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BECCARIA

On Crimes and Punishments
and Other Writings

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Introduction

Beccaria’s classic study *On Crimes and Punishments* belongs to the category of works which are much cited and little read. In Beccaria’s case the reasons for this relative neglect are twofold. First, until recently even those who have attempted to read him, either in the original or in translation, have had to rely on a corrupt text. As is explained in the Note on the texts, the present edition provides the first English version of the book as it was last published and revised by Beccaria. Second, the context provided by Beccaria’s other writings and those of his circle is rarely known, so that the background assumptions on which his argument rested have either appeared obscure or simply been misconstrued. As a result, Beccaria has come to be pigeon-holed as one of the founding fathers of a putative tradition of classic penal reformers, and the distinctiveness of his contribution has been recognised only rarely. His argument, however, was more complex than a number of commentators have appreciated, anticipating in an original way some of the solutions and difficulties of contemporary philosophers of punishment.

Punishment forms part of a wider system of social organisation and is sustained by a broad range of social practices, attitudes and institutions. Beccaria’s argument for penal reform reflected a whole new discourse about the nature of society and the need for social change more generally, and has to be read as part of this larger movement. Some account of the intellectual, social and political context of Beccaria’s activity, therefore, forms a necessary preliminary to any analysis of the text.
Introduction

Beccaria wrote his treatise whilst a member of a short-lived group of intellectuals known as the Accademia dei pugni, or Academy of Fisticuffs. This society, which lasted from 1762 to 1766, consisted of a small number of young men who regularly met to discuss and study together. Self-consciously modelled on the circle of French philosophes gathered around the Encyclopédie, they were a far less formal association than the numerous other literary societies and academies that abounded in Italy at this time. The name was adopted by Pietro Verri, their prime mover, when he learned that their discussions had the reputation of becoming so heated that they ended up in a fight. Between 1764 and 1766, members of the ‘academy’ also published the periodical Il caffe as a means of disseminating their ideas.

Although their interests were wide-ranging, their activity was essentially centred on winning over the Austrian rulers of Lombardy to a broad programme of reform and to bringing attention to themselves as potential agents of these changes within the imperial administration. The Habsburgs had held Lombardy since 1707, but did not begin the process of reform until the end of the War of the Austrian Succession in 1748. The initial impetus in Lombardy, as elsewhere, was the need to improve the administration of finances and the economy in order to reduce the massive deficit created by the cost of war. As Beccaria indicated in his inaugural lecture as Professor of Cameral Sciences, the most significant element of the reform programme was the completion of a new land register, the catasto. Begun in the 1740s, it was completed by the Florentine official Pompeo Neri in 1757. Outlining his aims in an important report in 1750, which set the agenda for all later reforms, Neri had proposed the abolition of all taxes except for those on land and the removal of all the exemptions allowed to nobles and the Church. The new register also offered an opportunity for redrawing the provincial and district boundaries, a review of the methods employed for the collection of taxes and a reappraisal of customs tariffs.

These measures brought the Habsburg regime into conflict with the Lombard establishment, for they threatened the independence and privileges of Church, patriciate and aristocracy. These groups resisted the reforms through numerous legal battles and appeals to precedent. Initially these countermeasures had some success.
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However, the further deterioration of state finances due to the Seven Years War of 1756–63 gave a fresh stimulus to the reorganisation of the province and its integration into the political structure of the Empire. In 1759 a new impetus was given to the reform movement by the appointment of Count Carlo di Firmian, whom Beccaria came to regard as his protector as minister plenipotentiary. Supported by the Austrian Minister of Foreign Affairs, Count Kaunitz, the next decade witnessed a concerted attack on ecclesiastical powers and immunities and the undermining of the position of local notables.

Beccaria’s and his colleagues’ writings belong to this second phase. Members of the ruling aristocracy, they nevertheless rejected the juridical mentality of their parents. Pietro Verri’s clash with his father was particularly emblematic of this generational conflict. Gabriele Verri had played an important part in the counter-attack of the Milanese establishment against the incursions of the Austrian government, defending in a series of works the local legal and administrative traditions of the Lombard region. Pietro, however, bitterly criticised the antiquarian and jurisprudential culture that then predominated in Milan and placed all state affairs in the hands of lawyers and scholars. Unlike either his brother Alessandro or Beccaria, he never took a legal degree. Instead, he escaped to fight in the Seven Years War. When in 1761, after an unsuccessful attempt to seek employment in Vienna, he returned to Milan, it was as a champion of the very reforms his father was attempting to block.

When Verri renewed his acquaintance with Beccaria in 1761 he found a willing disciple. Born in 1738, the eldest son of a reasonably wealthy noble family, Beccaria had become similarly estranged from his parents due to their attempts to prevent his marriage to Teresa Blasco, whom they considered socially inferior. As he confessed in his letter to André Morellet, reproduced below, his ‘philosophical conversion’ to the writings of the French Enlightenment dated from this period (p. 122). Rousseau’s recently published La Nouvelle Héloïse, in particular, offered a new discourse of moral sensibility that echoed his own romantic temperament and concerns. His first child, born in 1762, was symbolically named Giulia, after Julie – the heroine of the novel. Encouraged by Verri, in whose house he and his wife found temporary refuge, Beccaria’s
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conflict with his family developed into a thoroughgoing critique of the values and social system that underlay their opposition. The passages in *On Crimes* dealing with parental tyranny are only the most obvious indicators of the links Beccaria made between the organisation of the family and that of society as a whole. Like Verri, his aim became the substitution of the existing irregular, particularist and custom-bound legal system, based on hereditary rights and the personal rule of the monarch and nobility, by a regular, centralised and rational system of justice that was equal for all and grounded in the rule of law.

