

Limiting the Death Penalty: Beccaria's Polemical Styles

Richard William Davies

Abstract: The aim is to elucidate and appraise some of the various types of consideration Beccaria adduces in the chapter of *Of Crimes and Punishments* dedicated to the question of the death penalty. In light of the exceptions Beccaria makes to his rejection of the death penalty, we see some of the consequentialist principles he employs in thinking about punishment in general. Yet the first four arguments in the chapter depend principally on a social-contract account of the formation of society, but are not formulated in such a way as to exclude only the death penalty without also excluding other forms of punishment. The most famous argument in the chapter, aimed at showing that the death penalty is an “absurdity”, is premised on a flawed principle of harm, and likewise proves either too much or too little. The final section briskly reviews some of Beccaria's more specific observations about how judicial killing was carried out in his day; some of these can carry over to current practices and help us see the moral costs of acceptance of the death penalty.

Keywords: death penalty; punishment; deterrence; social contract.

The aim of the present note is to elucidate and appraise in a preliminary way some of the various types of consideration Beccaria adduces in the chapter of *Of Crimes and Punishments* dedicated to the question of the death penalty.¹ This is the chapter to which the book owes a good deal of its enduring fame. But Beccaria's argumentative moves may not have always been carefully attended to both as regards their targets and their cogency. In particular, it is an

¹ This is the chapter that was numbered XXVIII in the first three Italian editions (1764-1766) and XVI in the editions in various languages (including Italian after 1774) that came under the sway of André Morellet's French translation of 1766. The complex history of the book can be followed in the first volume of the *Edizione nazionale delle opere di Cesare Beccaria*, ed. Luigi Firpo (and, later, Gianni Francioni) (16 voll.), Milan, Mediobanca, 1984-2009. The preferability of the text of the third Italian edition – the last to come under Beccaria's hand – began to be defended by Franco Venturi in the third volume of *Illuministi italiani* (7 voll.), Milan-Naples, Ricciardi, 1958. For present purposes, I have adopted the pagination of Venturi's 1965 edition of *Dei delitti e delle pene* (Turin, Einaudi), which follows that order and contains other interesting material, abbreviated in the text as *DP*; where chapter numbers diverge, I give first the original/Venturi and then the Morellet version. All translations into English are mine.

occasional feature of the Italian press, television and other media to encounter the supposition that Beccaria's arguments in this chapter form a justification for the final sentence of article 27 of the Italian Constitution, according to which "The death penalty is not admitted", without qualification.

1. *Abolitionism total and partial*

If one says without qualification that the death penalty is not admitted, one supports its total abolition. Some people who say such a thing take such a position to be axiomatic, something than which no other ethical or political commitment is more obvious. People who take this view are to some extent disabled from engaging in fruitful debate with those who admit some cases in which the death penalty may be used, because there would seem to be little common ground between the two positions. Indeed, it is not unknown for total abolitionists to say that the question is not even open to discussion. Other people who say without qualification that the death penalty is not admitted and support total abolition take such a position to be a consequence of some other ethical or political commitments. People who take this view have more chance of changing the minds of those who admit some cases in which the death penalty may be used, so long as they can find some ethical or political stance in common with their interlocutor from which to infer the non-admissibility of the death penalty even in the cases in which it had appeared admissible to the interlocutor. We shall see shortly a type of argument in this second category that Beccaria puts into play and that is fairly frequently cited as a decisive argument against the death penalty, but that appears to have disastrous consequences. But to begin with, I want to consider the conditions in which Beccaria admits that the death penalty may be used, and to try to elicit the principles underlying them as well as some concrete cases that might fit the bill. In this way, we may be helped to see what motivates his non-admission of the death penalty in many cases in which it has been thought admissible.

Key passages of the third paragraph of the relevant chapter may be rendered as follows:

There are only two reasons why it may be considered necessary to put a citizen to death. The first is when, even if deprived of his freedom, he still has such relations and such power as to threaten the security of the nation; when his mere existence can produce a dangerous revolution in the form of the established government. The death of some citizen thus becomes necessary when the nation is recovering or losing its freedom, or in a time of anarchy, when the very disorders take the place of the laws; but when there is the tranquil rule of law, [...] I see no necessity whatever to destroy a

citizen unless his death is a true and the only brake to deter others from committing crimes, which is the second reason why the death penalty may be regarded as just and necessary (*DP*, XXVIII/XIV: 62-63).

Standing thus near the beginning of by far the longest chapter in the book (the second longest, that on torture, is half the length), this paragraph is helpful for understanding Beccaria's thinking about two principles, which we may call "Public Security" and "Deterrence", that have already made appearances in the book's ruminations on the justifications for punishment in general in the early chapters. Here, we may separate them, taking the semi-colon in the second sentence of the quoted paragraph as the point of *cæsura* between them.

Public Security seems to involve two separable conditions: the precariousness of the government; and the standing of the person whose death becomes necessary in conditions of precariousness.

The question of the precariousness of the government evokes the widely-recognized uncertainty about quite what model of social contract theory Beccaria is relying on. In one direction, the reference to "recovering or losing freedom" has overtones of a Lockean approach, on which the passage from a tyranny to a commonwealth or from commonwealth to a tyranny might make a difference to how to individuate which citizen poses the greatest threat to public security. In another, the reference to "anarchy" might make us think of elements in Hobbes' thinking, according to which any significant rival to an emerging "leviathan" may be eliminated to ensure the unity of the constituted authority. In either case, if the death of a certain person helps to accelerate the passage to a state of tranquil rule of law, then that death is not only permissible but necessary. If so, then we may detect here at least a hint of a view, to which we shall return, according to which the good of society is not merely the aggregate of the goods of the citizens that make it up, but has some priority and perhaps even special prerogatives in the actions that are permitted to or required of it.

