised on the ideas, developed by Beccaria and Bentham, that individuals pursue self-interest by trying to avoid pain and to seek pleasure—that individuals maximize their overall satisfaction or utility by choosing those opportunities that optimize their preferences.

---

[84] J Schumpeter, *History of Economic Analysis* (1968) 955 and 179.
[85] C Beccaria, "Tentative analytique sur les contrebandes" *in* C Beccaria, *Recherches concernant la nature du style*, 179-183, B Pautrat (trans) (2001) 182.
[86] Beccaria (2001) 183.
[87] Beccaria (2001) 182.
[88] Beccaria (2001) 183.

Becker reinvigorated this tradition with his seminal paper, *Crime and Punishment: An Economic Approach,* published in 1968.[89] Becker's economic model of crime—premised on the Beccarian idea that criminal behavior was influenced by calculation of the costs and benefits of committing crime—did away with many of the other explanations of crime offered by psychologists and sociologists. As Becker suggested in his paper, 'A useful theory of criminal behavior can dispense with special theories of anomie, psychological inadequacies, or inheritance of special traits, and simply extend the economist's usual analysis of choice.'[90] The modern economic model assumed only that an individual—any one of us—would engage in illegal activity as long as the benefits outweigh the costs. Becker's model generated a swell of research and attracted a coterie of young economists and Ph.D. students to the field of crime and punishment—most notably, Steven Levitt, author of *Freakonomics*.

As Becker recognizes and emphasizes in his influential 1968 paper, the source of the approach can be found in Beccaria: 'Lest the reader be repelled by the apparent novelty of an "economic" framework for illegal behavior, let him recall that two important contributors to criminology during the eighteenth and nineteenth centuries, Beccaria and Bentham, explicitly applied an economic calculus. Unfortunately, such an approach has lost favor during the last hundred years, and my efforts can be viewed as a resurrection, modernization, and thereby I hope improvement on these much earlier pioneering studies.'[91]

In American legal circles today, as a result, it is the *economist* Beccaria that often comes to mind—rather than the Enlightenment humanitarian. Beccaria has been canonized as the first economist to have applied rational choice theory to the field of crime and punishment. He is portrayed as the founder of the economic analysis of crime: the first to have rigorously applied the tools and logic of utilitarian calculus to criminal justice issues. And this, too, is by no means out of character. After all, after fleeing Parisian society and returning to Milan in 1766, Beccaria was appointed to one of only three chairs in public economy established during the eighteenth century—the newly created Professor of Cameral Sciences at the Palatine School in Milan in 1768.[92] Beccaria taught public economy for two years, before entering public service as an economic advisor and civil servant for the Milanese republic—until his sudden death in 1794.

Schumpeter places Beccaria at the fountainhead of classical economic theory—with Adam Smith and Turgot. Schumpeter in fact called Beccaria "the Italian A. Smith," and Adam Smith "the Scottish Beccaria."[93] And contemporary liberal economists also embrace Beccaria as one of their own. Richard Posner traces his intellectual genealogy,

---

[89] G Becker, "Crime and Punishment: An Economic Approach," 76 *The Journal of Political Economy* 169-217 (1968).
[90] Becker (1968) 170.
[91] Becker (1968) 209.
[92] P Groenewegen, *Eighteenth Century Economics: Turgot, Beccaria, Smith and their contemporaries* (2002) 40 n.2; Beccaria (1995) 129 n.1 & 2; Pautrat 2001:187. The other two chairs in political economy were bestowed on Genovesi in Naples in 1754 and P N Christiernin in Uppsala in the 1760s. Groenewegen (2002) 40 n.2.
[93] Schumpeter (1968) 179 and 180.

in the area of criminal law, specifically to Beccaria. In introducing his economic model of the criminal law, Posner states: 'The economic analysis of criminal law began on a very high plane in the eighteenth and early nineteenth centuries with the work of Beccaria and Bentham, but its revival in modern times dates only from 1968, when Gary Becker's article on the economics of crime and punishment appeared.'[94]