Against the traditionalist thinking of the lawyers and the Church, Verri, Beccaria and their circle placed the developing languages of political economy and of a secular morality that sought to harness and cultivate, rather than to repress, the passions. Verri’s writings on these subjects provide the necessary starting point for any consideration of Beccaria’s thought. For Beccaria’s ideas largely developed through daily discussion of his friend’s views. Indeed, as the Note on the text shows, Verri played a major role in initiating and eventually editing Beccaria’s most important work.

Whilst in Vienna, Verri had drafted his *Elements of Commerce*, which he later published in *Il caffè*. This treatise reflected the neo-mercantilism of writers such as Melon and Forbonnais, who tempered their advocacy of *laissez-faire* with a continuing role for the state, particularly in fostering domestic manufacturing industry, and a general concern to discourage foreign imports in order to secure a favourable national trade balance. Although he later modified the protectionist aspects of his views, ultimately favouring the abandonment of all restrictive practices such as guilds or the granting of monopolies for example, Verri remained largely indifferent to physiocratic ideas. He argued that stimulating the manufacturing and the export market would bring about an increase in agricultural production and a rise in population of their own accord. More in tune with the advanced economic theories of the time were his ideas on luxury and equality. Here Verri followed David Hume in believing that luxury provided a necessary incentive for work and industrial innovation, both creating wealth and destroying privilege in the process by forcing landowners to dissipate their wealth in conspicuous consumption, and with it their economic power. To foster further the breakdown of feudal ties, he advocated the
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abolition of *fidecommessi*, entails and other special rights of nobility that restricted the exchange of property and the free movement of labour. He contended that the commercial system not only required a more formally egalitarian society, in which there were no social barriers to freedom of contract and to trade, but led to the resulting prosperity being more equally distributed as well. Verri also shared Hume’s conception of money as a universal commodity that oiled the wheels of commerce by providing a uniform medium of exchange, and had corresponding worries about the dangers of paper credit and inflation. As the extracts reproduced below indicate, Beccaria’s lectures of 1769–70, posthumously published as *Elements of Public Economy*, developed substantially similar arguments.

Verri’s programme fitted with the interventionist tendencies of the Habsburg regime and their central concern with increasing state revenue. Even the egalitarian aspect of Verri’s thought found an echo in the Austrians’ desire to dismantle those privileges of the *ancien régime* which stood in the way of the process of centralisation and reform. The earliest publications of the group gathered around Verri were concerned with championing particular economic and fiscal policies associated with his theories. Verri began his campaign with an essay on the salt tax (1761) and from 1762–3 was engaged in composing his extensive *Considerations on the Commerce of the State of Milan*, in which he provided a comprehensive analysis of the decline of Lombard trade and the need to revive it through legal reform, internal free trade and the abolition of the tax farm. Beccaria’s first publication was a pamphlet *On the Monetary Disorders and their Remedies in the State of Milan in 1762*, in which he employed his skills as a mathematician to advocate the need for a stable rate of exchange in preference to Milan adopting its own currency as the best means of facilitating trade. Running through all these proposals was a desire to reduce the laws regulating trade to a more systematic order that reflected the rational economic calculations of individuals rather than a complex pattern of entrenched traditions, privileges and special interests. Both Verri and Beccaria were able to fashion powerful criticisms of the existing system with these new analytical tools. Beccaria’s brief essay on smuggling of 1764, for instance, offered a classic early application of the mathematical formulation of rational choice theory in order
to quantify how high tariffs could be before contraband proved worthwhile. Although many of their specific suggestions were ignored, the activity of these reformers brought them to sufficient prominence for the Austrian government ultimately to place many of them in important positions within the Lombard administration. Both Verri (in 1765) and Beccaria (from 1771), for example, ended up on the Supreme Council of the Economy, a body that had been in part created in response to their ideas.

Underlying these economic proposals, with their attack on feudal attitudes and practices, was a new account of human motivation and morals. The link between economics, ethics and psychology was provided by the concept of happiness – the subject of Verri’s *Meditations on Happiness* of 1763, which was published shortly before Beccaria’s treatise on punishment, and at the time was occasionally attributed to him. Giuseppe Ricuperati has called this book, rather than Beccaria’s more famous work, the true ‘manifesto of the Accademia dei pugni’. Enunciating a conception of legitimacy that was to be fundamental to Beccaria’s argument, Verri declared that ‘The end of the social pact 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.’ In accordance with the lessons of the new political economy, the maximisation of public wealth and happiness required the equal protection of individuals. Behind his qualified utilitarian goal lay a hedonistic psychology and associationist epistemology principally derived, albeit with important modifications, from Locke, Helvétius and Condillac. Verri shared the contemporary view that the passions were the springs of human action. However, he continued to accord reason a decisive role in the refinement and direction of our passional urges. Moreover, he treated the flight from pain rather than the pursuit of pleasure *per se* as the decisive factor. Happiness, therefore, consisted of more than the passing enjoyment of mere pleasurable sensations. Rather, it was achieved through the rational pursuit of our interests through the removal of obstacles to our well-being, such as poverty. In this way, the spread of ideas or enlightenment and the programme of economic and social reform came together, with the one producing the other and promoting in the process the progressive civilisation of society

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by providing for the greater satisfaction and refinement of human needs.

