

On Beccaria, the Economics of Crime, and the Philosophy of Punishment

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Abstract: This paper explores the influence of Cesare Beccaria's *On Crime and Punishments* on economists who study criminal behavior and the criminal law, particularly in the area of punishment, paying close attention to the aspects of Beccaria's thought that economists have missed. The paper begins with a discussion of their shared utilitarianism, emphasizing Beccaria's greater psychological depth. Next, it discusses the ways in which they emphasize the proportionality of punishment. Finally, it explores Beccaria's approach to deterrence, which is more complex than that found in the economics of crime, and also his embrace of several tenets of retributivism, which I believe economists would do well to emulate.

Keywords: Cesare Beccaria; economics; crime; punishment; retributivism; deterrence; law and economics.

Given that one of its central themes is proportionality, it is ironic that Cesare Beccaria's concise and compact 1764 book *On Crimes and Punishments* has had an influence vastly disproportionate to its size.¹ From its immediate impact on the utilitarian thinking of Jeremy Bentham to its inspiration to advocates for more humane punishment and eradication of the death penalty, many of Beccaria's ideas are still being realized today even though his name is not spoken as often as it deserves.

Perhaps the area in which his influence has been strongest – yet not as completely as it could have been – is the economic approach to law, otherwise known as 'law and economics', and in particular on the economics of crime. In his seminal paper that launched the field, as well as his lecture delivered upon winning the Nobel Prize, economist Gary Becker (1968; 1993) credited Beccaria along with Bentham as the pioneer of a mathematical approach to studying criminal behavior and policy. In his own groundbreaking work in the field,

¹ All parenthetical references to Beccaria in this paper will refer to David Young's translation (see bibliography), and will note the page number as well as the chapter number for the sake of readers consulting other editions.

Richard Posner (1985), another leading figure in the economics of law as well as a sitting judge, also hailed Beccaria's work.² Economists and legal scholars who have adopted this approach have replicated many of Beccaria's results, but have also missed much of the nuance and humanity with which Beccaria originally presented them.

In this paper, I will describe the ways in which scholars in law-and-economics have benefitted from Beccaria's work as well as the points they have missed – points which, in my opinion, would improve work in the field in terms of both descriptive realism and ethical depth. I will begin with their shared utilitarianism, emphasizing Beccaria's greater psychological depth. Next, I will discuss proportionality of punishment and how Beccaria and economists approach it differently. Finally, I will explore Beccaria's approach to deterrence, which is more complex than that found in the economics of crime, and also his embrace of some tenets of retributivism, which I believe economists would do well to emulate.

Utilitarianism and Psychology

There are many aspects of the economics of crime that are drawn from Beccaria's work. Many of these similarities appear in Becker's seminal 1968 paper, from which all mainstream economics of crime literature stems. For the sake of expositional simplicity, in this paper I will refer to Becker himself rather than "the economics of crime", making special note when there is some disagreement or elaboration in later work.³

The most essential thing that Beccaria and Becker have in common is their assumption of the egoistic pursuit of self-interest among individual decision-makers. Influenced chiefly by Helvétius, Beccaria maintained that "pleasure and pain are the motives for action among sentient beings" (VI: 15), language which would be echoed by Bentham (1781). Becker, on the other hand, used the standard economic terminology of utility, which is based formally on preference-satisfaction rather than hedonic measures of pleasure and pain. In typical economic models, agents maximize their preference-satisfaction or "utility" within given resource constraints and external parameters such as prices. Legal sanctions such as punishments are assumed to influence the agent in the same way that prices would. Their normative difference plays no role: a \$10 fee

² For more on Beccaria's influence on mathematical economics as well as his own economic views aside from the topic of crime and punishment, see Harcourt 2014.

³ For a survey of the most significant elaborations on Becker's work, see Polinsky and Shavell 2000.

to park legally has the same effect on behavior as an expected \$10 fine for parking illegally.⁴ This is consistent with Beccaria, who wrote that the “gravity-like force that impels us to seek our own well-being can be restrained only by the degree that obstacles are established in opposition to it”, namely punishments acting as constraints or “prices” (VI: 14).

