

# On Crime, Punishment, and Reform of the Criminal Justice System

*Kalyn P. Hoggard*  
Florida Atlantic University

The purpose of this paper is to shed light on the inner workings of the criminal justice system during the Enlightenment. Also, it is important to discuss the heinous nature of this system, what crimes were punished, to what extent they were punished, and a brief overview of the reasons for which the penal system was in existing condition. The first part of this paper will discuss the nature of the penal system, as it existed during the Enlightenment. In order to do this, it is necessary to take into account the observations of many prominent philosophers of the time including Montesquieu, Voltaire, and Beccaria and his colleagues at the Academy of Fisticuffs. The second part of this paper will examine the philosophy of Cesare Beccaria, his account of human nature, the purposes behind the formation of the state, and his theory of punishment. The third part of the paper will cover Beccaria's critique of the existing penal system, and his suggestions for reformation, and also, the arguments that Beccaria uses against torture and capital punishment.

The last part will take into account some of the critiques of abolishing capital punishment and the problems that are associated with its practical application. I agree with Beccaria in totality when it comes to reforming the use of the death penalty. The death penalty was not justified during his time, and it is not justified now. It is a horrendously unjust act, and for a state to assume the right to capitally punish its citizens is for a state to delegitimize its purpose and formation.

## Part 1

### The Context

To say that it would be utterly horrifying to live in Europe during the 17<sup>th</sup> and 18<sup>th</sup> centuries would be a gross understatement. Violence, famine, religious intolerance, and injustice were rampant and existed in all parts of Europe. Maybe not the worst, but certainly a major contributing factor to the situation was the abominable condition of the legal system, which was harsh, biased toward certain privileged groups, and illegitimate.

In order to develop the context from a first person point of view, it seems necessary to consider the observations made, and the disgust felt, by two prominent philosophers of the time: The Baron de Montesquieu and Francois-Marie Arouet de Voltaire. Voltaire states, while speaking of the atrocities of the jurisprudence of his time, "they subjected to the suffering of a thousand deaths those whom they suspected, because according to the jurisprudence of these early heroes, whoever was suspected merely of entertaining against them any slightly disrespectful thought was worthy of death. The moment that anyone has thus merited death, it matters little that terrible torments are added for several days, and even for several weeks, a practice that smacks somewhat of Divinity."<sup>1</sup> Montesquieu explains that the Greeks had no room for tolerance when it came to witchcraft. When one was accused of this, in order to prove their innocence, they had to "handle a red-hot iron without being hurt."<sup>2</sup> Apparently, during the 17<sup>th</sup> and 18<sup>th</sup> centuries, the only way to prove that you were not a witch was to be one.

Montesquieu also recalls a story that intricately shows the disturbed nature of the legal system and the impact it had on the people. He recalls, “[a] Jew was accused of having blasphemed against the Virgin Mary, and upon conviction was condemned to be flayed alive. A strange spectacle was then exhibited: gentlemen masked, with knives in their hands, mounted the scaffold, and drove away the executioner, in order to be the avengers themselves of the honor of the blessed Virgin.”<sup>3</sup>

These few cases were not the exception but the rule in most of Europe during this period. These abysmal conditions called for a serious critique and an attempt reform of the legal system. This leads us to the hero of our story, the Italian philosopher Cesare Beccaria, who took it upon himself to develop a critique of the criminal justice system and to do his best to reverse this savagery. With these goals in mind, Beccaria wrote *On Crime and Punishment*. This work was not only influential for many people but was also so moving that Voltaire took it upon himself to write a commentary on it, which was added to the later editions.

## Part 2

### Beccaria’s Philosophy, Moral Justification for the State, and Theory of Punishment

Beccaria’s most famous work, *On Crime and Punishment*, had a central theme: To substitute the existing legal system, that was characterized by superstition, unfair privilege given to the nobles and monarchs, and hereditary rights, with a criminal justice system that was a “centralized and rational system of justice that was equal for all and grounded in the rule of law.” In order to understand thoroughly Beccaria’s critique and ideas for reform, one must examine the philosophical principles that underlie his work. Doing so should provide a well-rounded understanding of his position on the topic, and help the reader understand the reasoning behind his critique and its implications.<sup>4</sup>

