

# THE JURISPRUDENCE OF CRIME AND PUNISHMENT FROM PLATO TO HEGEL

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PUNISH.

## INTRODUCTION

Focusing on some of the central challenges of today's criminal justice system in his 1987 book, *Corrections in America: Problems of the Past and the Present*, Charles W. Thomas identifies three "primary purposes of punishment": "punishment as retribution," "the utility value of punishment" as deterrence, and "the rehabilitative value of punishment." Each of these perspectives, he asserts, answers differently the central questions of penology: "What is it . . . that we seek to do or gain when we impose punishment on offenders? What goals do we (rightly or wrongly) believe that we can achieve by means of punishment?"<sup>1</sup>

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Purposes

Explaining the retributivist perspective, Thomas says that it "encourages us to ignore how or if punishment may influence the future attitudes, values, beliefs, and behavior of those who are punished." Citing Kant's *Philosophy of Law*, Thomas mentions the concern of retributivists that such "a future orientation is said to carry with it the danger that we will come to think of those who are punished merely as a means to an end and not as fully responsible people whose rights we are obliged to protect." Retributivists do not look forward, so much as back—back "to the seriousness and harmfulness of the offense that has been committed and to the moral blameworthiness of the offender." Retribution, Thomas goes on, means "just desert" and "proportionality." He casts considerable doubt, however, on the confidence with which we can "create an equation that will permit us to compute each offender's just deserts in a way that will not be offensive to the basic principles of proportionality." It is with comments like these that Thomas expresses his "grave reservations about the moral or ethical as well as the practical virtues of retributivism."<sup>2</sup>

Proport.

1. Charles W. Thomas, *Corrections in America: Problems of the Past and the Present* (1987), p. 36.

2. *Ibid.*, p. 40.

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Turning to deterrence, Thomas summarizes this approach by citing Bentham's observation that "the quantum of the punishment must rise with the profit of the offense." Under this perspective, Thomas says, "if we wish to control or prevent crime, we must simply convince everyone that 'crime does not pay' through our ability to manipulate relevant aspects of punishment." To deter, punishment must be swift, certain, and severe—or, at least, swift, certain, and severe *enough* to discourage this criminal, and other would-be criminals, from committing this act. Thomas mentions the well-known distinction between *general deterrence* (of "persons other than those who actually receive punishment") and *specific deterrence* (of those who are punished). Here, too, Thomas provides a few words of critique, noting that the "image of a person carefully weighing and evaluating the benefits and costs of criminal and non-criminal options before acting" may often be "simplistic."

Thomas explains that both retributivists and utilitarian advocates of deterrence tend to "view human actors as being fully responsible persons who have and who exercise the ability to choose between good and evil." They are, therefore, relatively "unconcerned with features of the criminal justice process that unfold after the point at which a sentence has been imposed." Rehabilitationists, Thomas asserts, "are a very different breed." Influenced by "the clinical disciplines (medicine, psychology, psychiatry, and so on) or the so-called 'helping professions' (especially social work)," they tend to reject the view that "most offenders choose to violate the law and are therefore blameworthy." Instead they see crime caused by and shaped by "prior events and forces, the identity of which can be established by careful scientific inquiry." Crime, for rehabilitationists, is a "disease"; punishment must aim at a "cure." Some may be "cured quickly"; others "may require a lengthy period of rehabilitation." But the aim of punishment must be correction of the offender.<sup>4</sup>

Thomas is, of course, not alone in identifying the retributivist, utilitarian/deterrence, and rehabilitative approaches to criminal punishment. Most texts on criminal law in American law schools today do the same thing. For example, in their section on "Why Punish" in *Criminal Law and Its Processes*, Sanford Kadish and Stephen Schulhofer speak of "Retribution," "Deterrence," and "Reform" as three central purposes of punishment. They devote a

3. *Ibid.*, p. 44.  
4. *Ibid.*, pp. 48-49.