While Becker and other researchers in the economics of crime inherited Beccaria’s basic assumption of hedonic psychology, Beccaria had a yet richer conception of it that produced unique results that the economics of crime has not incorporated. In particular, Beccaria borrowed his own understanding of motivation from David Hume’s theory of associations (1739); as Beccaria writes, “it is well established that the association of ideas is the cement that shapes the whole structure of the human intellect” (XIX: 36).⁵ Rather than reducing benefits and costs to utilities or monetary equivalents and making the association between them a matter of equivalence, Beccaria emphasizes the connections that people form in their minds between actual experiences and concepts and applies this understanding to deterrent punishment.

Specifically, Beccaria assumes that the closer the connection between a punishment and a crime, the stronger will be the deterrence produced. While this doesn’t seem to be a huge conceptual leap in terms of psychology compared to mainstream economists’ psychologically empty theory of choice, it produces results inconceivable in standard economic models of crime where benefits and costs are both put in terms of utility. For instance, Beccaria argues that the more quickly a punishment is imposed after the crime is committed (including the time it takes to prosecute and convict), “the stronger and more permanent the human mind’s association of the two ideas of crime and punishment, so that imperceptibly the one will come to be considered as the cause and the other as the necessary and inevitable result” (XIX: 36).⁶ Also, the punishment “should conform as closely to the nature of the crime” to better connect the consequences of a crime with its motivation and make a comparison as simple as possible in a prospective criminal’s mind (XIX: 37). Finally, he argues that most people cannot relate to large punishments, thinking them too remote from their own experience, which thereby reduces their deterrent effect. (This applies to the death penalty as well: in XXVIII: 49, he specifically mentions the idea of death is always seen “in the hazy distance”). Small punishments, however, are more common amongst the average people and their peers, and

⁴ For criticism of this false equivalence, see Cooter 1984 and White 2006.

⁵ This has been noted others, notably DePauley 1925 and Harcourt 2014.

⁶ He also states that this direct association is “of the utmost importance if one desires to arouse in crude and uneducated minds the idea of punishment with the seductive image of a certain advantageous crime” (XIX: 36-37).

“will dissuade them from minor infractions and deter them all the more from major ones”, therefore having a magnified impact on deterrence (XXIX: 55).

We’ll see below that Beccaria and Becker agree on many aspects on proportionality in punishment (although not always for the same reasons), but once again Beccaria’s richer perspective lends more nuance to details regarding punishment. For instance, in his famous discussion of the death penalty, he argues that the duration of punishment has more deterrent effect on observers than severity because the association lasts longer.⁷ Small frequent reminders of the penalties for criminal behavior will be a constant presence in people’s minds, whereas execution (in Beccaria’s day) was mere entertaining spectacle, and aroused sympathy more than fear (XXVIII: 49). This assumes, of course, that people are exposed to the prison system so it can serve as a constant reminder, a questionable assumption in most people’s lives in developed countries today. Nonetheless, it was an insight that would be difficult to derive from mainstream economic models.⁸

Finally, a shortcoming of both Becker and Beccaria’s assumption of a simple utilitarian psychology is that it denies any consideration of behavior based on principle or duty, even in explicitly normative situations such as those involving the law. Beccaria doubted the ability of moral principle to limit self-interest; he mocked the standard courtroom oath to tell the truth, “as though a man could bind himself to contribute to this own destruction; as though religion did not fall silent in most men when self-interest speaks” (XVIII: 35).⁹ He also denied any motivation of witnesses based on civic duty or truthfulness: “The true measure of his credibility is simply the interest he has in telling or not telling the truth” (XIII: 24). Similarly, economists who study crime (and law in general) use the simplistic assumption of preference-satisfaction despite the ethically-laden context of much legal behavior. Economists in general have incorporated other values into their models of choice, and some have even used such models in the context of law and economics, such as Medema (1993), Cooter (1998; 2006), and White (2008).¹⁰ Nonetheless, most law-and-econom-

⁷ Some economic work disputes this from a utility perspective, particularly if the disutility from imprisonment declines over time as the prisoner acclimates to his or her surrounding (such as Morgan Freeman’s character in the 1994 film *The Shawshank Redemption*); see Polinsky and Shavell 1999.