Much like Becker and Posner, Beccaria sought to extend the logic of economic rationality to the social sphere—to the field of crime and punishment. Beccaria believed that the logic of economics could tame and civilize society, could guide policy in the social domain, could determine right from wrong, just from unjust punishment. His project in *On Crimes and Punishments* was precisely to extend economic rationality to the penal sphere, so as to achieve there what had been achieved in the field of commercial exchange. As he wrote in his Introduction:

> We have discovered the true relations between sovereign and subjects and between nation and nation. Commerce has been stimulated by philosophic truths … and there is waged among nations a silent war by trade, which is the most humane sort of war and more worthy of reasonable men. Such is the progress we owe to the present enlightened century. But there are very few who have scrutinized and fought against the savagery and the disorderliness of the procedures of criminal justice, a part of legislation which is so prominent and so neglected in almost the whole of Europe.[95]

That was precisely the goal that Beccaria set for himself: to impose economic rationality on the barbaric sphere of punishment; to civilize and tame punishment the way that commerce tamed man; to harmonize the economic and penal spheres.

But there are crucial differences that set Beccaria apart from contemporary liberals economists who appropriate his name. The economic rationality that Beccaria sought to impose in the punishment field was not the self-regulating, free market system. It was, instead, an economic regime of minute governmental administration of every aspect of commerce. It was the economic model of eighteenth century policing—what is referred to as *cameralism* or, in German, *Cameralwissenschaft* or *Polizeiwissenschaft.*[96] It is the model of policing that is generally associated with the policing of the Parisian grain markets in the eighteenth century.[97] Beccaria's idea of 'the progress we owe to the present enlightened century' was *not* the liberalization of trade, but rather the intense administration of markets and commerce.

A good window into his economic thought was precisely his short article from 1764 on smuggling. What is clear from the essay is that Beccaria was not in the business

---

[94] R Posner, "An Economic Theory of the Criminal Law," 85 *Columbia Law Review* (1985) 1193.
[95] Beccaria (1995) 8.
[96] *See generally* A Wakefield, *The Disordered Police State: German Cameralism as Science and Practice* (2009); M Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005); M Dubber and M Valverde, *The New Police Science: The Police Power in Domestic and International Governance* (2006).
[97] See generally Harcourt, *The Illusion of Free Markets* (2011).

of *eliminating* government tariffs, but instead of mathematically calculating the optimal rate of taxation in order to maximize the sovereign's revenue. This was a *cameral science*—the economics of how to maximize the prince's wealth using all the tools of state intervention. And in this sense, Beccaria was in no way a precursor of liberal economic thought. To the contrary: Here he was, only 25 years old, and he placed himself in the role of advisor to the prince—well before he would become an advisor to the Republic. He was not yet working for the Milanese republic—and would not become a civil servant for another seven years. He was a young intellectual—yet he viewed himself, he identified as the prince's counselor figuring out how best to maximize the sovereign's revenues through taxation.

Beccaria's other lectures and writings in public economy come down to us as fragments mostly. His inaugural lecture, from when he assumed his chair as professor of public economy at the Palatine School of Milan, was immediately translated into English and published in 1769, and as we shall see in French as well—in the *Éphémérides*, the journal of the Physiocrats.[98] The full lecture notes from Beccaria's course in public economy were published posthumously in Italian in 1804 under the title *Elementi di economia pubblica*—'Elements of Public Economy,' though the notes have never been translated into English or French for that matter.

Beccaria's lectures on public economy were divided into five major sections: agriculture, arts and manufacturing, commerce, finance, and police—with an introductory part at first setting out the outline and general principles. The final section, titled "Of Police," formed an integral part of his lectures on public economy—it represented an entire section alongside commerce and finance, and it covered both policing and taxation. But by a curious twist of fate, Beccaria's lecture notes on "police"—as well as those on taxation and public finance—are missing. The *Elementi* that have come down to us today contain parts I, II, III, and IV, but they go no further. The lectures on "police" have never been found and so have gone predominantly unnoticed—an accident of history that has perhaps distorted some readings of Beccaria's writings on punishment.