- 1 Retribution - desert
- 2 Deterrence (spec. & gen.) - utilitarian - disbleant
- 3 rehabilit - reform

number of pages to each approach, citing a wide variety of sources for each and offering excerpts from a number of contemporary penologists under each.<sup>5</sup> As their extensive bibliography of the subject in the back of the book makes abundantly clear, there have been, and continue to be, a number of proponents of each of these approaches to and justifications for punishment.

Kadish and Schulhofer do cite some philosophers in their survey of the three perspectives—Kant is quoted at length in the section on retribution, and Bentham selections appear in both the retribution and the deterrence sections—but their focus is on the contemporary debate. Nor is this unusual. Very few contemporary books or articles on punishment tell us much about how some of the great philosophers approached these questions, and where they fit in the three approaches.

One recent book that does attempt, though briefly, to give us a sense of continuity with the great philosophers of the past is James Q. Wilson and Richard Herrnstein's *Crime And Human Nature*. Toward the end of that book, they link the three perspectives on punishment to "three views of human nature," each with roots deep in the history of political philosophy.

Wilson and Herrnstein first take up the model of "Man the Calculator." Tracing this approach back to Cesare Beccaria's *On Crimes And Punishments* (1764), as well as to Jeremy Bentham's *Introduction to the Principles of Morals and Legislation* (1789), they link it to contemporary "hard line" deterrence policies that are based on the theory that "manipulating the probability (and possibly the severity) of punishment in society changes the frequency with which crimes are committed." Originally, they note, such a perspective "provided a philosophical foundation for opposing cruel, arbitrary, or excessive punishment," on the rationale that "punishment in excess of what is necessary to induce people to obey the law is unjustified."<sup>6</sup>

Next, Wilson and Herrnstein turn to the model of "Man the Naturally Good," which they trace back to Rousseau's idea that the "corruption of man began with the formation of society." Today's rehabilitationists stand in this tradition, emphasizing that "crime is caused by social forces . . . and that the individual is not fully to blame for his behavior." This may mean many things in practice—

5. Sanford Kadish and Stephen Schulhofer, *Criminal Law And Its Processes* (5th ed. 1989), Ch. 2, pp. 113-65.

6. James Q. Wilson and Richard J. Herrnstein, *Crime and Human Nature* (1985), p. 515.

from greater attention "to excuses based on human need and social stress" to "applying the doctrine of diminished responsibility to the behavior of juvenile delinquents."<sup>7</sup>

The third of the three "views," according to Wilson and Herrnstein, looks on "Man the Social Animal." Under this approach, traced back to Aristotle, man is seen as naturally inclined to political association, learning virtue by habit. Very little is said about contemporary expressions of this attitude in criminal law, perhaps because, Wilson and Herrnstein insist, it is "less commonly represented in contemporary criminology."<sup>8</sup>

Wilson and Herrnstein devote only a few pages of their book to this survey of the roots in ancient and early modern political philosophy of contemporary perspectives on crime and punishment. As previously noted, some of their fellow criminologists do less. Focusing their research on the constitutional rights of accused persons and a wide range of issues in substantive criminal law, more than a few of them seem not to have given enough attention to some of the basic recurrent questions in the history of criminal jurisprudence: Why should society punish? What are the purposes of punishment? Where does crime come from—from an unjust society or from human nature?

This paper is an attempt to shed some light on the contributions that a number of important philosophers and sociologists in the western tradition have made to answering questions like these. The focus is on three periods in the history of political thought as they bear on changing philosophies of criminal responsibility: ancient Greek philosophy, with an emphasis on Plato and Aristotle; the Enlightenment, with an emphasis on Beccaria, his sources in Hobbes, Locke, Rousseau, and Montesquieu, and his influence on Bentham; and the reaction against the penal philosophy of the Enlightenment, with an emphasis on Kant and Hegel, and some reflections on contemporary comparative sociology.

The paper proceeds chronologically, but it certainly does not cover all the philosophers who have written about crime and punishment. Nor does it present an absolutely complete picture of any one philosopher's views on the subject; to assess thoroughly Aristotle or Hegel's views on crime and punishment, for example, would require volumes of writing that far exceed the scope of this project. Rather, the aim is to show convincingly that each of the contemporary

7. *Ibid.*, p. 519.