⁸ Such results could, however, be produced by scholars in the relatively new field of behavioral law and economics (Jolls, Sunstein, and Thaler 1998), which incorporates insights from experimental psychology into models of decision-making of legal actors.

⁹ Social psychologists know full well that oaths do influence a person’s propensity to tell the truth (Joule, Girandola, and Bernard 2007), an aspect of choice that could be incorporated into the framework of behavioral law and economics.

¹⁰ Others have incorporated indirect ways of incorporating normative considerations, such as social norms (Posner 2002).

ics scholarship remains stuck in the world of Hobbesian agents eager to take advantage whenever they can and however they can.¹¹

Proportionality of Punishment

Based on this common understanding of human motivation, both Beccaria and Becker assert the simple position that, to deter people from committing crimes, punishments need to exceed the benefit of the crime to the criminal. The economist phrases this in terms of balancing the benefit of a choice and its “price” in terms of the expected penalty (taking into account likelihood of apprehension, prosecution, and conviction). In Beccaria’s terms, “the obstacles that restrain men from committing crimes should be stronger according to the degree that such misdeeds are contrary to the public good and according to the motives which lead people to crimes” (VI: 14), in order to establish deterrence while minimizing the burden on the criminal when punished (a theme we’ll discuss later).

In the last quoted passage, Beccaria conflates two concepts to which punishment should be proportional, the benefit to the criminal and the harm to society (which he argues in VII: 16 is the “only true measurement of crimes”), which parallels the same conflicting approaches to proportionality in the economics of crime (Hylton 2005). Beccaria takes the first approach through most of his book, focusing on the criminal’s motivations and aiming to deter all crime by cancelling out the criminal’s reason for committing it (while minimizing the burden on the criminal, which we’ll discuss later). The other approach, which focuses on the harm to society, is used by Beccaria to ensure proportionality among crimes. Concentrating on harm is particularly useful in economics when considering the possibility of “efficient crime”, offenses that create more benefit than harm. These are offenses that society may not want to deter completely; examples include crimes which would later be excused by a court under doctrines of necessity, such as occupying an abandoned building to save one’s family or speeding a woman in labor to the hospital. In cases in which benefit and harm are roughly equal, such as theft, this distinction is not important (aside from considerations of diminishing marginal utility would may imply that the poor stealing from the rich may increase aggregate utility).¹² But in many cases harm is much higher than benefit, such as violent offenses that may not only cause

¹¹ Behavioral law and economics, which focuses on departures of textbook economic rationality, does study cases of imperfect self-interested behavior but does not deviate from the basic preference-satisfaction framework when doing so.

¹² See, for instance, Usher 1987.

severe physical or emotional injury (or even death) to individuals but also create enormous social unrest and uncertainty among the populace.

Beccaria conflates these two notions again when he asserts that “punishments and the method of inflicting them should be chosen that, mindful of the proportion between crime and punishment, will make the most effective and lasting impression on men’s minds and inflict the least torment on the body of the criminal” (XII: 23). He wants proportionality between punishment and harm to guarantee that more severe penalties are reserved for more harmful crimes, but at the same time urges that penalties should be set at that the minimal level that deters: “as mild as possible for the person who suffers it” (XIX: 36). In the case of violent crimes, however – a case to which Beccaria shows particular sensitivity later in the book – penalties will have to set much higher than what is necessary to deter in order to be proportionate to harm (the true measure of crime).