It is important to point out that many of Beccaria’s views are in agreement with, and potentially the product of, his conversations with the philosopher Pietro Verri and his fellow colleagues at the Accademia dei Pugni (Academy of Fisticuffs). This group concerned itself with many controversial issues that plagued Europe at the time: Economics, politics, human nature, and criminal justice. Underlying the ideas that they discussed was the agreement on a new account of human motivation and morals. Essentially, Beccaria agrees with the theory of human motivation proposed by Verri, which is as follows: “Pleasure and pain are the motive forces of all sentient beings.” Given the fact that Beccaria agrees with this, he goes further and claims that all acts are proportional in strength to the pleasure or pain that gave rise to said act. Moreover, he believes “that the proximate and efficient cause of actions is the flight from pain; their final cause is the love of pleasure, man rests in good times and acts when in pain.”<sup>5</sup>

Although Beccaria agrees with this notion of pleasure and pain, he does add an interesting twist to it, which allows him to avoid some of the classical problems of similar theories. He thinks that even the imagining of something that could be useful or pleasurable will act on one indirectly by way of the anxiety associated with not being able to obtain it. Beccaria does this to show that we are never fully satisfied, and that idleness will not occur due to fear of losing our pleasurable state or our motivation to escape a painful one. This type of hedonistic psychology provides an account for the progress of the individual and society. “The resulting continual expansion of human needs [is] at the heart of his [Beccaria’s] account of the progress of society.”<sup>6</sup> It is also important to discuss his epistemological theory and how it, along with his understanding of human motivation and the idea he formulates on happiness, lays the essential philosophical foundation upon which he develops his critique of the criminal justice system and his ideas for reformation.

Beccaria, like Kant, wishes to synthesize empiricist and rationalist epistemology. “Beccaria follow[s] the empiricist argument of Locke and Helvetius in attributing all human knowledge, including morality to the operation of impressions upon our senses.”<sup>7</sup> This is not the whole story though, because Beccaria believes that this process isn’t necessarily mechanistic or deterministic one. Rather, he adds that human reason has the ability to organize and interpret our sense perceptions. This being said, Beccaria does not agree with Hume that reason is somehow a “slave to our passions.” Rather, he claims that reason, what distinguishes us as human beings, is the ability to control our passions and to call upon them in a rational way.<sup>8</sup>

This type of epistemology leads Beccaria to believe that he established the grounds for developing a legal system that is based on a more rational foundation. For Beccaria, “[i]n general terms, law [has] to be clear and punishment speedy, certain and an economical deterrent so as to ensure an indisputable association of

ideas between pain and crime. A rational legal system require[s] that laws be as precise as possible, with judicial discretion reduced to a minimum, so that all citizens know where they [stand] and [can] reason accordingly. In Beccaria's eyes, if the legal system does not conform to the aforementioned proposal, then it will lead to the appalling practices that he is attempting to reform. If it does not adequately perform its purpose, according to his standards, then people will not be deterred from committing crimes against society. Thus, the entire state and its members' well being will be jeopardized.

So the question becomes, "What are the foundational principles upon which a legal system, such as the one proposed by Beccaria, is based?" Are these duty-based principles? Are they rights-based principles? Beccaria's answer to the last two questions is somewhat unsatisfying, because it is both 'yes' and 'no'. Beccaria would say that words such as 'duty', 'right', and 'obligation' are not only difficult to define by themselves, but are potentially impossible to define if one does not look at the underlying argument being made. "As Beccaria puts it such words [are] 'abbreviated symbols of a rational argument and not of an idea.'" So, it is necessary then to look for the underlying argument made when using these terms. For example, it is quite simply understood that when we say "your obligations or duties are predicated on rights", we are simply saying that you will be punished if you behave against the social contract or the law. This being said, Beccaria believes that this argument provides our essential understanding of the legal system, and it is upon this foundation that the state's right to punish is legitimized. This, then, is the foundation of Beccaria's criticism.<sup>9</sup>