8. *Ibid.*, p. 522.

approaches to crime and punishment has roots that reach far back into the history of political thought; that each has been closely linked to important assumptions, not only about human nature, as Wilson and Herrnstein intimate, but also about virtue and vice, justice and injustice, and the nature of politics and law. The paper closes with an indication of lessons that might be drawn for contemporary American criminology.

#### I. PENAL PHILOSOPHY IN ANCIENT GREECE

In Socrates' dialogue with the laws in Plato's *Crito*, crime is described as a destroyer of the city and of order, a declaration of war, as it were, upon society.<sup>9</sup> This passage seems similar to some pages in the writings of the social-contract theorists, where criminals are likened to beasts threatening to bring about a return to the state of nature. In Plato's case, however, the passage does not tell us much about his penal philosophy. For that, we have to turn to what he says, throughout his dialogues, about the causes of crime and the nature of proper punishment.

In Book VIII of *The Republic*, Socrates states that the presence of criminals in society "is the result of a defective culture and bad breeding and a wrong constitution of the state."<sup>10</sup> Plato elaborates on what he means by "bad breeding" in Book VI of that same dialogue, where Socrates says that "the best endowed souls become worse than the others under a bad education." A vigorous nature "corrupted by its nurture," he goes on, is the most dangerous.<sup>11</sup>

At this point, one should note the apparent similarity between this explanation of the causes of crime and the attitude of many modern rehabilitationists. Crime, the rehabilitationists often like to tell us, comes from society. If we could educate people better, give them happier and more secure childhoods, we could go a long way to reducing or, perhaps, even eliminating crime.

Plato's Athenian says over and over again in *The Laws* that bad men are always bad *against their will*.<sup>12</sup> People are not wicked by choice; they do bad things because they do not *know* what is good. From this it follows that the right education—in the family, at

9. Plato, *Crito*, 50b in *Plato: The Collected Dialogues* (E. Hamilton and H. Cairns, eds. 1978). (All further references to Plato's dialogues and letters will be to this edition.)

10. *Republic*, VIII, 552e.

11. *Ibid.*, VI, 491e, 495b.

12. *Laws*, IX, 860d.

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schools, and from the laws themselves—is necessary to show people the good.<sup>13</sup>

Education must teach people how to curb their passion—what Plato's Athenian describes in *The Laws* as "a contentious and combative element which frequently causes shipwreck by its headstrong violence." These "unsatisfied lusts" for wealth, "jealousies," and "craven and guilty terrors," perhaps more than anything else, explain why a person does turn to criminal acts. Education must teach us the dangers of such passions before a propensity for unlawfulness is "bred in men by crime done long ago."<sup>14</sup>

Plato's allusion to the importance of *habit* points to a similarity with Aristotle. His emphasis on the passions is also largely characteristic of Greek philosophy as a whole. But, in what he says about education and right upbringing, Plato seems to side with the modern rehabilitationists, for many of whom crime would be eradicated if we only changed society.

Plato, however, does not go this far. In Book IX of *The Laws*, he suggests that crime will always be with us because of "our universal human frailty." Why is it, the Athenian asks Clinias, that, in a well-ordered state, we need criminal law and punishment at all? Is it not "to our shame to be framing any such legislation" for a society that will "enjoy all the right conditions for the practice of virtue"? But, the Athenian goes on, "we are but men" and criminal laws are necessary "for slips of humanity."<sup>15</sup>

This is a memorable passage, and it puts Plato squarely on the side of Aristotle in the belief that the state and criminal law are necessary evils: it would be better if we had no need to put people in prison or execute them. As James Madison says in *The Federalist*, if men were angels we would not have to do any of these things. It is because men are not angels, because "we are but men," that practical justice requires this dark side—the side of justice which Frederic William Maitland aptly called "Justice and Police" in his short book of that title.

What, then, is the purpose of punishment for Plato? It is not retribution, at least as modern retributionists appear to understand that term. "The purpose of the penalty," the Athenian says in *The Laws*, "is not to cancel the crime" since "what is once done can

13. *Protagoras*. See editor's intro, p. 308.

14. *Laws*, IX, 854b.