Similar assumptions underlay Beccaria's writings. His study of crimes and punishments has often been treated as narrowly focussed on the issue of penal reform. Even Verri, who grew jealous at the fame the work brought his 25-year-old protégé, was apt to dismiss it as a limited exercise that he had set his young companion in applying the reformatory's ideas to a specific problem. The book was much more ambitious, however. Beccaria sought to establish a legal framework that reflected the general programme of the reformers to replace the existing system of semi-feudal privileges, customs and honours with a new conception of social organisation, based on a regular system of justice involving equal laws for all. This project was intimately connected to the academy's understanding of human nature and their views on political economy, which furnished him with the principles that guided his work. His purpose was to make punishment the chief instrument of reform by leading human beings, via their reason and passions, to the progressive promotion of the public happiness. As we shall see, however, Beccaria conceived this proposal in essentially liberal terms, as requiring the state to allow individuals to pursue their happiness in their own way so long as they did not harm others in the process.

As Beccaria made clear in his prefatory note To the Reader, appended to the fifth edition in reply to his critics, his aim was to provide an entirely secular account of the origins and function of law. He studiously avoided appeals to either revelation or natural law, making a clear distinction between God's justice, which was best left to Him, and terrestrial justice. The foundation of Beccaria's theory was human nature and in particular 'inerasable human sentiments' (p. 10). Beccaria shared Verri's positive evaluation of the function of pain. Whilst he believed 'pleasure and pain are the motive forces of all sentient beings', he thought 'every act of our will is always proportional to the strength of the sensory impression that gives rise to it' (pp. 21, 41). As he later specified, this meant that 'the proximate and efficient cause of actions is the flight from pain, their final cause is the love of pleasure', since 'man rests in good times and acts when in pain' (p. 157). Indeed, in his Elements of Public Economy (1769) he maintained that even the prospect of
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pleasure or of greater utility acted upon us only indirectly, via the pain resulting from the anxiety associated with the possibility of its not being achieved (p. 163). In this way, Beccaria was able to avoid one of the classic dilemmas confronting a social ethic based on a hedonistic psychology – namely, the worry that people will prefer either a very low level of contentment or base pleasures to the struggle to achieve quantitatively and qualitatively higher levels of fulfilment. On his view, we can never be fully satisfied. We are continuously driven on by the fear of being deprived of our present pleasures combined with a constant dissatisfaction with those pleasures created by the possibility of there being even greater pleasures to be attained. The resulting continual expansion of human needs was at the heart of his account of the progress of society, explaining the development of commerce through the multiplication of luxury goods as well as the role of law.

Beccaria followed the empiricist argument of Locke and Helvétius in attributing all human knowledge, including morality, to the operation of impressions upon our senses. However, he did not interpret this process in a totally mechanistic or deterministic manner. In common with Verri, he retained an element of the rationalist view in attributing a distinct function to human reason in the ordering and synthesising of our sense impressions. Moreover, far from reason being the slave of the passions, as in Hume, both the Italians believed that the distinctiveness of human beings lay in their capacity to control and channel them rationally. Civilisation resulted from the cultivation of this capacity. The spread of ideas or enlightenment became in this way directly related to the promotion of reform (see On Crimes, chapter 42).

This modified empiricist epistemology provided the basis for Beccaria’s attempt to place the law on what he regarded as a more rational footing. In general terms, law had to be clear and punishment speedy, certain and an economical deterrent so as to ensure an indisputable association of ideas between pain and crime. A rational legal system required that laws be as precise as possible, with judicial discretion reduced to a minimum, so that all citizens knew where they stood and could reason accordingly.