Although it is possible that translations of Beccaria's work may have overemphasized his utilitarian side, it seems that the main principle upon which his legal system is built is the concern "to maximize equally the happiness of each person – a goal he shared not just with Verri, but with the members of his group."<sup>10</sup> Beccaria contends that, in exchange for the security provided by the state, we give up only the smallest portion of our liberty. He believes that the main goal or purpose of forming the state, the government, and the legal system is to "maximize equally the happiness of each person." But it is, in many ways, difficult to do so without the proper regulations and sanctions provided by those very entities. In short, we take part in the social contract for no other reason than to promote utility, which extends to each and every person. The purpose of the social contract is to ensure our interests and to provide the necessary means to do so.<sup>11</sup> A statement made by Pietro Verri elucidates Beccaria's synthesis of utilitarianism and social contract theory. "The end of the social pact is the well-being of each of the individuals who join together to form society, who does so in order that this well-being becomes, absorbed into the public happiness or rather the greatest possible happiness distributed with the greatest equality possible."<sup>12</sup>

A few difficulties arise when one attempts to synthesize social contract theory with utilitarianism, in an attempt to morally justify the existence of the state. At first glance, these two theories might seem to be contradictory. However, Beccaria brings these seemingly opposing views together in an interesting way. For Beccaria, humans have in common certain basic interests, such as security, but these interests are not to be upheld by way of natural law. Rather, "their basis lay in considerations of utility, as being essential to human life and the pursuit of happiness. Moreover, when individual interests came into conflict utility again became the benchmark for resolving these clashes." To achieve this goal, people within the state must agree on a certain set of rules, which are upheld by an authority and apply to everyone in the same manner. This set of rules forms the contract that ensures equality, provides an obligation to abide by the rules, and allows for the achievement of utility for everyone.

This synthesis allows Beccaria to escape two of the pitfalls of classic utilitarianism. First, in classical act utilitarian theory, an innocent person may justifiably be sacrificed for the sake of utility for the 'greatest number'. However, Beccaria's synthesis adequately deals with this problem: The contract sets the boundaries and purpose of the state in such a way that it protects every citizen, rather than the highest aggregate utility. Second, since the rules that are set up and agreed upon are bound by the contract, there is no room for the rule utilitarian view that forces every case to be evaluated based on its particular context.<sup>13</sup> Now that I have briefly explained Beccaria's philosophical principles and their relation to how the state, the judicial system, and the legislative system ought to operate, I must turn to some of the specific recommendations for reform that he proposes in his work.

Beccaria states that "[l]aws are the terms under which independent and isolated men come together in society."<sup>14</sup> He believes that human beings existed in a barbarous condition of war and turmoil prior to the formation of the state. Human beings came together by way of a contract, in order to obtain a utilitarian goal, that is, the highest amount of happiness for all involved. Given this, a crime is any act that a member of a state commits in violation of this contract. It is impossible to create a catalog of all of the crimes that human

beings have committed or will commit. However, Beccaria does attempt to address the scope and hierarchy of crimes. According to him, the worst of all crimes are those that directly affect the destruction of society, whereas the less serious crimes are those that “involve the smallest amount of injustice to private participants.”<sup>15</sup>

Beccaria holds that all actions that go directly against the public good are to be called crimes and that there are a multitude of actions that fall in this category. Therefore, the state is justified in punishing criminals if and only if this is done to uphold the greatest amount of happiness for all of the participants in the state. Furthermore, given that crimes create varying degrees of debt to society, punishment for a crime should be proportional to the debt created, in order to deter people from committing that crime. Beccaria asserts that, if the punishment does not fit the crime, then that punishment is either too harsh and, therefore, unjust or not sufficiently harsh and, therefore, not deterrent.<sup>16</sup>

Beccaria’s theory of punishment is utilitarian and forward looking. The purpose of punishment, for the utilitarian, is to deter future crimes. On the other hand, the retributive account of punishment is backward looking, since its goal is to punish the criminal in equal proportion to the crime committed.<sup>17</sup> Beccaria maintains that the purpose of punishing a criminal is “to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise. Therefore, punishments and the means adopted for inflicting them should, consistent with proportionality, be so selected as to make the most efficacious and lasting impression on the minds of men with the least possible torment to the body of the condemned.”<sup>18</sup>

### Part 3

#### Arguments Against Torture and Capital Punishment

To further elucidate Beccaria’s attitudes toward the legal system that was in place, it is important to address his views on torture, as it relates to interrogation, and on capital punishment. Beccaria’s views on these two issues are both his most famous and most influential ideas, affecting many important figures in many different countries. These figures include Thomas Jefferson, John Adams, and Voltaire, to name only a few.