15. *Ibid.*, 853c.

never be made undone." Such "vengeance" is not justice and "not judgment."<sup>16</sup>

The argument that punishment should properly be seen as *correction* appears first in Plato in the *Protagoras*. There, as part of his argument that virtue can be taught, Protagoras tells Socrates that "punishment is not inflicted by a rational man for the sake of the crime that has been committed . . . but for the sake of the future, to prevent either the same man, or, by the spectacle of his punishment, someone else from doing wrong again." Just as "when children are not yet good at writing, the writing master traces outlines with the pencil before giving them the slate, and makes them follow the lines as a guide in their own writing," similarly "the state sets up the laws" and "whoever strays" outside them it punishes, which punishment is called "correction, intimating that the penalty corrects or guides."<sup>17</sup>

If this were the only passage in Plato's dialogues where punishment was linked to correction, one would be hard pressed indeed to infer a Platonic theory of punishment. After all, in these lines, Protagoras, not Socrates, is speaking, and we cannot be certain that Protagoras speaks for Plato here. There are, however, other comparable passages in the other dialogues. In Book IX of *The Laws*, Plato's Athenian says that punishment by law "is never inflicted for harm's sake" but rather to make "him that suffers it a better man, or, failing this, less of a wretch."<sup>18</sup> Again in Book XII of *The Laws*, we are reminded that "correction must always be meted to the bad—to make a better man of him."<sup>19</sup>

If punishment is viewed as a correction in Plato, the criminal is often compared to a sick man, and the judge is likened to a doctor who will make him better. For example, in the *Gorgias*, Socrates says that "injustice and ignorance" is "an evil condition of the soul." He adds that anyone who "has done wrong . . . ought to go of his own accord where he will most speedily be punished, to the judge as though to a doctor, in his eagerness to prevent the distemper of evil from becoming ingrained and producing a festering and incurable ulcer in his soul."<sup>20</sup>

But how will the doctor/judge cure this sickness? What form will the "correction" take? At times it seems quite plain that, for Plato,

16. *Ibid.*, V, 728c.

17. *Protagoras*, 326d-e.

18. *Laws*, IX, 854d-e.

19. *Ibid.*, XII, 944d.

20. *Gorgias*, 480b.

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correction involves painful, harsh punishment. For example, in the *Gorgias*, having said that we must take "the unjust and intemperate . . . to the judges . . . to suffer punishment," just as we take the "sick in body . . . to the doctors," Socrates reminds Polus that a "medical regimen" is not pleasant nor is it enjoyed by patients; it is painful, but it frees the patient from a greater evil, "so that it is profitable to submit to the pain and recover health." Similarly, Socrates says, "a just penalty" is painful, but it is "beneficial" because it "disciplines us and makes us more just and cures us of evil." Therefore, a criminal "ought not to play the coward but to submit as a patient submits bravely with closed eyes to the knife or cautery of the surgeon . . . and heeding not the pain, but if his guilty deeds be worthy of flogging, submitting to the lash; if of imprisonment, to bonds; if of a fine, to the payment thereof; if of exile, to exile; if of death, to death."<sup>21</sup> For Plato, as the Athenian says in *The Laws*, the best method of "purgation" of the soul, or of the society as a whole, "like the most potent of medicines, is painful; it is that which effects correction by the combination of justice with vengeance, and carries its vengeance, in the last instance, to the point of death or exile, usually with the result of clearing society of its most dangerous members."<sup>22</sup>

In other passages, Plato emphasizes that the correction of wickedness may take the form of the carrot *and* the stick. We must educate "to hatred of iniquity and love of right or even acquiescence in right" by all possible means—"by acts we do or words we utter, through pleasure or through pain, through honor bestowed or disgrace inflicted."<sup>23</sup>

Not all criminals, Plato says again and again, will be capable of correction. As Protagoras puts it, "whoever does not respond to punishment and instruction must be expelled from the state or put to death as incurable."<sup>24</sup> In Book IX of *The Laws*, the Athenian says that often "some 'hard shell' may be found among our citizens whose native stubbornness will be proof against all softening." He adds that "such characters should yield no more to the mollifying influence of our laws, effective as they are, than the tough bean to the heat of the fire."<sup>25</sup> The stranger makes much the same point in his discussion with the young Socrates in the *Statesman*. "Some