This approach, though present to some degree in Helvétius, was to become very influential, especially through the work of Jeremy Bentham, who found Beccaria’s work extremely suggestive. Ben-
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Like classical jurists, Beccaria credited him with being ‘the father of Censorial Jurisprudence’ – the first thinker to attempt a critical or ‘censorial’, as opposed to a merely expository, account of the law, which sought to demystify and correct the prejudices and confused reasoning that guided most contemporary legal decision making. Indeed, Beccaria provided Bentham with one of his most important tools of criticism. For Beccaria not only followed Locke in seeking to analyse complex ideas into their simple, experience related parts. As H. L. A. Hart has observed, he also anticipated Bentham’s elaboration of this technique in order to deconstruct the supposed logical fictions that in their eyes constituted the bulk of our traditional legal and moral concepts. Both thinkers appreciated that terms such as ‘right’, ‘duty’ and ‘obligation’ could not be defined readily in terms of concrete material objects and their effects upon us. As Beccaria put it, such words were ‘abbreviated symbols of a rational argument and not of an idea’ (p. 12). It was necessary, therefore, to look not for definitions of these words alone but of the complete sentence or argument within which they were employed. Only then would it be possible to translate such statements into others in which the words to be explained did not appear and were replaced instead by things which could be directly experienced and analysed in terms of pleasure and pain – a procedure Bentham called paraphrase. For both thinkers, notions of obligation and of duties, which lay behind doctrines of rights, were all abbreviations for the argument that we will suffer a sanction unless we behave in a particular way. As a result, our basic legal and political vocabulary boiled down to the possibility of punishment or the infliction of pain if we do not act in a stipulated manner. The establishment of the right to punish, therefore, provided the key to our understanding of the whole legal and political system and consequently was the starting point for Beccaria’s theory.

Beccaria agreed with Hobbes that the asocial state was one of war, and that fear and the desire for security provided the motivation for uniting to form society. Characteristically, it was the prospect of pain rather than of pleasure that moved us to act. However, he was far from believing that we sacrificed all our liberty to the Leviathan in return for the protection it offered us. On the contrary, he contended that we give up only the smallest portion of our liberty, i.e. that portion necessary for us to enjoy the remaining
part in peace and tranquillity (p. 11). As a result, law was justified only to the extent that it was limited to what was required to preserve the maximal amount of individual liberty possible.

Beccaria employed the idea of a social contract more as a theoretical device for setting limits to the legitimacy of law than as an actual historical act to explain its origins. However, in the same chapter he made reference to a classic utilitarian justification for law. If there were a sufficiently large secondary literature on Beccaria to contain interpretative disputes, this combination of contractarian and utilitarian arguments would no doubt have given rise to ‘the Beccaria problem’. For it is generally argued that the utilitarian argument either negates the contractarian or renders it unnecessary and vice versa. On the one hand, utilitarians have tended to regard the notion of a social contract as either redundant or a pernicious fiction. If the purpose of government is to secure optimal welfare then our obligation to obey any law lasts so long as it performs this function better than any alternative and no longer. Contractarian notions of consent and related considerations of natural rights seem beside the point and merely serve to help individuals withdraw their support for the general good. On the other hand, social contract theorists have suggested that utilitarianism fails to show a sufficient degree of equality of concern and respect for the differences between individuals. They accuse utilitarians of potentially sacrificing the individual to the greater good of society as a whole. From their perspective, the contract argument appears as a way of ensuring that individuals are not used as a means for some collective purpose.

The seeming confusion arising from Beccaria’s mixture of these apparently conflicting arguments draws additional plausibility from the fact that the first English translation of Beccaria’s book wrongly credited its author with making ‘the greatest happiness of the greatest number’ the benchmark of all laws and other human arrangements. In the hands of Bentham, this principle became the sole foundation of morals and legislation and was employed by him in a merciless attack on all contractarian and rights-based arguments. However, although Bentham owed the wording of his formula – if not the ideas behind it – to this source, and in spite of the fact that all subsequent English translators have continued to attribute it to Beccaria, the Italian never employed the phrase. His
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exact words were ‘the greatest (massima) happiness shared among the greater (maggior) number’.

Unfortunately, even this formulation offers a poor guide to Beccaria’s meaning. The notion of division might suggest that he had in mind average as opposed to aggregate utility, whilst the use of the comparative (maggior) instead of the superlative (massima) potentially indicates that he might have meant ‘the greatest happiness of the majority’ rather than of the ‘largest number’. However, Beccaria’s discussion of the utilitarian injunction elsewhere reveals that such inferences would be wrong and that his own wording here is also misleading and imprecise. In these other passages, it becomes clear that his meaning is much closer to that expressed by Verri in his Meditazioni, cited above, who together with Hutcheson, Helvétius, and (less directly) Bacon and Rousseau inspired his thesis. From these sources, it emerges that Beccaria was concerned to maximise equally the happiness of each person – a goal he shared not just with Verri but with other members of the Caffe group. Thus, in the Fragment on Smells (1764) he defines the public good as ‘the greatest sum of pleasures, divided equally amongst the greatest number of people’, whilst in his Reflections on the Barbarousness and Civilisation of Nations and on the Savage State of Man he went so far as to describe ‘barbarity’ as a disequilibrium between knowledge and opinion, on the one hand, and ‘each individual’s needs and greatest expectations of happiness’, on the other. More importantly, in his Elements of Public Economy he defined the sovereign as the ‘just and equitable distributor of public happiness’ and this latter as ‘the happiness of all those individuals that are subject to him’. Consequently, he included amongst his list of ‘false ideas of utility’, enumerated in chapter 40 of On Crimes, any attempt ‘to give a multitude of sensible beings the symmetry and order of brute inanimate matter’ or doctrines that ‘separate the public good from the good of each individual’ (pp. 101–2).