As regards the standing of the person whose death may become necessary in turbulent times, Beccaria seems to have in mind figures like pretenders to the throne, and he thus is presupposing, at least as a default, some of the institutions of a hereditary monarchy not so different from the one he lived under. In addition, deposed tyrants, Crown Princes in a hurry or heads of cadet branches of royal houses, not to mention impostors, may be rallying points in situations of interregnum or incipient civil war. Keeping persons of such potential symbolic significance in prison may be inefficacious for regaining peace and may even foment efforts to liberate them. So, their physical elimination may be the only way to restore order, by removing any hope of forming an effective opposition to the government of the day.

The two conditions involved in Public Security present themselves as separately necessary and jointly sufficient to justify the infliction of a death penalty. In admitting this exception to his general rejection of capital punishment, Beccaria is allowing that a penalty may be inflicted even though the person punished has not committed a crime. Though he may have been thinking in the first instance of persons attempting to usurp power for themselves, the condition regarding the “mere existence” of a person who is a focus for *others’* insurrectionary actions allows that that person need not have acted against the constituted government. Merely existing is not a crime. But, when the two conditions of Public Security are met, a certain person’s merely existing may be dealt with as if it were a crime, and indeed as if it were a very serious crime attracting the most extreme measures because a peril to the state. In this respect, the conditions in question also overrule the general principles enunciated in the early chapters of the book, according to which the penal law applies only to actions performed (*DP*, IV: 15-16). If so, the Public Security exception is of a political or military rather than penal nature.

Beccaria’s formulation of Deterrence is rather disappointing for someone who wishes to uphold something close to total abolition of the death penalty on at least two grounds.

One is that, as it stands, it leaves room for the death penalty to be inflicted on persons who have not committed crimes so long as their destruction is “a true and the only brake to deter others from committing crimes”. The death of a citizen may thus be an instrument *pour encourager les autres*, even if the citizen put to death is not in point of fact guilty of any crime. This again is in conflict with the principle that only crimes may be punished (*DP*, XXXII/XXV: 79). Among upholders of the abolition of the death penalty, this principle is generally regarded as sacrosanct, and even those who admit the death penalty tend to regard this principle as an important consideration.

The other ground for disappointment with Beccaria’s formulation of Deterrence is that, in the estimate of many who think that the death penalty may be inflicted in some or many circumstances, it is precisely the supposed deterrent effect that makes the death penalty admissible. Though Beccaria has some acute observations to make about the psychology of deterrence, the passage we are considering leaves it open not only what are the conditions in which the death penalty is “a true and the only brake to deter others”, but which are the crimes that these others may be deterred from committing by this brake. Were it true that the death penalty is a uniquely effective deterrent for some class of crimes, then it would be justified in such cases, and much of Beccaria’s effort to show that it is, as he says in the preceding paragraph of our chapter, “neither necessary nor useful” would be in vain.

Much ink has been spilt to show that, as a matter of fact, the admission or non-admission of the death penalty in a given state has very little influence on the rates of certain crimes (rather arbitrarily, emphasis is often put on the murder rate), and the introduction or abolition of the death penalty are likewise causally disconnected from (changes in) such rates. But, apart from rather gestural references to the exemptions extended to Roman citizens and the reforms of Elizabeth II of Russia (*DP*, XXVIII/XVI: 63), Beccaria does not in this chapter try to show that the death penalty has little or no deterrent effect. As we shall see, he has up his sleeve some psychological considerations about why other punishments may have a greater deterrent effect, but he seems to be taking almost for granted that, if the death penalty were “useful”, that would be justification enough for its occasional – or even ordinary – deployment.

Moreover, if there were some trivial offence – such as bad parking – that stood in this peculiar relation to the death penalty, then the formulation of Deterrence that we have before us would seem to admit the destruction of such offenders. This is of course in conflict with the considerations about proportionality that we find elsewhere in *Of Crimes and Punishments* (*DP*, VI/XXIII). We may presume that Beccaria would have resolved the conflict in favour of leniency (see *DP*, XXVII/XV). Yet it is not entirely clear what more general principles he could appeal to in order to ensure that the infliction of the death penalty in the name of Deterrence should be exceptional or at least rare.

Consideration of Public Security and Deterrence suggests that among Beccaria's principles for judging the admissibility or otherwise of a certain form of punishment is a general thought about public tranquillity and law-abidingness: the more a penalty promotes these goods or opposes their contraries, the more justifiable it is. This is a thought that expresses the utilitarian or consequentialist strand of Beccaria's thinking; so it is perhaps not surprising that it admits of inflicting harm on the objectively innocent for a greater good. Moreover, it allows that the tariff of punishments may be relativized to the degree of order in a society (*DP*, XLI). If a community is tranquil and law-abiding, then even the harshest punishments can be lenient; if, on the other hand, it is sliding towards anarchy or certain sorts of criminality are widespread, then the penalties meted out may have to be calibrated to the general level of lawlessness. The astonishment expressed in some American press on learning that Norwegian law contemplates no jail sentence longer than 21 years (even in the case of the mass murderer Anders Behring Breivik) may have been a reflection on the state of American society in 2012.