V. *Beccaria and the French Economists*

Beccaria's views on policing, however, did not escape the Physiocrats—a group of French thinkers in the eighteenth century who were the first to be called 'economists,' including most notably François Quesnay and Pierre-Samuel Dupont de Nemours.[99] Beccaria, it seems, had not met Quesnay or Dupont during his visit to Paris in 1766—in fact, it is not clear whether Beccaria was exposed to Physiocratic thought at all while he was in Paris. Those who surrounded him and received him in Paris were primarily in the circle of *Philosophes* and they included several thinkers who were arch opponents of the Physiocrats. From Beccaria's correspondence, it appears, he first came to the attention of the Physiocrats in 1769—three years after his short visit.

[98] The *Discourses* are also reproduced as Beccaria's Inaugural Lecture to the Milanese professorship in Bellamy's edition of *On Crimes and Punishments and Other Writings* (1995).
[99] *See generally* Harcourt (2011).

Dupont, as editor-in-chief of the *Ephémérides du citoyen*, the Physiocrats' journal, was proud to announce Beccaria's appointment to the chair in political economy in his third volume of the *Ephémérides* in 1769.[100] Dupont praised Beccaria for being one of the first recognized economists, but at the same time, used the announcement to underscore the deep differences between Beccaria and the Physiocrats—differences that traced to Beccaria's earlier treatise, *On Crimes and Punishments*.[101] Dupont focused his critique primarily on the question of the right to property, suggesting that Beccaria had not properly recognized the importance of that right: 'the *right to property*,' Dupont emphasized, 'is not *a terrible right*,' and '*contraband* is not *a theft on the Treasury*,' he added.[102]

Beccaria had included a chapter on contraband in his little tract, where he had advocated severe punishment, including the galleys, for smuggling: 'such a crime deserves a fairly heavy punishment,' Beccaria wrote, 'even up to imprisonment or penal servitude.'[103] In the case of a tobacco smuggler, for instance, Beccaria prescribed a prison regime including 'toil and exertion in the excise service which [the smuggler] wished to defraud.'[104] Dupont's reaction in the *Ephémérides* was visceral and it centered around the notion of private property. To Dupont, the *real* criminals are not those who smuggle contraband, but those *who regulate* commerce: 'If there is, then, a true *offense that deserves prison and penal servitude*, it's not that of the smugglers, but that of the *Regulators* who have proposed and still propose, who have compelled and still compel the adoption of royal edicts that hamper trade, of fiscal inquisitions, and of monopolistic threats to the natural rights of citizens, to their property, to their civil liberty, deterring useful work, and as fearsome for public as for private wealth.'[105]

A few months later, Dupont published a translation of Beccaria's inaugural lecture in economics in the *Ephémérides*, but annotated the text heavily in the margin.[106] His disagreement, in passages, is sharp—at times vitriolic. Dupont began by criticizing Beccaria's method, which, he suggested, starts with the particular instead of beginning with general principles and first truths. The wrong method, Dupont declared, 'led M. de Beccaria astray' and made him 'take very thin consequences for general principles, and very dangerous errors for general truths.'[107] Dupont hoped that, with some guidance, the young Italian economist 'would change considerably his opinions on very many points.'[108]

---

[100] *Ephémérides du citoyen, ou bibliothèque raisonnée des sciences morales et politiques, 1769, Tome Troisième*, Dupont de Nemours (ed.) (1769) 159-181.
[101] Ibid. 178 (« Nous nous chargerions volontiers par exemple de démontrer quelques vérités dont M. *le Marquis de* BECCARIA n'étoit pas encore convaincu lorsqu'il a publié son excellent Ouvrage *des Délits & des Peines* »).
[102] Ibid. 178 (« *le droit de propriété* n'est pas *un droit terrible,* ») and 179 (« *la contrebande* n'est point *un vol fait au Fisc* »).
[103] Beccaria (1995) 88.
[104] Beccaria (1995) 88.
[105] *Ephémérides* (1769), vol. 3, 180-81.
[106] *Ephémérides* (1769), vol. 6, 53-152.
[107] *Ephémérides* (1769), vol. 6, 66-67 n.5.
[108] *Ephémérides* (1769), vol. 6, 67 n.5.