21. *Ibid.*, 478c-480d.  
 22. *Laws*, V, 735d-e.  
 23. *Ibid.*, IX, 862d-e.  
 24. *Protagoras*, 325b.  
 25. *Laws*, IX, 853d.

pupils," he says, "cannot be taught to be courageous and moderate and to acquire the other virtuous tendencies, but are impelled to godlessness . . . by the drive of an evil nature." The state, he adds, "expels [them] from the community," executes them, or "chastises them by the severest public disgrace."<sup>26</sup>

In speaking of incurable criminals, Plato seems perfectly consistent with those modern rehabilitationists who concede that some offenders cannot be corrected. But Plato also suggests that some *crimes* are so horrendous that society should not try to correct those who commit them. For instance, in *The Laws*, the Athenian argues that if a citizen is caught in the act of a "gross and horrible crime against gods, parents, or society, the judge shall treat him as one *whose case is already desperate* . . . [and] his sentence shall be death, . . . and he shall serve as an example for the profit of others, being buried in silence and beyond the border."<sup>27</sup>

This is a particularly interesting passage, and one worth examining, since it is not immediately apparent what theory of punishment Plato is advocating here. He is speaking the language of what we today would call *rehabilitation*; citizens, who have enjoyed the proper education and nurture from childhood, and who, nevertheless, commit gross crimes, have shown themselves incapable of reform. But the punishment they receive—"as an example for the profit of others"—seems a means to general *deterrence*. There is also a *retributive* tone in this passage, in as much as Plato suggests that such individuals *deserve* death for the "shame" of such wicked and horrible offenses.

There are other passages in the dialogues in which Plato speaks of inextinguishable, uncorrectable crimes. In the *Phaedo*, we are told that, in the afterlife, those "who on account of the greatness of their sins are judged to be incurable as having committed many gross acts of sacrilege or many wicked and lawless murders or any other such crimes . . . are hurled by their appropriate destiny into Tartarus, from whence they emerge no more."<sup>28</sup> And in his letters, Plato refers to "impious crimes" which are "past redeeming" and which "no one can ever cleanse."<sup>29</sup>

Passages like these, then, suggest a certain *retributive* element in Plato's approach to punishment. Criminals who commit these crimes *deserve* punishment; they cannot and *should not* be corrected or

26. *Statesman*, 308e.  
 27. *Laws*, IX, 854e. Emphasis added.  
 28. *Phaedo*, 113e.  
 29. *Letters* VIII, 852c.

pardoned. Punishment for such people, as indeed for all criminals, is *just*; as Socrates argues in the *Gorgias*, it is a greater evil to escape punishment than to be punished when guilty, and "he who is punished suffers justly when he pays the just penalty."<sup>30</sup> The Athenian makes the same point in *The Laws* when he says that punishment done to us is comely in "so far as it has its share of rightness."<sup>31</sup>

For the most part, however, punishment is just, for Plato, because it benefits the wrongdoer, or at least those wrongdoers who can be corrected. Thus, in the *Gorgias*, Socrates says that "he who is punished justly suffers what is good" because "his soul is bettered" and he is "rid of evil." Punishment is necessary to make such a man happy: "the wicked man and the doer of evil is in any case unhappy, but more unhappy if he does not meet with justice and suffer punishment, less unhappy if he pays the penalty and suffers punishment from gods and men."<sup>32</sup>

In short, from our modern perspective, we would say that Plato's theory of punishment, though primarily rehabilitative, does have elements of retribution. Nor does Plato ignore deterrence and compensation. For instance, in one passage in Book IX of *The Laws*, the Athenian says that the law must "both teach and constrain the man who has done a wrong . . . never again . . . to venture on repetition of the act, . . . and he must make the damage good to boot."<sup>33</sup> To this end, the law "must be exact in determining the magnitude of the correction imposed on the particular offense, and . . . the amount of compensation to be paid."<sup>34</sup>