2. *Four rhetorical questions (and answers to them)*

While allowing exceptions to the total abolition of the death penalty, Beccaria also offers a range of arguments that, if well-founded and valid, would point in the direction of total abolition. A group of four of these can be found in the first paragraph of our chapter, expressed in the form of rhetorical questions, which can be rendered and divided up as follows:

[A] What can be the right that men attribute to themselves to kill their own kind? Certainly not that from which sovereignty and the laws derive. These are nothing but the sum of the minimum portions of the private liberty of each [*sc.* man]; they represent the general will, which is the aggregate of the particular [*sc.* wills]. [B] Who has ever wanted to leave the choice of whether to kill him to other men? [C] How can there be in the minimum sacrifice of the liberty of each [*sc.* man] that of the greatest of goods, namely life? [D] And if this was done, how can such a principle be reconciled with the other one according to which a man is not master of himself as regards killing himself, and he would have had to be if he could have given this right to others or to society as a whole? (*DP*, XVIII/XVI: 62)

The four arguments suggested by these rhetorical questions are based on some form of contract-based rights theory, which is at least in tension with the consequentialist theory that underpins the exceptions to total abolition. In [A] and [D] Beccaria himself suggests answers to his questions, while in [B] and [C] it is not hard to guess what answers he expects to them.

In [A] the rights attributable to sovereignty and to the laws are nothing but the sum or aggregate of the minimum portions of individuals' liberties and wills that were ceded to form the general will. Beccaria's argument depends, then, on the thesis that this sum or aggregate is never enough to vindicate a right to kill a man. It is not entirely clear how liberties, wills or rights enter into arithmetical operations of the sort envisaged. So it is not entirely clear how one excludes their summing or aggregating in such a way that the general will does have the right to kill a man. For it might seem that, if the arithmetical way of talking is really appropriate, then, if, say, a million individuals each cede a tenth of their liberties (a minimum portion) in the social contract, then the sum or aggregate of them embodied in the laws will be equivalent to the rights of a hundred thousand individuals.

If we take argument [A] to work by analogy with deposits in a bank, then we may distinguish two things that the bank is free to do that the individual depositor is not. One is to buy very expensive things that are beyond the reach of single account-holders. The other may be to enter markets, such as those in financial futures, that are reserved to institutional players. In this latter case,

it would seem that a state might have rights that individuals do not simply by virtue of being a state. If so, the question of summing or aggregating fades in importance and a qualitative question of right-attribution comes to the fore. On the banking analogy, the notion that sovereignty and the law are “nothing but the sum of minimum portions” is insufficient to show that they are limited in the ways that private liberties are, and hence that they do not extend to the right to kill a man.

A curious consequence of this way of expressing the argument that Beccaria is seeking to propose is that a more numerous state may have more rights than a less numerous one; in that case, perhaps the Chinese state may after all do what it likes to its citizens, while San Marino is severely circumscribed in its rights. Conversely, a state in which the minimum portions of private liberties ceded to sovereignty are very small (for instance, because there is antecedent trust among the individuals not to need protection by the sovereign) may not aggregate the rights that a Hobbesian “leviathan” demands as the price of peace; Norway does not have the right to inflict harsh punishments because Norwegians are (mostly) peaceable libertarians, while Somalia’s peace-sacrifice is the drastic curtailing of the citizens’ rights and freedoms.

The oddness of this way of expressing Beccaria’s argument may be a sign that it is not to be taken quite at face value. But it is not at all clear how the thought may be more perspicuously expressed. Unless argument [A] can be re-laborated in some other way so as to limit the rights attributed to the laws, it is not at all clear that the partial or total abolition of the death penalty follows from this consideration regarding individuals’ sacrifice of their freedom that, as chapter I puts it, has “been rendered useless by the uncertainty of conserving it” (*DP*, I: 11).

Proceeding to the argument corresponding to [B], it is clear that the answer expected to the question, “Who has ever wanted to leave the choice of whether to kill him to other men?” is, “No-one, ever”. The thought, then, is that, if no-one has ever left the choice about whether he is to be killed to other men, then no-one has ever left the choice of whether he is to be killed to the law either (whose rights are, as in [A], assimilable to those of an individual). If no such choice has ever been left to others, then no such right has been transferred. Hence it is never left to others to decide the life or death of a given individual.

This argument clearly depends on the notion that the terms of the sacrifice of freedom in setting up the laws can be freely negotiated by the individuals involved. This is far from certain. Even if we accept the idea that a state is formed on the basis of a pact or contract, factors other than the preferences of individuals may determine what terms have to be settled in order to ensure the passage to security and tranquillity. For instance, the parties to the agreement

may have to allow that there be some tariff of punishments for malefactors in certain categories. For instance, in order to enjoy their remaining freedoms, they may have to leave to other men the choice of whether certain goods can be confiscated. That is to say, they admit that fines or taxes may be levied. Thus, to the question “Who has ever wanted to leave the choice of whether to confiscate his goods to other men?” the answer might not be “No-one, ever”. Likewise with “Who has ever wanted to leave the choice of whether to deprive him of his freedom to other men?”, if the terms of the contract envisage imprisonment as condign punishment for certain crimes. This puzzle for [B] arises from a point of analogy with other punishments that we do accept: “can we tell in advance that the death penalty can never be envisaged as one of the punishments that enters into the tariff established by contract?” The answer to this question would appear to be “No”.