There can be no doubt, then, that Beccaria took both the contractarian and the utilitarian aspects of his doctrine seriously and sought to combine them. Was this synthesis confused, as Bentham’s remarks about Beccaria’s ‘false sources’ and ‘obscure notions’ lead one to believe he thought? Or can a coherent thread be found that links the two into a form of contractarian utilitarianism, in which the good of the individual cannot be sacrificed to the common
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good? The general drift of Beccaria’s theory suggests that he attempted the latter, anticipating in the process a number of arguments more usually associated with Bentham’s most famous disciple and critic, J. S. Mill.

Like Mill, Beccaria contended that human welfare was tied up with the protection of certain basic interests, most particularly the security of person and possessions. The moral justification for protecting these interests, however, did not depend upon notions of natural right. Their basis lay in considerations of utility, as being essential to human life and the pursuit of happiness. Moreover, when individual interests came into conflict utility again became the benchmark for resolving these clashes. Indeed, such reasoning underpinned Beccaria’s understanding of the moral foundations of the state. Beccaria contended that our interests could not be guaranteed without the legal sanctions and regulatory mechanisms provided by government. However, as we saw, he believed that the agreement to obey the law involved a trade-off, whereby individuals sacrificed a part of their liberty to preserve the greatest possible liberty over all. Both the purpose and limits of government, therefore, were set by what Beccaria regarded as the utilitarian goal of securing the greatest possible happiness of each and every citizen. For to achieve this utilitarian goal we had to submit to a number of general rules which applied equally to all and which were upheld by some authoritative power. The idea of the social contract became in this way both a means for expressing the central utilitarian concern that in minimising pain and maximising pleasure we show equal respect for the interests of each individual and a device for justifying our obligation to uphold this maxim. On this view, the only laws we could and should agree to were those concerned with the furtherance of human well-being, the most vital of which were those prohibiting harm to our vital interests. As a consequence, the only rights that either state or citizen might validly claim flowed from their mutual obligation to preserve those human interests necessary to the reduction of pain and the promotion of happiness.

Beccaria’s mixture of contractarianism and utilitarianism served therefore to modify the latter in two main respects. First, the contract established that the purpose of government was to govern according to rules that promoted the public happiness by giving the greatest possible protection to the vital interests of each and
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every citizen rather than by pursuing the greatest possible aggregate utility. Although it is not clear that Beccaria appreciated that his attempt to equalise happiness might conflict with his desire to maximise happiness, forced to choose between the two he invariably opted for the former rather than the latter. Second, by making the rules subject to a contract, Beccaria effectively blocked the collapse of rule into act utilitarianism, which would have allowed the government to weigh each case on its particular merits. Both these moves served to prevent the utilitarian reasoning which he employed as an effective tool of social criticism and reform being used in certain instances to sacrifice the individual to the common good. These considerations were of the utmost importance for Beccaria’s theory of punishment. They enabled him to escape some of the problems associated with purely utilitarian theories of economical deterrence and to adopt a compromise theory, not dissimilar to that proposed by contemporary philosophers such as John Rawls and H. L. A. Hart, which found room for the concerns of retributivists as well.

Very briefly, the respective merits and demerits of the retributive and utilitarian views of punishment have been traditionally described as follows. For the utilitarian, punishment is forward-looking. Its basic purpose is the reduction of crimes, and hence pain, in the future. From this perspective, past wrongs cannot be undone, merely prevented from reoccurring by making illegal actions less attractive than legal ones. For the retributivist, in contrast, punishment is backward-looking. It follows from guilt and aims to ensure that wrongdoers suffer in proportion to their wrongdoing. Retributivists have made two general and related criticisms of the utilitarian view, both of which strike at the heart of Beccaria’s theory. First, they claim that utilitarianism might lead to the imposition of excessive punishments for relatively minor offences. For the gain to society resulting from deterring multiple minor infractions of the law by administering a severe exemplary punishment, such as hanging some one for double parking, might outweigh the pain caused to the unfortunate individuals selected to be made an example of. Second, they have argued that utilitarianism could even justify punishing an innocent person for a crime they did not commit: for example, if the real criminal could not be apprehended and a conviction was necessary to prevent people losing faith in the effectiveness of the forces of law and order and a consequent
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lessening of the deterrent effect of punishment. Indeed, they contend that utilitarianism creates no necessary connection between guilt and punishment at all, other than the rather tenuous link established by the likely undermining of the whole deterrent argument if people come to believe that individuals are simply punished arbitrarily. Utilitarians, in their turn, argue that the retributivist view is circular and vague, amounting to little more than the assertion that someone deserves to be punished because they deserve it. Such theories may be good at specifying who should be punished, namely the transgressor, but are less compelling at explaining why or how. The classic retributivist argument of the lex talionis (i.e. ‘an eye for an eye, a tooth for a tooth’), for example, proves rather imprecise when it comes to concrete cases. It is unclear, for instance, what form of punishment it decrees for a toothless person who has knocked out someone else’s teeth.