Dupont was extremely critical. In his lecture, Beccaria had advocated placing tariffs and charges on the importation of value-added products and on the exportation of primary resources. Dupont took issue: 'it is distressing to hear again these alleged maxims that have caused so much harm, especially from a Philosopher, from an illustrious Professor, charged by the state to refute political errors and to substitute them with the knowledge of useful truths.'[109] Dupont dedicated eight long pages to disparaging Beccaria and his policy proposals, suggesting that they inevitably will lead to an impoverished nation that manufactures nothing but luxury goods, and then concluded, 'we have already said enough perhaps to show a Philosopher as shrewd as *M. le Marquis de* Beccaria that trying to make a *People* more industrial than liberty and instruction would lead them, amounts to a completely wrongheaded understanding of politics.'[110]

Dupont attacked Beccaria for suggesting in his treatise that merchants who engage in evasive measures such as smuggling contraband, should be sent '*aux galères*'—to the galleys—and Dupont composed a lengthy monologue by one hypothetical such merchant, who he named 'Galérien,' protesting his fate and lauding liberty of commerce and the pursuit of self-interest.[111] In his inaugural lecture, Beccaria had praised Colbert—the enemy of free trade—and traced the history of economics to Vauban, Montesquieu, Hume, Genovesi, and a few others, but he left out entirely the Physiocrats. This too caught Dupont's ire.[112]

For Dupont, Beccaria was threatening and promoted a markedly different brand of economics. Instead of opposing commercial regulation to the penal sphere—as the Physiocrats had done—Beccaria sought to integrate and harmonize the two: to regulate the penal sphere in the image of economic administration; to infuse the penal with that logic of regulated competition "which is the most humane sort of war and more worthy of reasonable men;"[113] to inject the criminal sanction within the economic domain; in sum, to simultaneously penalize and economize *both* fields. Beccaria's position embraced, at its heart, both intense administration and a notion of liberty, which was anathema to Dupont.

VI. *Foucault's Beccaria*

It is the regulatory dimension of Beccaria's thought—highlighted by the Physiocrats—that makes sense, perhaps, of why Beccaria's writings would become such a pivotal aspect of Foucault's work on the birth of the prison and the emergence of the disciplinary form in *Discipline and Punish* and in his later lectures. Foucault's fascination for the emergence of disciplinary techniques drew his interest both to the police regulations of the Parisian markets in the eighteenth century, especially of the Parisian grain markets, and to Beccaria's treatise *On Crimes and Punishments.*

---

[109] *Ephémérides* (1769), vol. 6, 72 n.7.
[110] *Ephémérides* (1769), vol. 6, 79 n.7.
[111] *Ephémérides* (1769), vol. 6, 85-90 n.7; *Ephémérides du citoyen, ou bibliothèque raisonnée des sciences morales et politiques, 1770, Tome Sixième*, Dupont de Nemours (ed.) (1770), 51.
[112] *Ephémérides* (1769), vol. 6, 146-48 n.23.
[113] Beccaria (1995) 8.

Regarding the first, Foucault closely associated the concept of discipline to the policing of grain markets. In his 1978 lectures at the Collège de France, titled *Security, Territory Population*, Foucault used several different sets of illustrations to help demarcate the three different approaches to governing that he identified—the juridical, the disciplinary, and the security modes of governmentality—and along those lines, Foucault used the policing of the grain markets as the illustration and quintessential example of the disciplinary approach.[114] Foucault specifically referred to "the example of the disciplinary police of grain as it existed until the middle of the eighteenth century, as set out in hundreds of pages in Delamare's *Traité de la police*'[115] to demonstrate how the disciplinary mode of governing was centripetal, all-encompassing in its regulatory nature, and codifying—as opposed, for instance, to the security apparatus of the Physiocrats. It is by means of the *police des grains* that Foucault shows all three key elements of discipline: how it isolates, concentrates, and encloses; how it focuses on the smallest of minor details and seeks to eradicate all disorder; how it categorizes into the permissible and the prohibited.[116] In fact, Foucault even goes so far as to coin the term '*la police disciplinaire des grains*'—the '*disciplinary* police of grain'—a qualifier that he alone would use to name those policing practices. In other words, Foucault identified the precise economic regulatory mechanisms that Beccaria had espoused with his concept of discipline—without directly mentioning Beccaria.[117]