Beccaria’s expresses argument [B] in terms of “other men” having choice of life or death over us. On the sort of contractual theory that is in the wings here, the magistrate is not acting as an individual but in the name of the collective or, to speak Rousseauesquely, “general” will. If Beccaria has in mind here the fear that other individuals may be acting out of malice or other particular interest, his point is fair enough: we would not want punishments inflicted for any other reason than the public good, as he clearly sets out in chapter VI. But, again, this is not specific to the death penalty, but a feature of the legal system as a whole.

If, on the other hand, the thought is that “other men” are fallible even when they are judging for the public good, then it should be recognized that this will apply also to punishments other than the death penalty. Beccaria himself does not seem to take seriously any argument from the irreversibility of a capital execution as a ground for opposing the death penalty, even though this sort of consideration has been quite popular in the United States of late, where the number of miscarriages of justice leading to death row has been a cause for public concern. Yet, when a fine is inflicted, the condemned party loses forever the economic opportunities then available to him, even if the money is returned at a later date. And no-one can give back years unjustly spent in jail; a monetary recompense is a mere shadow of what has been lost.

Where argument [B] makes explicit reference to “other men” as not to be trusted with the choice of life or death, rhetorical question [C] places the emphasis on the relation between a minimum sacrifice of freedom and the danger of losing the greatest of goods. Rather than a banking analogy, we seem to have here a betting strategy. For the purposes of abolishing the death penalty, Beccaria’s answer to the question would surely be that it is always too risky to bet on one’s life, even if the stake is only a minimum part of one’s freedom.

But, once we see it enunciated, this answer leaves grounds for dissatisfaction. In one direction, it seems ignoble to base one's opposition to the death penalty on one's own gambling hunches. In another, it is less than wholly obvious that there are never situations or enterprises in which are indeed prepared to put our lives at risk – so long as others do likewise – as an indicator of our seriousness of intent. For instance, if I sign up for some particularly perilous expedition, it might be reasonable for me to concede to the group a stern discipline to ensure that each does his duty to the others. Likewise, martial law regarding mutiny and desertion may need capital sanctions to make vivid to soldiers that their choice may be between perhaps being shot by the enemy and certainly being shot by their officers; for this reason, we might doubt the legitimacy of applying what martial law seems to require to conscript armies. If there are such exceptions to its being “always” too risky to bet on one's life, then it remains at least open whether, in some phases of social development, the members of a given commonwealth should be called on to put their lives in jeopardy to ensure the stability of the whole. After all, Beccaria himself, in pointing out the Public Security exceptions to total abolition, seems to rely on just such a thought.

We may draw a general moral from the difficulty of framing [C] in such a way as to ensure that the death penalty is excluded from the terms of any supposed social contract. Even if such contracts are entirely suppositious, a theoretician using the supposition of them as an analytic tool for seeing what rights and duties the state and the individual may justly claim, has to render explicit what would be reasonable terms for such a contract starting from a given social and political condition. If we are starting from a Hobbesian anarchy, from which we should be prepared to make virtually any concession in order to secure some protection, then the death penalty might be contemplated, while if we are starting from a state of tranquil rule of law, then perhaps it ought not to be. In between, there will be a range of conditions under which various supposed contracts could be acceptable proposals. Unless we know what condition we are in, we cannot know whether accepting the terms of a contract that contemplates the death penalty is reasonable or not. The blanket nature of the formulation of [C], seems to exclude any evaluation case-by-case of the social conditions that militate for or against harsh punishments.

The fourth shot in Beccaria's opening salvo of arguments against the death penalty, question [D], is rather harder to unpick than the others. The basic move is to say that if we admit the death penalty we expose ourselves to suicide and we have no right to do that. For the argument corresponding to question [D] to go through, then, we have to assert (i) that men do not have a right to commit suicide; and (ii) that admission of the death penalty is tantamount to

suicide; to arrive at the conclusion (iii) that men do not have the right to admit the death penalty.

In chapter XXXII/XXXV, Beccaria argues that there can be no law against suicide because any punishment would be directed either at innocents (such as the family of the deceased) or at a corpse. In either case, the punishment would be misdirected and, so, tyrannous. Though he allows that suicide is in act contrary to normal inhuman inclination, his dominant analogy – the main, and rather curious, argument of the chapter – is that of how to make expatriation an unalluring prospect for one's citizens: if committing suicide is like going abroad, and it is useless for the state to make itself into a prison, then it is better make life at home attractive. At the end of the chapter, he turns from political and economic considerations to concluding that, even if it is a sin that God punishes in the hereafter, suicide is not a crime (*DP*, XXXII/XXXV: 82). Where traditional Roman Catholic teaching, for instance in Aquinas (*Summa Theologiæ*, IIa IIæ, 64, art. 5), holds that suicide is an offence against nature (specifically charity to oneself), against society (which is prior to the individual) and against God (as the donor of life), Beccaria sees it solely as a matter of refusing the gift of God.