Beccaria’s primary concern for proportionality – understandable in light of the common use of punishments in his time which would be considered cruel and unusual today – conflicts with economists’ more focused attention on deterrence itself, especially in light of considerations of the resource costs of criminal justice to which Beccaria pays little attention. (This aspect of punishment was left to Bentham and Becker to develop.) Economists understand individuals to be motivated by expected penalties, which depend not only on the severity of punishment but also on its likelihood. Beccaria understood this too, of course, stating (XXVII: 46) that the certainty of punishment was much more effective than the severity of punishment in deterring crime, especially because it denied the criminal any hope of reprieve.¹³ But even if the expected penalty is set at the lowest level that will deter – equivalent to or slightly above the expected benefit from the crime – the fact that the likelihood of being convicted is less than 100% implies that the penalty will have to be increased to keep the level of deterrence the same. For instance, the penalty for a crime that is punished 50% of the time would have to be doubled; if a crime is only punished 10% of the time, the penalty would have to be magnified tenfold. (This explains fines of hundreds of dollars for littering, a penalty wildly out of proportion to the benefit or the harm of the crime but which is rarely enforced.) If criminals are caught with anything less than certainty and the penalties are set equal to benefit, then individuals will perceive an expected penalty that is less than the benefit and will not be deterred. Deterrence in the absence of a 100% conviction rate demands that penalties be higher than the benefit to the criminal. In a sense, this may be “as mild as possible” given the circumstances of the criminal justice system, but it may not have been what Beccaria was thinking.

¹³ Economists generally agree; for example, see Polinsky and Shavell 1979.

This disproportionality is only exacerbated by the standard economics-of-crime observation that if enforcement is very costly compared to punishment, then in the interest of overall efficiency resources should be diverted from enforcement to punishment, lowering the probability of punishment but raising its severity. The result is exemplified in the cases of fines, which have a trivial resource cost to collect; in the case of imprisonment it becomes an empirical question to determine which is more expensive, punishment or enforcement, as well as the already-mentioned psychological question of which factor of punishment, probability or severity, criminals respond to more.¹⁴ Again, Beccaria did not deal with the issue of the resource costs of punishment, but it seems reasonable to imagine that he would have been disturbed by the justification of disproportionately high penalties based on the efficiency of resource use alone.

To the extent that Becker and other economists support proportionality, they do so chiefly for reasons of marginal deterrence: the prospect of higher penalties for more serious crimes provides incentives for people committing lesser crimes not to 'step up', the obvious example being the penalty enhancement for felony murder. Beccaria also supports this logic: "if an equal punishment is meted out to two crimes that offend society unequally, then men find no stronger obstacle standing in the way of committing the more serious crime if it holds a greater advantage to them" (VI: 16). Beccaria and Becker also agree on the effect of a natural upper limit on effective penalties in demanding proportionality: since penalties for the most serious crimes can only go high, those for lesser crimes have to be lower, once again to provide incentive for people to restrict themselves to less or fewer crimes. As Beccaria wrote, "the very savagery of a punishment makes the criminal all the bolder in taking risks to avoid it precisely because the evil with which he is threatened is so great, so much so that he commits several crimes in order to escape the punishment for a single one of them" (XXVII: 46).

While Becker did not discuss it himself, Beccaria and later economists of crime agree on the deterrent approach to punishing attempts: that lesser penalties for attempts will provide incentive for people who have begun criminal activity to stop before completing it: "The importance of preventing a criminal attempt justifies a penalty, but, as there may be an interval between the initial undertaking and the completion of a crime, reserving the greater punishment for the crime that has been carried out may lead to repentance" (XXXVII: 69). But this does not speak to attempts that were completed but nonetheless unsuccessful, such as firing a surprisingly unloaded gun or administering a poison that was mixed improperly, nor attempts that were impossible, such as sticking pins in a

¹⁴ On the economics of nonmonetary penalties, see Shavell 1985.

voodoo doll. Some economists of crime still recommend full deterrent penalties in such cases, lest the person try again with better knowledge or method, though there is more disagreement among legal philosophers on this point.¹⁵

In terms of method of punishment, Beccaria and Becker are in some agreement but for vastly different reasons. Purely on the basis of cost, Becker recommends that fines be used whenever possible (and set very high so that enforcement costs can be saved), and imprisonment should be used in serious crimes where the fines would likely exceed the resources of most criminals (and would therefore provide little deterrence). Anticipating resistance, he writes:

One argument made against fines is that they are immoral because, in effect, they permit offenses to be bought for a price in the same way that bread or other goods are bought for a price. A fine can be considered the price of an offense, but so too can any other form of punishment; for example, the “ price “ of stealing a car might be six months in jail. The only difference is in the units of measurement: fines are prices measured in monetary units, imprisonments are prices measured in time units, etc. If anything, monetary units are to be preferred here as they are generally preferred in pricing and accounting (1968: 194-195).