Even today, with the aid of forensic science and advanced interrogation techniques, there are many situations in which it is clearly difficult to determine the real perpetrator of a crime. Therefore, to the extent that forensic science and interrogation techniques were far from being developed in the 17<sup>th</sup>, 18<sup>th</sup>, and 19<sup>th</sup> centuries, the question became: “How does one determine who committed a given crime, particularly if there were no witnesses?” Unfortunately, the most common method of interrogation, during Beccaria’s time, involved the use of torture. The process of determining who had committed a crime boiled down to how much pain one was willing to endure in order to tell the truth or, more likely, to give in to whatever the torturer wanted to hear.<sup>19</sup>

In response to this injustice, Beccaria states “No man may be called guilty before the judge has reached his verdict; nor may society withdraw its protection from him until it has been determined that he has broken the terms of the compact by which that protection was extended to him.”<sup>20</sup> It is not justifiable to cause someone pain for committing a crime, before they have been proven guilty of that crime. This understanding of what is justified leads us to reject torture as a method of “questioning”, but not simply because it is unjust. We must also reject it because it is an inefficient means for the discovery of truth. A criminal who has the ability to endure large amounts of pain may very well walk free because of this ability. As well, an innocent man who lacks the ability to resist pain will be convicted of any crime to which he confesses, because he could not endure the pain of the interrogation.<sup>21</sup>

There are other arguments that have been made to legitimize the use torture. For example, if a criminal is decidedly guilty of a crime and has information that will aid in the deterrence of another heinous crime then, some have argued, it is justifiable to use torture in order to obtain this information and save lives. This utilitarian justification of torture is still illegitimate, according to Beccaria. As was previously stated, for Beccaria, torture is both unjust and inefficient. Even in the case in which a criminal may have information regarding future crimes, the reliability of the information extracted is a function of the criminal’s ability/inability to resist pain.

Now for the 'grand finale' to this essay, I will examine Beccaria's arguments and commentary against the death penalty as a punishment for crime. Beccaria states "[w]ho has ever willingly given up to others the authority to kill him? How on earth can the minimum sacrifice of each individual's freedom involve handing over the greatest of all goods, life itself?"<sup>22</sup> Beccaria uses four arguments against the death penalty. First, Beccaria argues that the death penalty cannot be legitimized on utilitarian grounds. His argument can better be described by way of a question: "How could it be legitimate for a state to kill a criminal, a person that can still benefit society, because they have created a debt to that society?" When the death penalty is enacted, one is not only eliminating the possibility for said criminal to repay his/her debt to the state, but one is also taking the life of a person. This, in many cases, adds to the suffering of some of the members of the state and, therefore, it is contributing to a higher amount of pain, rather than happiness. This goes against the purpose of utilitarianism. However, for Beccaria, this first argument is not enough to establish the complete inhumanity of the death penalty.<sup>23</sup>

Second, Beccaria addresses the issue of the proportionality of a crime to its corresponding punishment. In Beccaria's time, less serious crimes were punished to a similar degree as heinous crimes. Therefore, Beccaria argues, a criminal who is risking death by committing a particular crime does have any incentive to commit a lesser crime, since the punishment is the same for both types of crime. He adds that the taking of a life is so cruel that it is not proportionally appropriate as punishment for any crime whatsoever. Moreover, Beccaria maintains that this disproportion actually incites crime, rather than deters it. He holds that public executions do a poor job of giving a lasting impact of deterrence on the people and adds that, in many cases, it would become necessary to conduct many public executions to actually deter people from committing a particular crime.<sup>24</sup>