The theological view that Beccaria appears to share with Aquinas and many others is that life is in some way a gift from God. Though some translations of the passage in Aquinas suppress the phrase for “in some way” (“*quoddam*”) as if it were unequivocal how life is a divine gift, it is not entirely clear in *what* way we have a gift and what obligations it imposes. If God gives man life as a present, then it becomes the property of the man. In which case, he is free to dispose of it as he sees fit. Of course, it would be respectful toward the donor to treat it with care and to get the best out of it. But if it has become unendurable, then the owner has the right to dispense with it. If, on the other hand, the gift is really more by way of a loan, as Aquinas also hints, saying that a man's life is not his business (*Summa Theologiæ*, IIa IIæ, 64, art. 5, resp. 3), then it would seem that a man is free to return it to its rightful owner before the expiry of the threescore years and ten that, we are told, is the standard term. It may be hard to make much literal sense of what it is for life to be a gift from God, but, so long as the manner of speaking is taken seriously by its proponents for the purposes of establishing the illicitness of suicide, the manner of speaking itself seems to point in the direction opposite to that for which it is frequently used.

Is it true (i) that men do not have a right to commit suicide? If the view of Beccaria and Aquinas (and many others) is correct and suicide is a sin, then to commit it is to sin. Anyone who is not antecedently committed to the theological claims that underpin this view is free to say that, even if it is sin, we have a right to commit suicide (and to take any eventual comeuppance in the

hereafter), or that the notion of sin is embedded in so unconvincing a network of ideas as to be even less cogent than most of the arguments advanced in favour or against the death penalty. While Beccaria is surely right to say that it is useless to try to legislate against suicide, there are many laws, such as those that prohibit the consumption of certain chemical compounds, that seek to forbid citizens from doing themselves harm. If one admits that we have a right to commit suicide, it would follow that we have a right to take heroin and that the laws in question infringe our rights. Even if admission of the death penalty were a form of suicide, it would also follow that we have a right to enter into contracts that foresee the death penalty when some terms of the contract have been broken; which is to say, that we have a right to cede to others – in particular, to impartial magistrates – choice over our lives. Whether we want to do so or not, and whether we actually do so or not, is quite another question, for it is surely better not to be in a condition in which such risky contracts appear our only option. But, as already suggested in connection with [B], whether or not we are in such a condition may not be under our control at the moment of contracting. In some conditions, it may be better to contract in, even where the terms contemplate the death penalty, than be left, for instance, in a Hobbesian state of nature.

Is there any sense, then, in which (ii) admission of the death penalty is tantamount to suicide? At best, if a person simultaneously willed there to be the death penalty for some action x and committed x , then she would be willing death on herself. But even this is not actually to commit suicide. If the death penalty has been instituted for actions of some class of which x is a member, then committing x is a way of risking death. But something of the same can be said of life-or-death matters such as crossing the road. It would be hazardous to say that we do not have the right to cross the road just because it is sometimes fatal. And it would be wildly misleading to say that all pedestrian victims of road accidents are suicides simply because they choose to take the risk of entering a dangerous zone by stepping off the pavement.

Given that both (i) and (ii) are far from natural things to say, the conclusion (iii) that men do not have a right to cede to others the right to kill them is not well supported by what Beccaria offers with rhetorical question [D] concerning the alleged relations between suicide and the death penalty.

In short, the arguments gestured at in the questions [A]-[D] can be made a little bit more explicit, but the cost of spelling them out is that they raise further questions, plausible answers to which do not strongly favour the near-total abolitionism that Beccaria was aiming to support.

3. *The Argument from Harm*

The Italian sentence of which the following is a translation is perhaps Beccaria's most famous:

[K] It seems to me an absurdity that the laws, which are the expression of the public will and which hate and punish murder, commit one themselves and, to turn citizens away from assassination, order a public assassination (*DP*, XXVIII/XVI: 67).

If you type this thirty-three-word string into Google, you will get some thirteen thousand hits. Having only checked the first two hundred and fifty, in all of which the whole sentence is reproduced, I am in a position only to say that very many of those who quote [K] take it to establish that the death penalty is an "absurdity". If the death penalty is an absurdity, it should be abolished. If the death penalty should be abolished because it is an absurdity, then total abolition would be the indicated position, and the exceptions that we have seen Beccaria wanting to make should not after all be made: neither Public Security nor Deterrence seem adequate to get round an absurdity, if that is what the death penalty is.

I propose to call the argument-schema, of which [K] is an application to the death penalty, the Argument from Harm. [K] seeks to show that the death penalty is an absurdity and it is an instance of the Argument from Harm, because a crucial but suppressed premise of [K] is that killing is a harm. The public will hates and punishes killing because it is a harm; in particular, it hates and punishes intentional homicide because it is a great harm. If intentional homicide were not a great harm, it would, as Beccaria repeatedly says, be tyrannical to punish it. It is also true that infliction of the death penalty is an intentional homicide, and so a great harm. Does this mean that the public will should hate the death penalty?

I am less than certain that it does, at least because it appears that the Argument from Harm can be applied to generate similar "absurdities" with regard to other forms of punishment, as we have already glimpsed in considering the rhetorical question [B]. Arguments formally analogous to [K] can be formulated with regard to other forms of punishment about which few people, including proponents of the total or near-total abolition of the death penalty, will feel any strong sense of there being an absurdity in their infliction. Of course, the formulation of formally analogous arguments that do not carry any sense of absurdity does not show that [K] is invalid to show the absurdity of the death penalty, but it is an indicator that Beccaria's sense of absurdity needs to be supplemented in this particular case.