In Book X of *The Laws*, the Athenian speaks of the need for three prisons in the ideal state: "a *common jail* in the market place for the majority of cases, for safe custody of the persons of the commonalty, a second attached to the nocturnal council and known as the *house of correction*, and a third in the heart of the country in the most solitary and wildest situation available, and called by some designation suggestive of *punishment*." Incurable offenders will be sent to this third place, or banished or executed, but most criminals, it seems, will be subject to the corrective, purifying punishment that, if successful, will rid their soul of its sickness, and make them happy, or at least less wretched.<sup>35</sup> Perhaps more than

30. *Gorgias*, 476e.

31. *Laws*, IX, 860a.

32. *Gorgias*, 472e.

33. *Laws*, IX, 862d.

34. *Ibid.*, X, 934b.

35. *Ibid.*, X, 908a-b.

any other, this passage provides a fitting summary of Plato's theory of crime and punishment.

To present a coherent picture of Aristotle's philosophy of criminal justice, with an eye to how he differs from Plato, it is first necessary to give some background on his views of how virtue is acquired and cultivated and how ethics and politics are related. From there, one can move on to a consideration, first of his views on crime and punishment in general, and then to his reflections on choice and responsibility as they bear on criminal justice in particular.

Early in the *Nicomachean Ethics*, Aristotle denies that moral virtue comes to us by nature, or that we are, in a sense, naturally *born* morally virtuous. If this were so, he explains, our moral virtue could not be changed by practice, just as the nature of a stone to fall to the ground when dropped cannot be changed by any amount of practice. Moral virtue, for Aristotle, comes from *habit*. We learn moral virtue by *being* morally virtuous, by practicing moral virtue, by acquiring a habit for morally virtuous actions.<sup>36</sup>

Where do we get these good habits? Not, Aristotle avers, by listening to a good argument for moral virtue. Not, in other words, by reading Aristotle's *Ethics*! Words alone, Aristotle says at the end of the *Ethics*, "do not have the capacity to turn the common run of people to goodness and nobility." This is because most people are influenced less by shame and more by fear; they "refrain from acting basely not because it is disgraceful, but because of the punishment it brings."<sup>37</sup> People live for pleasure and let their emotions rule, but emotions do not yield to argument but only to force. Argument cannot change what is ingrained by habit; before argument can make any progress, the soul must be prepared by habit.

To prepare the right habits, good laws are needed. It is the lawmakers and the state which must inculcate the right habits in us. Just as one learns to play the harp by practicing the harp but will not practice well without an instructor, so we need to practice moral virtue under the guidance of good laws and good government.<sup>38</sup>

But what is the relevance of all of this for criminal justice? At one level, it would seem that Aristotle would agree with the modern rehabilitative perspective. The purpose of politics, he says, is to cultivate virtue. The purpose of criminal law, then, would be to

36. Aristotle, *Nicomachean Ethics* (Martin Ostwald, trans. 1962), Book II, Chapter I. (All further references to the *Ethics* are to this edition, unless otherwise indicated.)

37. *Ibid.*, 1179b, 10-15.

38. *Ibid.*, 1180a-1181b.

educate the offender to a life of virtue, to correct and reform him/her, where possible, and to guide him/her to an improved life.

In Book X of the *Ethics*, Aristotle presents this perspective on punishment. With an eye on Plato's argument in *The Laws* and *Protagoras*, he notes that some believe that legislators "should impose corrective treatments and penalties on anyone who disobeys or lacks the right nature, and completely expel an incurable."<sup>39</sup> This passage is often cited by those who see in Aristotle's penal philosophy a belief in the reformation of criminals. But surely there are two obvious problems with that interpretation. For one thing, it turns on the use of the words "corrective treatments," but not all English translations of the *Ethics* use that expression here. For instance, Hippocrates Apostle uses "punishments and penalties"<sup>40</sup> and Martin Ostwald speaks of "chastisement and penalties."<sup>41</sup> Secondly, even if Aristotle is speaking here of "correction," he is *not* presenting his own view. He is very careful not to say here whether he agrees with this approach to punishment. In short, we are still left with the same difficult question: how would Aristotle respond to the modern rehabilitationists? Did he view rehabilitation as the proper purpose of the criminal justice system?