On the other hand, Beccaria makes a more value-based distinction, arguing that punishments must be proportionate in kind as well as degree: property crimes are best punished with fine while crimes against persons need a non-monetary punishment (such as imprisonment). “Crimes against persons are one thing, and crimes against property are another. Without exception the former should be punished with corporal penalties. Neither the great nor the rich should be able to atone for an attempt against the weak and the poor by means of a cash payment” (XXI: 37-38).

Again, Becker expects opposition, but falls back on the insolvency argument (also conflating deterrence with compensation, which is usually a matter of tort, not crime):

Another argument made against fines is that certain crimes, like murder or rape, are so heinous that no amount of money could compensate for the harm inflicted. This argument has obvious merit and is a special case of the more general principle that fines cannot be relied on exclusively whenever the harm exceeds the resources of offenders. For then victims could not be fully compensated by offenders, and fines would have to be supplemented with prison terms or other punishments in order to discourage offenses optimally. *This explains why imprisonments, probation, and parole are major punishments for the more serious felonies; considerable harm is inflicted, and felonious offenders lack sufficient resources to compensate* (1968: 196, italics mine).

¹⁵ For the economics, see Shavell 1990 and Friedman 1991; for the philosophy, see Feinberg 1995.

In fairness, later scholars in the economics of crime realize that using fines for violent crimes will be met with significant disapproval with the citizenry, and for this reason other penalties are “more efficient”.¹⁶ To think otherwise is a direct consequence of a belief that values that can be monetized with no change in their social meaning.

Beccaria also maintains that while punishments should be proportionate to the crimes, they should be applied equally to all offenders, regardless of class or wealth. Addressing possible objections that the same penalty exacted on a commoner and a nobleman does not have the same effect – particularly in terms of the “infamy” that would accrue to the latter – Beccaria argues that “the sensitivity of the criminal is not the measure of punishment, but rather the public injury... that equality of punishment can only be intrinsic” (XXI: 39).¹⁷ But this principle of equal treatment once again contrasts with a focus on deterrence – as we noted earlier, he recognizes the lesser burden of a given fine on a rich person compared to a poor one. Becker notes, while discussing the monetary equivalent of prison time, that the burden of imprisonment on a criminal is also related to his or her income, because a high-income individual has more to lose from a given time in prison than a low-income one (1968: 195-198). Beccaria’s plea for equal punishment also contrasts with his frequent admonition that punishments be as mild as possible in order to secure deterrence, which would require that punishments be tailored to a person’s situation.¹⁸ As Beccaria demonstrates, proportionality can be applied along many dimensions, and oftentimes those dimensions contrast, in which case proportionality along some of them must be sacrificed.

Beccaria’s Philosophy of Punishment

Deterrence

We’ve seen that Beccaria was not as single-minded about the pursuit of deterrence as are economists who work in crime. For instance, economists see proportionality as an agreeable implication of optimal deterrence while Beccaria seems to regard it as an independent goal – and often a goal that takes precedence over deterrence itself. There are other concerns that Beccaria in-

¹⁶ For a general discussions of the futility of punishments that seem unfair or unjust, see Dorff and Ferzan 2009.

¹⁷ For an economic analysis of the “infamy” resulting from imprisonment, see Lott 1992.

¹⁸ The subjective nature of punishment has been a topic of some discussion lately; see, for instance, Kolber 2009.

roduces that do not necessarily augment deterrence, and sometimes serve as side constraints on its pursuit. Many of these constraints promoted by Beccaria have much in common with the recommendations of Lon Fuller in chapter 2 of *The Morality of Law* (1969) concerning the proper administration of law – publicity, clarity, promulgation, and so forth – in the interest of fairness and justice. None of these concepts are incorporated to any depth in the economics of crime; it may be that they value these aspects of law but simply take them for granted, just as standard economic models of commerce assume honesty among buyers and sellers without accounting for it.