Let us spell out how the Argument from Harm can be applied to two forms

of punishment that even total abolitionists with regard to the death penalty will tend to admit as condign in some cases and of which we have already made mention: fines and imprisonment. A fine is the subtraction from a person of a sum of money against that person's will; and imprisonment is the curtailing of the freedom of movement and action for a certain period. These are harms to the persons on whom they are inflicted. Specifically, a fine is a harm inasmuch as it corresponds to a theft, where theft is the subtraction of a sum of money (or other good) against its owner's will; and imprisonment is a harm inasmuch as it corresponds to a kidnapping, where kidnapping is the curtailing of the freedom of movement and action for a certain period. Thus, we have the two arguments:

[R] It seems to me an absurdity that the laws, which are the expression of the public will and which hate and punish robbery, commit one themselves and, to turn citizens away from theft, order a public theft;

and

[H] It seems to me an absurdity that the laws, which are the expression of the public will and which hate and punish hostage-taking, commit one themselves and, to turn citizens away from kidnapping, order a public kidnapping.

If [K], [R] and [H] are on all fours and [K] establishes that the death penalty is an absurdity, it would seem that [R] and [H] establish that fines and imprisonment are absurdities. If fines and imprisonment are absurdities, then they should be abolished. Indeed, by parity of reasoning, any punishment that inflicts a harm on an offender would generate its own version of the Argument from Harm and hence be an absurdity that ought to be abolished.

One thing that the Argument from Harm appears to underestimate is that, for something to count as a punishment, it must involve the infliction of a harm, at least recognized as such by the person on whom it is inflicted. If it did not involve the infliction of a harm it would be either indifferent or a reward. Crimes cannot be deterred by threatened responses that are indifferent or rewards, and criminals cannot be reformed or re-educated unless they are under constrictions of one sort or another. In this way, the Argument from Harm proves too much or too little. Too much, because, if applied even-handedly, it would abolish all punishment. And too little, because, if applied only to the death penalty, it leaves open the question of why the great harm of intentional homicide generates an absurdity that the other forms of punishment do not.

Another thing the Argument from Harm fails to take account of is some distinction between justified harm and unjustified harm. Thus, there is the self-defence justification in the case of some killings: the harm is the same, but there may be no crime that the public will detests and punishes. If we regard

penal arrangements as the self-defence system of the public will, then there may be killings in defence of the public good. When the public will has no choice but to defend itself by killing, then that killing may be justified, and so we do not have to do with assassination or murder, which are to be regarded as *unjustified* intentional homicides. If so, [K] would have no purchase: while the public will detests and punishes unjustified killing, a killing that it orders may be justified if it is in defence of the public good; and likewise with [R], [H] and any other instance of the argument schema.

Despite the popular estimate of [K] as a decisive consideration to establish that the death penalty is an absurdity, it is not evident that it can do so without also establishing that every punishment is an absurdity. Though it is certainly true that every punishment stands in need of some justification because every punishment is a harm, it does not follow from that that no punishment is justified. Those that are justified are so in spite of being harms. If the great harm that is an intentional killing requires a very serious justification, then we may say that the infliction of the death penalty requires a very serious justification. But that does not exclude the possibility of there being such a justification in some cases.

In short, the proponents of the total or near-total abolition of the death penalty do themselves a disservice when they appeal to Beccaria's famous formulation of [K], because they expose themselves to a *reductio ad falsum* of the principle that [K] instantiates, namely the Argument from Harm. One might even say that it is a good thing that Beccaria formulates [K] very succinctly and passes on; his followers might do well to do likewise.

4. *Images and sentiments*

If the arguments underlying the rhetorical questions [A]-[D] and the absurdity alleged in [K] are hardly adequate to support total abolition of the death penalty without at the same time abolishing the entire penal system, it might seem that Beccaria's polemic is on thin ice. But [A]-[D] and [K] represent a very small proportion of the chapter dedicated to capital punishment: only about 150 words out of 2,400. And, on a sober view of the matter, one would not expect there to be so brief or knock-down an argument that was also sufficiently well-focused so as to exclude only this form of punishment. Rather, one would expect considerations that concentrate on what is characteristic of the death penalty. Which is, indeed, how Beccaria himself seems to have seen the matter, given the range of individually telling and cumulatively damaging observations that he makes about the institution.

If, in §§2 and 3, I have devoted 4,500 words to what are often thought of as Beccaria's key arguments, we might fear that the remaining polemic would, to respect the proportion of 1:30, demand an analysis running to 65,000 words. I shall be swifter, summarily classifying the four main standpoints from which Beccaria views the death penalty as neither necessary nor useful. Most of these would apply in some degree also to forms of corporal punishment, such as flogging, though in a lesser degree to forms of humiliation punishment, such as the stocks or the pillory. Beccaria's proposed replacement for capital punishment, namely perpetual servitude of hard labour (*DP*, XXVIII/XVI: 64-65), is an extension of those penalties insofar as it requires the condemned to be visible in public as they undergo their torments (*DP*, XXVIII/XVI: 65).

4.1. The advancement of morals

We have noted that Beccaria makes no effort of the sort that has become fashionable to show that there is no positive statistical correlation between the death penalty and crime rates of various sorts. Rather, his reflections on the social history of the death penalty concern primarily the way that the widespread in time and space of this form of punishment is no argument in its favour, but rather an argument against, inasmuch as human history is a "long and shadowy night" (*DP*, XXVIII/XVI: 69), in which moments of enlightenment are few and far between. This might suggest, in line with Deterrence, that the retention or the reinstatement of the death penalty is an admission on the part of a given society that it is in a state of turbulence or barbarity.