Beccaria was well aware of the pros and cons of each of these theories of punishment, and in framing his own theory aimed to draw on the former whilst avoiding the latter. His basic justification for why we should punish was utilitarian. One of the central points of his essay was that the existing system of criminal justice, which was essentially retributive in character, was far too arbitrary and often pointless. Essentially orientated around the lex talionis, its basic rationale was that crimes against the body politic should be punished by heaping suffering upon the body of the criminal. Beccaria ridiculed such notions as both useless and unjust. ‘Can the wailings of a wretch’, he asked, ‘undo what has been done and turn back the clock?’ Against such views, he asserted that there could be no other purpose for punishment than ‘to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise. Therefore, punishments and the means adopted for inflicting them should, consistent with proportionality, be so selected as to make the most efficacious and lasting impression on the minds of men with the least possible torment to the body of the condemned.’ (p. 31).

As we have seen, however, it is precisely at this point, when considerations of whom and how one should punish enter the discussion, that the utilitarian begins to get into difficulties. Beccaria clearly wanted to avoid these problems, since his two other main concerns in the book were that the present system frequently
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convicted the wrong person and that it exacted unduly harsh penalties. His solution was to introduce some of the retributivist arguments into his theory in ways that paralleled his contractarian view of utilitarianism. His argument was essentially that whilst the basic purpose and rationale of punishment was utilitarian, its application had to be limited by retributivist considerations of guilt. For the contractarian justification that Beccaria gave for the adoption of the utilitarian rules provided by the state, made them subject to the limitation that they afforded each of us equal mutual protection of our basic interests except in those circumstances where we intentionally broke the agreement.

As a result of this dual perspective on punishment, Beccaria made a similar distinction to that proposed by Rawls and Hart between the functions of the legislator and those of the judiciary (pp. 12, 14–15). The first should adopt utilitarian criteria for the framing of laws and punishments, the second employ retributive criteria when applying these rules to particular cases. Moreover, as Foucault has noted, the contractarian argument also enabled Beccaria to distinguish between the public and the private spheres, restricting state action to the former. The legal rules merely operated as an external framework to regulate our social interaction, leaving us as much as possible to pursue our own affairs as we pleased. Punishment referred solely to the restitution of the legal order and to the legal personality of the criminal. Unlike later penal reformers, he did not aim at the rehabilitation of the criminal’s moral personality as such (pp. 22–3, 74).

The power of the sovereign to punish offenders, therefore, only became a right to the extent that it was exercised in a manner ‘most useful to the greatest number’, whilst punishments were only just in so far as they did not go beyond what was necessary ‘to unite together particular interests’ and prevent society degenerating into a harmful state of warlike anarchy (p. 11). However, what utility entailed was not left to the sovereign’s discretion, but was determined by those laws that could have been agreed to under a social contract between free and equal individuals as providing for the greatest possible reduction of harm divided amongst the greatest possible number. Two important consequences followed from these criteria. First, punishment only became justified to the extent that the crime harmed society, the punishment was proportionate to
that harm and the individual to be punished had violated the terms of the contract from which everyone benefited. Second, and far more radically, he contended that if the benefits of the legal system failed to be equitably distributed, so that the law promoted the happiness of some rather more than others, then it would not only justify but positively promote crime. In so arguing, Beccaria not only had the privileges and immunities of the Church and nobility in mind, but also the maldistribution of property which gave rise to them. In such circumstances, he argued, it was entirely understandable that the poor should seek to ‘break those bonds which are so deadly for the majority and useful only to a handful of indolent tyrants’ by returning to a ‘natural state of independence’ in which, as members of a robber band, they could, for a time at least, ‘live free and happy by the fruits of courage and industry’ (p. 69). As Venturi has observed, Beccaria moved at this point beyond reform and towards the discourse of utopia. It is little wonder that the term socialism was first coined in Italian by Ferdinando Facchini, who intended it as a term of abuse, in his critique of Beccaria of 1765.

The best way to illustrate Beccaria’s compromise theory is by examining two of his most famous arguments – his case against torture (in On Crimes, chapter 16) and, for contemporaries the most original of all, his rejection of the death penalty (in On Crimes, chapter 28). Beccaria considered two different uses of torture. First, he examined the practice of judicial torture to get the criminal to confess to his or her crime. Beccaria objected that this procedure was both unjust and inefficient. It was unjust for largely contractarian reasons. Torture involved punishing someone before they had been proven guilty. However, Beccaria argued, society had a duty to protect the individual until it had been ‘decided that he had violated the pacts according to which this protection was provided’ (p. 39). In other words, we had only submitted to abiding by the laws of the state to the extent that they offered us protection and any attempt to go beyond this remit was illegitimate. He condemned torture as inefficient, though, on largely utilitarian grounds. For a start, he saw no purpose in forcing some one to confess to crimes that could not be proven in some other way, since such offences would presumably be otherwise unknown and hence offered no bad example to others from which they had to
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be deterred. Even more importantly, though, torture undermined the deterrent effect of punishment. The weak, he claimed, would reason that they could be made to confess to any crime under torture and, on the principle that one might as well be hanged for a sheep as for a lamb, would have no incentive not to commit crimes. The strong, in contrast, would reason that they could withstand the pain and hence could break the law with impunity.