For instance, Beccaria devotes a chapter to “Obscurity of Laws”, stating that if laws are too obscure for the common people to understand, “this will place them at the mercy of a handful of men, for they cannot judge for themselves the prospect of their own liberty or that of others” (V: 12-13). Later he argues against arbitrary and capricious laws, laws that conflict with each other, “and a host of laws that expose the most well-behaved people to the most stringent punishment” (VI: 15). He also endorses the publicity of laws, warning of the possibility of tyranny and firmly declaring that “every citizen must know when he is guilty and when he is innocent” (XI: 22). Near the end of the book, in a chapter titled “How to Prevent Crimes”, he compiles a list of recommendations echoed later by Fuller, such as “see to it that the laws are clear and simple” and “see to it that men fear the laws and only the laws” (XLI: 75).

In fact, the very last sentence of the book sums up his side constraints (including those elaborated upon later by Fuller), stating that punishments should be “public, prompt, necessary, the minimum possible under the given circumstances, proportionate to the crimes, and established by law” (XLVII: 81). Some of these prescriptions may enhance deterrence and others may not, but there is no necessary connection between them. For instance, in certain circumstances, obscure laws may make people more compliant out of fear, and in others it may embolden them to commit more crime. However, Beccaria’s (and certainly Fuller’s) concern seems less with augmenting deterrence as with ensuring justice and fair treatment, as well as with protecting the individual against the arbitrary power of the state, which is not a significant concern with economists insofar as they study criminal enforcement and procedure (while they may have such concerns in other areas of their scholarship and political activities).

Sometimes Beccaria openly acknowledges the trade-off between his more principled concerns and deterrence. In the discussion of criminal conspiracies, for instance, he recognizes the value of offering reduced punishment to a criminal in exchange for information on his or her compatriots. But his reservations are many:

the nations authorizes betrayal, which is detestable even among scoundrels. Further, crimes of courage are less fatal to a nation than cowardly crimes, for courage is not common, and it needs only a benevolent guiding hand to make it work for the public good [...]. Again, the court shows its own uncertainty and weakness of the law by imploring the aid of those who break it (XXXVII: 69).

It will surely come as no surprise that his concern with the character of the citizenry, even those who voluntarily suborn the law, is not reflected in the economics of crime. Nor do we see in economist's purely instrumental perspective on law Beccaria's fear for the honor of the law itself: "But in vain I torment myself to overcome the remorse I feel for authorizing the inviolable laws – the monument of public trust, the foundation of human morality – to suborn betrayal and dissimulation" (XXXVII: 70).

Putting aside his reservations, however, Beccaria stresses that fairness must be worked into such arrangements by institutionalizing them, so "the court would not encourage the audacity of criminals by letting them see that their help was needed in a specific instance" (XXXVIII: 70). Moreover, he stresses that "what an example it would to the nation" if such agreements were broken and "someone who had accepted the invitation of the laws were dragged to punishment in spite of public pledges!" (XXXVII: 70). This is consistent with other passages in which he urges the uniform enforcement and administration of laws, such as in the discussion of equal punishments and his disapproval of selective enforcement, including acquitting criminals after forgiveness by their victims, which usurps the role of state in prosecuting crimes against the public (XXIX: 55). Once again, such policies may very well be consistent with deterrence, but targeted (and secret) exceptions to them will likely enhance it further, if Beccaria's belief in the integrity of the law did not preclude such actions.