Thirdly, capital punishment seems to have an interesting effect on the people in those places in which it is employed as a form of punishment. Beccaria believes "that execution in general inure[s] people to violence and in some cases even ha[s] the effect of glorifying the criminal by turning him or her into a martyr, thereby encouraging rather than deterring the crime committed."<sup>25</sup> This is a really interesting insight because research suggests that, in the United States, those states in which there is a death penalty have demonstrably higher murder rates than other states. This information is the result of a meta-analysis of the deterrent effect of the death penalty that was conducted by The Death Penalty Information Center. This statistical analysis compares murder rates in death penalty states and non-death penalty states from 1990 to 2010. The murder rate by state was developed per 100,000 people, ensuring that the analysis results are per capita. The DPIC \ got its data on population statistics from the U.S. census and compared it with murder rate data that made available by the Federal Bureau of Investigation's *Crime in the United States*.<sup>26</sup> According to the results of this study, the percentage difference in murder rates, between 1990 and 2005, increased from a 4% higher murder rate in death penalty states to 46% higher murder rate in those states. These observations not only negate the notion that the death penalty is an effective deterrent. But they also seems to suggest that the use of the death penalty may be directly related to negative behavior in those people who live in a society that promotes the death penalty as a punishment. It seems that, if the purpose of punishment is to deter criminal behavior and if capital punishment is not effective for this purpose, then the use of capital punishment cannot be justified on this basis.<sup>27</sup>

If these arguments do not suffice to convince, Beccaria does have one more argument up his sleeve, and this one is concerned with the contractual basis of a state. Beccaria questions the idea that a state has a justifiable right to kill its members. To argue that the state has such a right would fly in the face of the justification for the state's existence. If the state is legitimized by the fact that it promotes the security and the interests of each of its members, then it seems quite contradictory to claim that the state has the right to kill the very members for whose sake the state exists.<sup>28</sup>

Beccaria suggests hard labor as an alternative to capital punishment for heinous crimes. However, this is open to the question: "How much hard labor does a criminal have to perform both to provide for their own sustenance and to also repay their debt to society?" This is not an easy question for Beccaria to answer. However, he proposes that the best punishment for the most heinous of crimes is intense labor that is difficult and long lasting enough to deter a criminal and others from committing a similar crime. He suggests this for at least three reasons. The first reason relies on the fact that public executions do not have a lasting effect of deterrence on the population. The second reason is related to the ability of the criminal to pay back the society to which they are indebted. The third reason is best described by Beccaria himself: "[T]here is no-one who, after considering the matter, could choose the total and permanent loss of his own freedom, however profitable the crime might be. Therefore, permanent penal servitude in place of the death penalty would be enough to deter even the most resolute soul." This reasoning considers the proportionality

of punishment and argues that permanent penal servitude provides a greater deterrent than the death penalty.<sup>29</sup>

## Part 4

### Final Thoughts on Applying Beccaria's Suggestions for Reform

This last part will consider two important critiques against Beccaria's arguments. The first of these considers the alternative to the death penalty that Beccaria suggested. The second looks into to the practical application of his suggestions for reform and provides a solution to the difficulties that may be involved.

In *On Crimes and Punishments*, Beccaria considers the critique that "permanent penal servitude is as grievous as death, and therefore as cruel." He contends that penal servitude is a greater deterrent than the death penalty but rejects the notion that it is as grievous a punishment, since capital punishment is a lesser deterrent than the idea of a permanent loss of liberty. He also maintains that, if we add up the pains from an entire lifetime of servitude, they may very well be greater than the pain of the death penalty, which lasts only a moment. Given this, while weighing the potential outcome of his/her action, a criminal will be more deterred by the prospect of everlasting pain than by the potential of momentary pain. Although this counterargument may leave room for questioning the proportionality of punishment, it conforms to the idea that murder is a savage act and that neither the state nor its citizens should be involved in this type of conduct. For Beccaria, the move away from the cruelty of capital punishment is crucial for the maximization of happiness and the progression of the 'public will'.<sup>30</sup>

Extinguishing the death penalty seems to be a reasonable proposal theoretically. However, when one looks into the practicality of abolishing capital punishment, there are a few problems that arise. For example, it has been brought to my attention that in certain countries abolishing the death penalty would quite complicated. For example, if a country has a high murder rate and does not have the appropriate facilities or space to provide for numerous amounts of lifetime inmates, then the abolition of the death penalty becomes difficult to implement. This becomes even more difficult when one considers the fact that the number of inmates will consistently grow over time. This critique does complicate the matter, but it can be dismissed when we consider the following. Although it may be tricky to abolish the death penalty in every country, it is not impossible.