In this direction, if violence is the only language that the people understand, capital punishment may be the only way to get the message across. On the other hand, while abolition may not directly cause progress towards enlightenment and civilization, it may be an index or symptom of the grade of pacific coexistence that a given society has reached. From his brief gesture at the way that Roman citizens were exempt from the death penalty (*DP*, XXVIII/XVI: 63), Beccaria might even be thinking that, within a given society, the grade of refinement of certain groups might make a difference to the tariff of penalties applicable. Something similar might be applied to geographical areas within a given country, as one might be tempted somewhat mischievously to infer from a map of the abolitionist states in the USA.

Though he does not make out much of an argument out of such considerations, Beccaria may have at the back of his mind an *argumentum ad verecundiam*: we ought to be ashamed of ourselves if we admit the death penalty, as we should if we went in for backward practices like human sacrifice – even though they too are to be found in almost all nations (*DP*, XXVIII/XVI: 64-65). In particular, if we think of *Of Crimes* as ideally directed to enlightened

monarchs, then this thought might be a challenge to a prince to prove his modern sensibility by acting on a sense of horror at the barbaric practices of his forebears, as Pietro Leopoldo, Grand Duke of Tuscany, did under Beccaria's influence (*Riforma* 1786, §LI).

4.2. The failure of deterrence

When he considers the effects of the threat of death on criminals planning a crime, Beccaria invokes the comparative deterrent effects of capital punishment and penal servitude. Where the former is quick and even allows the scoundrel to save his soul by repentance (*DP*, XXVIII/XVI: 66), the latter weighs more heavily because of its duration when compared with the uncertainty of the outcome of his crimes (*DP*, XXVIII/XVI: 66-67). Despite what we have heard Beccaria saying about Deterrence, his general view is that those who are determined to offend against society will not be deterred by the threat of death if they are caught (*DP*, XXVIII/XVI: 63). It is for this reason that, for instance in chapter XIX on the promptness of punishment, Beccaria insists that the law should set up an association of ideas – of cause and effect – between the commission of crimes and the infliction of punishment, and that the hope of impunity should not loom large for criminals in their calculations (*DP*, XXX/XII: 74). In any case, as Beccaria notes, there are many people who, whether from fanaticism, vanity or desperation, are able to look death calmly in the face (*DP*, XXVIII/XVI: 65); these are attitudes that, it seems, will not endure in the chains of penal servitude.

Here Beccaria appears to depend on the claim that forced labour fills men's minds with greater dread than does the prospect of being put to death. In that case, it presents itself as a more extreme punishment than the death penalty, and so arguments like [A]-[C] and [K] would apply with so much more force to penal servitude. But of these we have already said enough.

Yet the comparative values may not be in all cases as Beccaria presents them. For sure, a person belonging to the wealthier classes of society may have a lively terror of hard labour and of being seen in such a degraded position; but it is not clear that persons born and brought up as hewers of wood and drawers of water would see manacles of iron as cause for concern over and above the constrictions imposed by the misfortune of social position. If the calculating criminal has the option, in the first instance, between potential advantage from his crime and being a wage slave, and in the second (in case of capture), between being a state slave and being a wage slave, then crime would seem to offer at least the chance of a better life.

Though Beccaria does not himself make much of it, there is a further calculation that a criminal might make if whatever is the most extreme punishment

meted out by the penal system is reserved only for the most heinous crimes. Suppose, for instance, that murder and attempted murder carry the same sentence. In that case, if an attempt fails, the criminal has no disincentive not to try again (and eliminate a witness). If, on the other hand, the attempt is punished less severely, then there may be some incentive to leave it at that. The thought that one “might as well be hanged for a sheep as for a lamb” can be mobilised in favour of employing the death penalty only for the most ferocious or socially dangerous acts, which is a consideration that appears briefly in the chapter on the leniency of punishments (*DP*, XXVII/XV: 61). In that case, the rarity of its infliction can be guaranteed, though its total abolition might not be.

4.3. The image of the law

The last two standpoints from which to deprecate the specifics of the death penalty are premised in the first instance on the nature of executions in Beccaria's day. But they may be extended, perhaps dilutely, also the present.

Another rhetorical question: “What ought men to think when they see the wise magistrates and the grave priests of justice, who with indifferent tranquillity have the convict dragged towards death with a slow apparatus, and while a wretch agonizes in his final anguish awaiting the fatal blow, a judge passes by with insensible coldness and perhaps even secret complacency in his own authority to taste the comforts and pleasures of life?” (*DP*, XXVIII/XVI: 68). Beccaria spells out what men ought to think, namely that the legal system is an insatiable despotism, and he adds a dash of an argument akin to [K].

But it seems to me that the rhetorical force of this passage lies primarily in the image it offers of the scene on the scaffold: the contrast between abject suffering of the condemned man and the insolence and sadistic pomp of those officiating the execution. In particular, the characterisation of the officials as acting without passion in the midst of physical pain seems particularly repulsive and damaging to the image of the functionaries as persons devoid of normal human fellow-feeling – a point to which we shall return shortly. If, *viceversa*, the magistrates present at an execution were to be seen looking on with glee and exultation at their handiwork, that would be even more appalling. In this sense, there appears to be no attitude that anyone with this role could adopt without attracting the “indignation and scorn” of onlookers (*DP*, XXVIII/XVI: 67).