Retributivism

Some of the limitations on the pursuit of deterrence that Beccaria urges (to the exclusion of the economics of crime) resemble aspects of retributivism, a philosophy of punishment that is often presented in opposition to deterrence. Briefly stated, retributivism requires that wrongdoers be punished as a matter of justice and that they be punished in proportion to their crime, following the spirit if not the letter of the ancient *lex talionis* that demands "an eye for an eye, a tooth for a tooth". Whereas deterrence looks to the future in trying to lessen the future harm from crime, retributivism looks to the past in addressing the wrong done; as such, retributivism is often associated with a deontological approach to criminal justice while deterrence is derived from one based on utilitarianism.¹⁹

¹⁹ For a survey of retributivist theory, see Brooks 2012 (Ch. 1), and some contemporary perspec-

The most prominent and obvious aspect of retributivism that Beccaria incorporates is proportionality. Above I explained how Beccaria's concern for proportionality is not derived from deterrence but rather is an independent concern, albeit a conflicted one that tries to balance both general deterrence through proportionality with harm and protection of the individual from harsh punishment through proportionality with the benefits from crime. Retributivists are similarly conflicted about the proper basis of proportionality – some favor the extent of harm, others the degree of wrongdoing, yet others the culpability of the criminal – but the general principle remains a core aspect of retributivism.²⁰

While he argues forcefully for proportionality in general, Beccaria's criticism of harsh punishments are especially impassioned, appearing throughout *On Crimes and Punishments*. For example, he writes that

even though they were not directly opposed to the public good and to the very goal of preventing crimes, then such cruelty would nevertheless be contrary to those beneficial virtues that flow from enlightened reason, which prefers to command happy men rather than a herd of slaves who constantly exchange cruelties with one another; excessively severe punishments would also be contrary to justice and to the nature of the social contract itself (III: 10).

Retributivists share this rejection of disproportionately harsh punishment, but the emphasis on it can vary. *Negative retributivists* focus on limiting the abuses of punishment by opposing the intentional punishment of the innocent as well as any disproportionately harsh punishment of the guilty.²¹ In addition to these concerns, *positive retributivists* require that the guilty must be punished and that they must not be punished disproportionately mildly. As Immanuel Kant, perhaps the philosopher most closely associated with (positive) retributivism, wrote, “woe to him who crawls through the windings of eudaemonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it promises” (1797: 331).

While Beccaria's concerns regarding harsh punishment would be met with approval by both negative and positive retributivists, the latter might have issues with his frequent recommendations that punishment be made as mild as possible (such as previously quoted admonitions that punishment should “in-

tives and debates, see White 2011. Law-and-economics scholars are generally dismissive of retributivism; for instance, Posner says it is “widely viewed as immoral and irrational, at least as primitive and nonrational” (1980: 92). For rare instances of economic work on retributivism, see Wittman 1974 and White 2009.

²⁰ See Davis 1986 on harm versus wrong, and Alexander, Ferzan, and Morse 2009 on culpability.

²¹ The distinction between negative and positive retributivism is due to Mackie 1985.

flict the least torment on the body of the criminal” and be “as mild as possible for the person who suffers it”). Positive retributivism demands that wrongdoers receive their “just deserts” or “pay for their crimes”, and in this view punishment must be proportionate, neither too harsh nor too mild. Beccaria’s position that punishment be proportionate to harm is consistent with this, insofar as severity of crime is measured by its harm. But as explained above, his insistence that punishment be as mild as possible – with “only the degree of intensity needed to deter other men from crime” – contradicts the purpose of punishment in the retributivist view.

Some, such as Young (1983), assert that, despite the popular conception, Beccaria’s philosophy of punishment has more in common with retributivism than with deterrence. Implicitly following H.L.A. Hart’s (1968) hybrid model of punishment in which the general justifying aim of punishment and the distribution of penalties can be different, Young argues that Beccaria has a retributivist justification for punishment while determining penalties according to a utilitarian calculus that promotes deterrence. Young focuses on Beccaria’s invocation of social contract theory to explain the state’s right to punish as evidence of his essential retributivist orientation. Beccaria certainly echoes Plato’s *Crito* and contemporary work by Morris (1968) when he writes that the small sacrifices in individual liberty for the sake of living in civil society must be “defended against the private usurpations of each particular individual” (I: 7). But he also states this in the next chapter in terms of “defending the depository of the public welfare”, the last word suggesting that punishment may be justified by concerns of utility instead of rights.