By contrast, Foucault explicitly and repeatedly deployed Beccaria's name and his writings to identify the crucial turning point that would give way to discipline in the nineteenth century. Foucault portrayed Beccaria as the leading theoretician of the Enlightenment reformers—the first of 'the "great reformers"' who would announce 'all those rules that authorize, or rather demand, "lenience", as a calculated economy of the power to punish.'[118] As such, Beccaria's work forms a pivotal moment in *Discipline and Punish*: that moment between the brutal corporal punishments of the seventeenth century and the perfection of discipline in the early to mid-nineteenth century. Beccaria stands as the key reformer who, drawing on the Enlightenment themes of equality, humanity, lenience, autonomy, and universality, as well as utilitarian principles of prevention and correction, helped imagine a system of proportional and signifying penalties that would communicate the proper values and simultaneously educate the citizenry. By way of these reforms, rational punishments were to represent to the citizens, in more muted but

[114] The other sets of illustrations include, for instance, the exclusion of lepers in the Middle Ages as evidence of a juridical form of governing, the regulations surrounding the plague at the end of the Middle Ages as a reflection of disciplinary mechanisms, and the smallpox inoculation practices from the eighteenth and nineteenth centuries as an illustration of the security apparatuses, *see* Foucault, *Security, Territory, Population* (2007) 9-10; as well as, the different treatments of urban space, the building of artificial towns, and the commercial development of towns during the seventeenth and eighteenth centuries, *see* ibid. 12-20.
[115] Foucault, *Security, Territory, Population*, 45.
[116] Ibid., 45-46.
[117] Foucault returns to this theme at the end of his lectures, arguing perhaps even more forcefully, that the eighteenth century regime of policing represents 'the world of discipline:' 'We are in the world of the regulation, the world of discipline.' Ibid., 340; *see also* ibid. 324-325.
[118] Foucault, *Discipline and Punish*, 101.

powerful ways than the brutal punishments, the lessons to be learned and the associations to be remembered.

Although Beccaria's writings do not themselves represent the form of discipline *per se*, paradoxically they sowed the seeds of the disciplinary turn. Foucault emphasized that the prison and the disciplinary form do not derive from the logic of the Enlightenment reformers—even more, that they are incompatibility with it[119]—nevertheless, there are certain aspects of Beccaria's work that, as portrayed by Foucault, reflect a kind of minute regulatory mechanism that is not entirely foreign to the disciplinary techniques. 'The reform of criminal law must be read,' Foucault emphasized, 'as a strategy for the rearrangement of the power to punish, according to modalities that render it more regular, more effective, more constant and more detailed in its effects.'[120] Foucault showed that the intervention of the reformers was not so much humanitarian, as a project to rehabilitate or refashion an ailing punishment system. The problem was not that the brutal punishments of the *Ancien régime* were too savage, he argued, rather it was that they did not function properly anymore—as a result of changing social and political circumstances. 'The criticism of the reformers was directed not so much at the weakness or cruelty of those in authority, as at a bad economy of power,' Foucault maintained.[121] There was a 'badly regulated distribution of power' that resulted in 'dysfunction.'[122] Foucault argued:

> The true objective of the reform movement, even in its most general formulations, was not so much to establish a new right to punish based on more equitable principles, as to set up a new "economy" of the power to punish, to assure its better distribution, so that it should be neither too concentrated at certain privileged points, nor too divided between opposing authorities; so that it should be distributed in homogenous circuits capable of operating everywhere, in a continuous way, down to the finest grain of the social body.[123]