As Beccaria's empirical epistemology would require, it is important to pragmatically deal with the problems that arise when reforms are necessary. We must observe each particular culture, as well as the causes of the crimes that we punish by death. We must then develop solutions that address the causes of these crimes, and envision appropriate alternative ways to deter and punish these crimes when they are committed. Instead of resorting to the death penalty when alternative punishments are difficult to implement, we must consider the 'right to life' as a baseline principle from which to work. If we consider that murder, under any circumstances, is an unjust act, then murder cannot be justified as a form of punishment for criminality. It may be very strenuous to provide solutions to the problem of eliminating the death penalty in some countries, but this is a burden worth bearing if we are to continue reforming our legal institutions and progressing as societies.<sup>31</sup>

In summation, this paper has examined the problems with the legal system in place in Europe, during the 17<sup>th</sup> and 18<sup>th</sup> centuries, and examined Cesare Beccaria's critiques of and proposals for reforming this system. I have taken into account Beccaria's synthesis of empiricist and rationalist epistemologies and linked this synthesis to his ideas for criminal justice reform. This discussion of Beccaria's philosophy also included a detailed discussion of his synthesis of social contract theory with utilitarian justifications for the state, as well as of his synthesis of retributive and deterrent-based theories of punishment. This essay also considered torture as an interrogation technique and questioned its effectiveness and justifications. Lastly, it examined Beccaria's four arguments against the death penalty and considered the practical implications of abolishing capital punishment. Beccaria gave sufficient grounds for the rejection of the death penalty during his time, and I used the same grounds to argue for its rejection by today's legal system.

I hope that my lack of elegance, eloquence, and enlightened understanding have not led me to misunderstand or inadequately explain the philosophy and implications of Beccaria's theories. His writing has certainly influenced many notable philosophers and their work. For example, Beccaria's ideas influenced Jeremy Bentham, while the latter was developing his version of utilitarianism. Voltaire took it

upon himself to write a commentary on Beccaria's work. And, the Italian philosopher Ferdinando Facchinei, went as far as coining the term 'socialism', as a word of abuse, to critique Beccaria's. It is, indeed, unfortunate that Cesare Beccaria's thought is not currently given the attention that is due to such a towering philosophical figure.

### References

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- <sup>5</sup> *Ibid.*, xiv-xvi
- <sup>6</sup> *Ibid.* xvi
- <sup>7</sup> *Ibid.*
- <sup>8</sup> *Ibid.*
- <sup>9</sup> *Ibid.*, xvii
- <sup>10</sup> *Ibid.*, xix
- <sup>11</sup> *Ibid.*, xx
- <sup>12</sup> *Ibid.* xiv-xvi
- <sup>13</sup> *Ibid.*, xx
- <sup>14</sup> Beccaria, Cesare, "An Essay on Crimes and Punishments" (Selection), in *The Portable Enlightenment Reader*, edited and with an introduction by Isaac Kramnick (New York: Penguin Books, 1995), 9
- <sup>15</sup> *Ibid.*, 20
- <sup>16</sup> *Ibid.*, 20-21
- <sup>17</sup> Beccaria, "Introduction", xxi
- <sup>18</sup> *Ibid.*
- <sup>19</sup> Beccaria, *An Essay on Crimes and Punishment*, 31
- <sup>20</sup> Beccaria, "Introduction", xxiv-xxv
- <sup>21</sup> Beccaria, *An Essay on Crimes and Punishment*, 39
- <sup>22</sup> *Ibid.*
- <sup>23</sup> *Ibid.*, 66
- <sup>24</sup> *Ibid.*, 70-71
- <sup>25</sup> *Ibid.*
- <sup>26</sup> Death Penalty Information Center, "Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates." <http://www.deathpenaltyinfo.org>. Last modified 2010. Accessed November, 15 2012.
- <sup>27</sup> Beccaria, "Introduction", xxvi-xxvii
- <sup>28</sup> Beccaria, "Introduction", xxvi-xxvii, and *An Essay on Crimes and Punishment*, 66-72
- <sup>29</sup> Beccaria, *An Essay on Crimes and Punishment*, 67-68
- <sup>30</sup> *Ibid.*, 70
- <sup>31</sup> Beccaria, "Introduction", xxvii