I agree that Beccaria’s theory of punishment is complex and best fits a hybrid theory – but not the one Young supports. I will argue instead that Beccaria fits the hybrid system advocated by Hart himself, as well as Rawls (1955) and perhaps even Kant (according to Byrd, 1989), in which the general justifying aim is deterrence and the distribution of penalties is guided by retributivism. That this is the more natural interpretation of Beccaria is shown by his overarching emphasis on deterrence together with his numerous limiting factors on penalties inspired by (negative) retributivism.

We do not have to argue the true nature of Beccaria’s social contract theory to point to many other statements that make clear his belief that the general justifying aim of punishment is to deter crime. For instance, in a chapter entitled “Purpose of Punishments”, he makes a clear assertion in favor of deterrence: “The purpose of punishment, then, is nothing other than to dissuade the criminal from doing harm to his compatriots and to keep other people from doing the same” (XII: 23). Near the end of the book, he writes, simply, that “it is more important to prevent crimes than to punish them”, a declara-

tion of preference between the aims of deterrence and retributivism (XLI: 74). All of his concerns with proportionality, which are consistent primarily with negative retributivism, serve as limitations on this primary goal of deterrence, not the other way around.

In addition to the comparison quoted in the previous paragraph, Beccaria made some other statements that criticized positive retributivism. He wrote the “the purpose of punishment is not to torment and afflict a sentient being or to undo a crime which has already been committed” (XII: 23), the second part anticipating the annulment interpretation of retributivism associated with Hegel (1821). Also, when discussing secret punishments, he does admit that “it is important that no manifest crime go unpunished”, but this is consistent with deterrence as well as positive retributivism. As he continues, however, “it is useless to discover who has committed a crime that lies buried in darkness. A wrong which has already been done and for which there is no remedy cannot be punished by political society except when the failure to do so would arouse false hopes of impunity in others” (XVI: 29). In short, the *only* reason to punish a crime, especially a “forgotten” one, is to deter others from doing the same. This is a far cry from the demand of Kant (1797: 333) that even were a society to disband, all the murderers must first be executed, though there be no possibility of future benefit from it.

Because Beccaria argued strongly for deterrence, incorporating side constraints based on negative retributivism but firmly repudiating positive retributivism, his philosophy of punishment is mostly easily characterized as a hybrid theory such as that of Hart, in substance as well as format. While the economics of crime does not often endorse retributivism to any extent, it can also be considered to be consistent with Beccaria’s more elaborate endorsement of deterrence – at the very least, it is not significantly inconsistent with it, aside from its explicit endorsement of disproportionate punishments. The fact that the economics of crime does not engage with the rest of Beccaria’s nuanced philosophy of punishment is more a sin of omission, a failure to grapple with many of the details of criminal justice administration with which Beccaria was concerned. This should be taken as encouraging, demonstrating that there is nothing to stop economists who study crime from taking up these issues if they so choose.

Conclusion

While Becker and subsequent economists who studied crime adopted the most basic elements of Beccaria’s work, specifically his utilitarian psychology and primary emphasis on deterrence, they missed many of the details of his

work which add nuance and realism to his theories of criminal behavior and policy. One does not have to be a utilitarian or a deterrence advocate to appreciate that Beccaria's account of both is far richer than the versions offered in the literature on the economics of crime. This can be attributed to the fact that while Beccaria embraced a mathematical approach to economic and legal problems – and is properly credited as a pioneer in this area – he was more reasonable and pragmatic in its application. Like economists, Beccaria believed that “a mathematically precise solution” to problems would guard against “the fog of sophistry, seductive eloquence, and timid doubt” (XI: 23). But compared to his intellectual descendants, he was more realistic regarding the prospect of such a solution: “it is not possible to reduce turbulent human activity to a geometric order devoid of irregularity and confusion” (XLI: 75). Mathematical modeling is a useful tool, not just in clarifying logic but also in exposing overly simplistic assumptions – aspects of a poorly designed economic model which generate the same sophistry and “seductive eloquence” against which mathematization was meant to guard. If economists studying crime had learned more from Beccaria's balance and sensitivity to human concerns, the field today would be much healthier. One could even say that economists should strive in their work toward greater proportionality to the spirit of Beccaria.

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