Instead of representing a challenge or limits to the sovereign's power to punish, according to Foucault, Beccaria's writings evinced 'the emergence of a new strategy for the exercise of the power to punish' with the primary objective 'not to punish less, but to punish better,' with 'more universality and necessity.'[124]

This, possibly, is the dark side of Beccaria's treatise, where leniency is not simply the product of an honest desire for more humane punishments, but represents instead a more effective, efficient, and persuasive form of social control—where the true goal, as Foucault proposed, was 'to insert the power to punish more deeply into the social body.'[125] Whether or not this represents something to be criticized, it does capture a final

---

[119] M. Foucault, *La Société punitive. Cours au Collège de France. 1972-1973*. B Harcourt (ed.), __ ; Foucault, *Discipline and Punish*, 114.
[120] Foucault, *Discipline and Punish*, 80.
[121] Ibid. 79.
[122] Ibid. 79 and 80.
[123] Ibid. 80.
[124] Ibid. 81-82.
[125] Ibid. 82.

and significant dimension of Beccaria's work. It is reflected well in the final clause of the penultimate paragraph of Beccaria's treatise:

> I conclude with a final reflection that the severity of punishments ought to be relative to the state of the nation itself. Stronger and more easily felt impressions have to be made on a people only just out of the savage state. A lightening strike is needed to stop a fierce lion who is provoked by a gunshot. But as souls become softened by society, sensitivity grows. And as it does so, the severity of punishments ought to diminish, *if the relation between the object and the sensation is to remain constant*.[126]

Conclusion

It may be possible, on the basis of the manifold receptions of Beccaria's treatise, to write a history of the foundations of criminal law. The uses, critiques, deployments, appropriations, and rereadings of Beccaria's work constitute an outline of a history of criminal law theory, or at least an important series of some of the major interventions in the field. In becoming a classic text that has been so widely and varyingly cited, though perhaps little read today, *On Crimes and Punishments* may be used as a mirror on the key projects over the past two centuries and a half in the domain of penal law and punishment theory—and I hope to have contributed, in a small way, to such an endeavor. In the end, we may learn as much about those who have appropriated and used Beccaria than we would about Beccaria himself—perhaps more.

[126] Beccaria (1995) 113.

Readers with comments should address them to:

Professor Bernard E. Harcourt
harcourt@uchicago.edu

Chicago Working Papers in Law and Economics
(Second Series)

For a listing of papers 1–600 please go to Working Papers at http://www.law.uchicago.edu/Lawecon/index.html