Beccaria is calling to his readers' minds the ways in which, at the time, capital punishment was often not merely the infliction of death, but a process of torturing to death: the “fatal blow” as *coup de grâce*, almost a kindness to put an end to the agonies of the “slow apparatus” of the garrotte or the wheel. That is to say, the scene of justice had become a scene of cruelty; and when the words “cruel and unusual punishment” were used in the English Bill of Rights and in

the American Eighth Amendment, the “unusual” seems to have had to do with the ingenuity or elaborateness with which the torment could be protracted consistent with the frailty of the human body. In this way, Beccaria’s protest is aimed at least in part to promote the humane treatment of the condemned.

In more recent times, perhaps beginning with the French guillotine, the tendency has been to adopt methods of execution that are less subject to this criticism. For instance, in China, a bullet in the back of the head in a football stadium is swifter than the “slow apparatus” that Beccaria invokes, though fully public. Yet the fact that soldiers are often employed for this task may put us in mind of the way that capital punishment can easily appear a “war of the nation against one of its citizens” (*DP*, XXVIII/XVI: 62). Again, the American tendency towards technological fixes, such as electrocution or poison gas, has gone hand-in-hand with the removal of the site of execution from the public gaze. One might nevertheless think that the presence of technicians who are “just doing their job” is cause for dismay. Moreover, even when the death penalty is administered in a quasi-clinical environment, there is generally an element of spectacularization in the positioning of the witnesses, for instance by curtaining off the death chamber until the condemned is strapped in position. And there remains something eerily repellent about the gurney with arm-support that is the symbol of death-by-injection. It would take us too far afield to consider the European ban on the export of drugs for use in such executions, but it is hard not to despise, for instance, the authorities in Oklahoma for torturing to death at least one condemned man (Clayton Lockett, April 2014) for want of pentobarbital.

Though there has been some trend towards humanization over the last two hundred and fifty years, Beccaria could still contend that it is bad for the image of the law that an executioner, whatever means he uses, will be an object of horror his fellow citizens, even though, within the logic of capital punishment, he is “as necessary a means to public safety within as valiant soldiers are to that without” (*DP*, XXVIII/XVI: 67).

4.4. The sentiments of spectators

We have already seen that Beccaria takes the death penalty not to be as effective deterrent as penal servitude because the prospect of it will not frighten a criminal as much as that of years of hard labour. Whether this is generally true or not, a further point that Beccaria makes is that the (relative) swiftness of a killing on the scaffold has the wrong kind of effect on those who witness it. Though the spectacle is terrible, it does not last long enough (*DP*, XXVIII/XVI: 63), and can be too quickly forgotten to forge the right sort of association of ideas (*DP*, XXVIII/XVI: 64). For this reason, while it tends to harden the hearts of men, it does not correct them (*DP*, XXVIII/XVI: 67).

I have left what I think is Beccaria's most astute observation to last, partly because it may easily seem the least, expressed as it is in four pregnant words: "compassion mixed with disdain" (*DP*, XXVIII/XVI: 64), as the sentiment elicited by the spectacle of capital punishment. I take it that the "disdain" is linked to the attitudes referred to judges and magistrates overseeing an execution. And I hazard that the "compassion" is directed at the condemned.

How can compassion for a condemned man provide the materials for an argument against the death penalty? In the most trivial sense, if an institution goes against what we might call a natural sentiment, that is a reason against the institution. Given that the spectacle of judicial killing elicits compassion for the condemned man, then we have a reason against judicial killing. But I think there may be more to Beccaria's point. This is that, unlike other forms of punishment, the death penalty goes to the heart of what it is to be mortal. We cannot help putting ourselves in a condemned man's shoes: even if, as in the film *Dead Man Walking*, he is a confessed and unrepentant, racially-motivated multiple murderer of small children, his taking his final steps to extinction strikes a chord in our own finitude. Yet it is not so much this repulsion that makes Beccaria's point, as the fact that our natural sentiment of solidarity with another individual human being in the face of imminent death makes us enemies of the law: it de-moralizes us, which is the worst possible outcome for an institution that has the education and guidance of the citizenry as its principal purpose. In order to keep us on the right side, such sentiments should not be aroused. Yet it seems that the death penalty cannot but arouse them.

5. *Abstract and concrete*

If the drift of the foregoing is not entirely misleading, it would seem that arguments against the death penalty that appeal to abstract principles are likely to fail either because the principles are not true or because, if they were true, they would apply also to penal arrangements that are much less controversial than the death penalty. For myself, it would be more comfortable if there were some argument of this sort to defend my own inclination to think that it is never (or almost never) right to inflict the death penalty. But I do not know of such an argument, and I do not think that Beccaria provides one. The more attention we pay to the particularities of the institution itself, the more we are likely to find considerations that exclude almost all uses of the death penalty, but that do not commit us to implausible or unstable positions as regards punishment in general. In this respect, the chapter of *Of Crimes and Punishments* on the death penalty provides rich pickings, only some of which I have been able to summarize here.

References

Beccaria, Cesare, 1965 [1764], *Dei delittie delle pene. Riforma della legislazione criminale toscana* (30th November 1786), reproduced in Id., ed. Franco Venturi, Einaudi, Torino: 258-300.

Thomas Aquinas, 1988, *Summa theologiæ*, Edizioni Paoline, Cinisello Balsamo, Milano.

Richard William Davies
davies@unibg.it
Dipartimento di Lettere e Filosofia
Università di Bergamo