Both the internal evolution of judicial procedure and the impact of the empirical methods of the natural sciences on rules of evidence, a theme Beccaria developed elsewhere in his treatise, had made these latter arguments against torture relatively commonplace. More novel was his case against the second use of torture, as a means of punishment for exonerating guilt. Here he employed the utilitarian reasoning that provided his basic justification of punishment to condemn the retributive use of torture as a means for removing the taint of infamy as pointless and so illegitimate. However, this argument had its dangers since utilitarian theorists of deterrence could be accused, as we saw, of a potential willingness to employ overly severe punishments to achieve their goal, in which case cruel and unusual punishments might be thought occasionally appropriate. Once again, therefore, Beccaria had to adopt a mixture of contractarian and utilitarian reasoning.

In fact, utilitarians can avoid the most simplistic versions of this charge by stressing that their goal is economic deterrence. In other words, they seek to use the least pain possible so as to maximise happiness over all. In general, this criterion entails that punishment is proportionate to the gravity, or harmfulness, of the offence. Beccaria certainly took this view, arguing that crimes ought to be categorised by the harm they inflicted on society and punished accordingly. He insisted that punishments should never be more painful than was necessary to prevent a given crime or outweigh in suffering the harm done to society by the misdemeanour they aimed to prevent. He also believed it important to ensure that criminals had an incentive to commit a lesser rather than a greater crime. Torture, he maintained, was too inflexible and rarely, if ever, possessed these necessary features. In spite of all the ingenuity that had gone into the devising of tortures, their adaptability was limited by the human frame, which could only stand so much. His condemnation of torture for being simply too crude drew additional
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support from his belief that the duration of a punishment had a greater effect on other people than its intensity. Hard labour lasted over many years, for example, whilst it was difficult to prolong torture for more than a few hours or days without losing your victim. As a result, he doubted that tortures could ever be sufficiently refined so as to provide the carefully graded scale of punishments required by his deterrence argument for punishment to be legitimate. Moreover, he also maintained that torture was essentially brutal and brutalising and as such was likely to increase violent crimes by desensitising people to cruelty.

Nevertheless, such thinking does not rule out torture on principle. Some of his arguments are empirically debatable. Torture, for example, might be prolonged and refined by administering it at weekly intervals rather than at one go. Nor does his case exclude the possibility that the cumulative effect of some minor but common crime could justify on utilitarian grounds a harsher penalty in order to stamp it out than a rare but grave offence. It does not even ensure that some barbarous penalty inflicted on an innocent person might not be allowable in certain rare instances, although we have already noted Beccaria’s separate argument against this possibility. To prevent such exemplary punishments ever being justified, however unlikely they might be, Beccaria had to turn once again to the contractarian argument underlying his utilitarianism, whereby the utilitarian strategy was adopted as a means for giving equal weight and protection to the interests of every individual. According to this line of argument, although it might in some highly hypothetical case make sense to convict and torture a relatively innocuous person, it could never make good utilitarian sense to institute such a practice by giving the state the right to do so. In the language of modern utilitarianism, the contract bound the state to follow certain utilitarian rules rather than to weigh up all actions on the basis of utilitarian criteria. For to allow any institution to do the latter involves handing over a wide degree of arbitrary power the utility of which is highly doubtful.

This move becomes clearer in Beccaria’s discussion of the death penalty. Beccaria believed that the most novel feature of his argument was the utilitarian claim that the death penalty could never have been established because to give the state the right to kill its members on a regular basis, even subject to numerous limiting
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conditions, could never be deemed useful or necessary to the protection of their interests. As with his argument against torture, the main part of this reasoning related to his belief that the death penalty was essentially wasteful and a doubtful deterrent. He argued that by killing the criminal, a potentially useful member of society who could have repaid his or her debt to society was taken out of circulation. Moreover, he believed that public executions rarely had a lasting impact on the population. With the exception of murder, the association between the sentence and the crime committed was hard to establish in people’s minds and was soon over and as soon forgotten. Paradoxically, therefore, one needed a constant succession of capital crimes if the death penalty was to retain its effectiveness. Finally, capital punishment did not allow of any degree of proportionality, so that a criminal risking death had no incentive to moderate his or her behaviour in any way in the hope of a lesser sentence. In these cases, the death penalty offered an incitement to crime. Indeed, he believed that executions in general insured people to violence and in some cases even had the effect of glorifying the criminal by turning him or her into a martyr, thereby encouraging rather than deterring crime.