601. David A. Weisbach, Should Environmental Taxes Be Precautionary? June 2012
602. Saul Levmore, Harmonization, Preferences, and the Calculus of Consent in Commercial and Other Law, June 2012
603. David S. Evans, Excessive Litigation by Business Users of Free Platform Services, June 2012
604. Ariel Porat, Mistake under the Common European Sales Law, June 2012
605. Stephen J. Choi, Mitu Gulati, and Eric A. Posner, The Dynamics of Contrat Evolution, June 2012
606. Eric A. Posner and David Weisbach, International Paretianism: A Defense, July 2012
607 Eric A. Posner, The Institutional Structure of Immigration Law, July 2012
608. Lior Jacob Strahilevitz, Absolute Preferences *and* Relative Preferences in Property Law, July 2012
609. Eric A. Posner and Alan O. Sykes, International Law and the Limits of Macroeconomic Cooperation, July 2012
610. M. Todd Henderson and Frederick Tung, Reverse Regulatory Arbitrage: An Auction Approach to Regulatory Assignments, August 2012
611. Joseph Isenbergh, Cliff Schmiff, August 2012
612. Tom Ginsburg and James Melton, Does De Jure Judicial Independence Really Matter? A Reevaluastion of Explanations for Judicial Independence, August 2012
613. M. Todd Henderson, Voice versus Exit in Health Care Policy, October 2012
614. Gary Becker, François Ewald, and Bernard Harcourt, "Becker on Ewald on Foucault on Becker" American Neoliberalism and Michel Foucault's 1979 *Birth of Biopolitics* Lectures, October 2012
615. William H. J. Hubbard, Another Look at the Eurobarometer Surveys, October 2012
616. Lee Anne Fennell, Resource Access Costs, October 2012
617. Ariel Porat, Negligence Liability for Non-Negligent Behavior, November 2012
618. William A. Birdthistle and M. Todd Henderson, Becoming the Fifth Branch, November 2012
619. David S. Evans and Elisa V. Mariscal, The Role of Keyword Advertisign in Competition among Rival Brands, November 2012
620. Rosa M. Abrantes-Metz and David S. Evans, Replacing the LIBOR with a Transparent and Reliable Index of interbank Borrowing: Comments on the Wheatley Review of LIBOR Initial Discussion Paper, November 2012
621. Reid Thompson and David Weisbach, Attributes of Ownership, November 2012
622. Eric A. Posner, Balance-of-Powers Arguments and the Structural Constitution, November 2012
623. David S. Evans and Richard Schmalensee, The Antitrust Analysis of Multi-Sided Platform Businesses, December 2012
624. James Melton, Zachary Elkins, Tom Ginsburg, and Kalev Leetaru, On the Interpretability of Law: Lessons from the Decoding of National Constitutions, December 2012
625. Jonathan S. Masur and Eric A. Posner, Unemployment and Regulatory Policy, December 2012
626. David S. Evans, Economics of Vertical Restraints for Multi-Sided Platforms, January 2013
627. David S. Evans, Attention to Rivalry among Online Platforms and Its Implications for Antitrust Analysis, January 2013
628. Omri Ben-Shahar, Arbitration and Access to Justice: Economic Analysis, January 2013
629. M. Todd Henderson, Can Lawyers Stay in the Driver's Seat?, January 2013
630. Stephen J. Choi, Mitu Gulati, and Eric A. Posner, Altruism Exchanges and the Kidney Shortage, January 2013
631. Randal C. Picker, Access and the Public Domain, February 2013
632. Adam B. Cox and Thomas J. Miles, Policing Immigration, February 2013
633. Anup Malani and Jonathan S. Masur, Raising the Stakes in Patent Cases, February 2013
634. Arial Porat and Lior Strahilevitz, Personalizing Default Rules and Disclosure with Big Data, February 2013
635. Douglas G. Baird and Anthony J. Casey, Bankruptcy Step Zero, February 2013
636. Oren Bar-Gill and Omri Ben-Shahar, No Contract? March 2013
637. Lior Jacob Strahilevitz, Toward a Positive Theory of Privacy Law, March 2013
638. M. Todd Henderson, Self-Regulation for the Mortgage Industry, March 2013
639 Lisa Bernstein, Merchant Law in a Modern Economy, April 2013
640. Omri Ben-Shahar, Regulation through Boilerplate: An Apologia, April 2013

641. Anthony J. Casey and Andres Sawicki, Copyright in Teams, May 2013
642. William H. J. Hubbard, An Empirical Study of the Effect of *Shady Grove v. Allstate* on Forum Shopping in the New York Courts, May 2013
643. Eric A. Posner and E. Glen Weyl, Quadratic Vote Buying as Efficient Corporate Governance, May 2013
644. Dhammika Dharmapala, Nuno Garoupa, and Richard H. McAdams, Punitive Polic? Agency Costs, Law Enforcement, and Criminal Procedure, June 2013
645. Tom Ginsburg, Jonathan S. Masur, and Richard H. McAdams, Libertarian Paternalism, Path Dependence, and Temporary Law, June 2013
646. Stephen M. Bainbridge and M. Todd Henderson, Boards-R-Us: Reconceptualizing Corporate Boards, July 2013
647. Mary Anne Case, Is There a Lingua Franca for the American Legal Academy? July 2013
648. Bernard E. Harcourt, Beccaria's *On Crimes and Punishments:* A Mirror of the History of the Foundations of Modern Criminal Law, July 2013