Although this reasoning clearly inspired later utilitarian arguments against the death penalty, such as Bentham’s, it rests once again on speculative and possibly mistaken empirical assertions. A convict, for example, would have to break a lot of rocks and sew a good many mail-bags before he began to earn his keep, let alone render a return. As Beccaria’s earliest critic – Ferdinando Facchini – pointed out, it also would be difficult to make much of a deterrent out of hard labour given the harshness of the average peasant’s everyday existence. Of course, Beccaria’s argument that the death penalty was an uneconomical deterrent had far greater plausibility in the case of the numerous petty offences for which it was still administered at the time, although we have already noted that even here difficulties might arise. However, whilst many of his contemporaries granted this much, even admirers, such as Denis Diderot, felt that capital punishment remained justifiable for murder. Beccaria’s clinching argument, therefore, had to lie elsewhere. Namely, that it was the right to punish with death, rather than this or that particular use of it, which failed the test of utility by giving the state a power which appeared contrary to the very
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purpose of the state and seemed to set it at war with its members, bringing it into disrepute in the process. He contended that to have granted such a power would have been contrary to the utilitarian calculation that provided the basis for the legitimacy of the state. ‘For how’, he wrote, ‘could it come about that the minimum sacrifice of liberty made by everyone included the greatest good of all, life?’ (p. 66). Indeed, if, as Christians then claimed, suicide was wrong, the gift of life being a matter of God’s will rather than our own, no-one could be said to have a right to kill him or herself which could be surrendered up to others in the first place. The only exception Beccaria entertained was that of an individual, such as a revolutionary leader, whose exile or imprisonment might still constitute a threat to the very existence of the state. However, with the exception of this limiting case, he contended that the state’s duty to protect our vital interests could never entail that it put itself at war with us.

Hegel regarded Beccaria’s argument as revealing the ultimate absurdity of the contractarian conception of political obligation. For in his view, the state was characterised by precisely this right to call on its citizens to lay down their lives. Other commentators, however, have been less convinced that a prohibition on capital punishment follows so inexorably from the contractarian position. Although Beccaria is often interpreted as having radicalised the Hobbesian account of the social contract, for example, Hobbes himself did not deny the state the right to apply the death penalty in appropriate cases. On the contrary, he believed it was entirely rational that contractors would grant such a right in order to protect themselves from law-breaking by others. He merely contended that the condemned had no duty to obey in such circumstances. Similarly, Kant pointed out in an important criticism of Beccaria’s argument that when the contractors cede to the state a right to punish certain crimes by death they cannot be regarded as literally willing their own capital punishment. Rather, they are seeking to create a system of law appropriate to a society which they know will probably contain murderers and other heinous criminals within it. The criminal does not will his or her own punishment, he or she merely opts to commit a punishable deed. From both the Hobbesian and the Kantian perspective, therefore, it is perfectly possible for the contractors to decide that the death penalty might

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be justified either because of utilitarian considerations as to its
general deterrent effect, as in the case of Hobbes, or for retributive
reasons concerning its basic justice, such as Kant put forward. At
most, Beccaria has simply provided grounds for believing that the
utilitarian reasoning of Hobbes’s contractors might be flawed. He
could only have argued for the absolute injustice of the death
penalty had he been prepared to employ some form of natural
rights theory which treats all killing as intrinsically wrong.

Beccaria’s later writings, most of which were not published during
his lifetime, developed the essentially liberal reasoning underlying
his theory of punishment. The two fragments reproduced below
are the sole remains of a projected work on ‘the civilising of
nations’, although his lectures on public economy fit into the same
general vision of human development. Refining his argument, he
contended that utility required that the laws operate negatively, to
prevent harm, rather than positively, to promote happiness – this
latter being best left to individual initiative. As he put it: ‘Everything
that is publicly useful does not need to be directly commanded,
although one should prohibit everything that is harmful. Therefore,
all laws that restrict the personal liberty of men have their limit
and rule in necessity; and the laws that aim solely at positive utility
must not restrict personal liberty’ (p. 157). This thesis anticipates
in a striking manner the indirect utilitarianism that was to inform
Adam Smith’s writings. It suggests that had Beccaria lived longer
he would have followed Verri in abandoning enlightened despotism
as the means of reform and embraced a form of constitutional
liberalism.

Beccaria’s book made a tremendous impact when it was first
published. A comparatively short work, its literary quality and ability
to synthesise some of the quintessential themes of the Enlighten-
ment and bring them to bear on a particular issue quickly won it
a wide audience. It attracted the praise of the French philosophes,
who invited him to Paris and encouraged the preparation of a
French translation by Morellet. Voltaire recruited Beccaria’s work
to his own campaign against various abuses perpetrated by the
French legal system and prepared a Commentary on the text, which
was regularly published along with subsequent editions of the
Italian’s book in French and other languages. The English edition

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of 1767 brought him to the attention of Bentham, and was subsequently reprinted many times. Catherine the Great even invited him to Russia to help in the preparation of her ukase reforming the Russian penal code. Unfortunately, this immediate success proved a mixed blessing in both the short and the long term. Beccaria was unnerved by his sudden fame and curtailed his visit to Paris. Pietro Verri, piqued by the fact that Beccaria rather than he was being credited as the leading light of the Milanese intelligentsia, broke with him. Deprived of Verri’s support and that of his circle, Beccaria failed to complete any other major work. Instead, he confined himself to the role of practical reformer in his career as a prominent official in the Austrian administration of Lombardy. These reports reveal a continuity with his early theories. A memorandum of 1792, for example, proposed the abolition of the death penalty and further elaborated the views of his famous book. However, the dissemination of his ideas amongst other intellectuals now largely fell to others and the various distortions that came about in the process went uncorrected. The recovery of his views only began in the 1960s as a result of the scholarly efforts of Franco Venturi and Luigi Firpo. In drawing on their work, this edition aims to enable English readers to come to a fuller appreciation of Beccaria’s place within Enlightenment and liberal thought than has hitherto been possible.