In fact, Aristotle would take *sharp issue* with much of modern rehabilitation theory. As we have seen, modern rehabilitationists tend to argue that crime is caused by forces *external* to the individual—by bad upbringing, rotten neighborhoods, the drug culture, and so on. Individual offenders, then, are, to a large degree, not responsible for their criminal acts; criminal behavior is a disease forced on them by their surroundings. To cure individuals of this disease, we must try to take them out of this harsh environment and expose them to the right reformatory guidance. Some rehabilitationists even go so far as to say that if we could change society sufficiently—and eliminate those bad environments—we might be able, ultimately, to dispense with, or at least drastically reduce the need for, criminal law.<sup>42</sup> With all of this, Aristotle would most emphatically disagree.

It is not that Aristotle would deny that it would be nice if we had no need for criminal law. Rather, he would say that "just punishments and chastisements" are a *necessary evil*—or, as he puts it in the

39. Aristotle, *Nicomachean Ethics* (T. Irwin, trans. 1985), 1180a, lines 8-14, p. 293.

40. Aristotle, *Nicomachean Ethics* (Hippocrates G. Apostle, trans. 1984).

41. *Nicomachean Ethics* (Ostwald, trans.), p. 297.

42. See for example Jeffrie Murphy, "Marxism and Retribution," excerpted in *Criminal Law and Its Processes*, pp. 145-48.

*Politics*, "they are good only because we cannot do without them [and] it would be better that neither individuals nor states should need anything of the sort."<sup>43</sup>

Put differently, Aristotle proceeds from a fundamentally pessimistic perspective about man's ability to be good outside a regime of good laws. When man is separated from the coercive restraints of law and justice, says Aristotle in his *Politics*, he is the worst of animals. Put him in a good regime, where he is restrained by good laws, however, and man is capable of great things.<sup>44</sup> In short, for Aristotle, man is neither naturally an angel, as the authors of the *Federalist* well understood, nor naturally a beast. Rather, he occupies a middle position—capable of being good, but only when guided by good laws.<sup>45</sup>

To the extent, then, that modern rehabilitationists are optimistic, holding that by improving society, we might ultimately eliminate the need for coercive criminal law, Aristotle would surely part company with them. In fact, he would disagree with the view that it is *society* itself that causes crime and that, therefore, criminals are not morally responsible for their acts.

Take for example, the often-expressed view that poverty causes crime. Aristotle would not deny the importance of poverty in understanding crime, as in understanding revolutions and all forms of social violence. But to say that poverty *causes* crime would be, for him, utterly simplistic.

In Book II of the *Politics*, Aristotle considers what he calls "the causes of ordinary crime" in the course of his assessment of Phaleas' proposals for land reform. There are, says Aristotle, "some crimes which are due to lack of necessities," and Phaleas, he adds, thinks that equalization of property will there serve a sufficient remedy. "But want is not the only cause of crimes," Aristotle goes on. "Men also commit them simply for the pleasure it gives them, and just to get rid of an unsatisfied desire." In fact, Aristotle later admonishes, the "greatest crimes are committed not for the sake of necessities, but for the sake of superfluities. Men do not become tyrants in order to avoid exposure to cold."<sup>46</sup>

43. Quoted in Cesare Beccaria, *On Crimes and Punishments* (H. Paolucci, trans. 1963), p. 13, editor's note 19.

44. Quoted in Henry Paolucci, "Morgenthau vs. Aristotle," in 13 *State of Nation* (May 1981), p. 2.

45. H. C. Mansfield, Jr., *Lectures for Government 1060*, Harvard University, Fall 1983.

46. Aristotle, *Politics*, Book II, 1267b in *The Politics of Aristotle* (E. Barker, trans. 1958). (All further references to the *Politics* are to this edition.)

If crime comes from human nature—from the tendency of at least some of us to want things to excess—can it be said that people are not responsible for their crimes, that, in modern terminology, they “couldn’t help” doing what they did? To understand what Aristotle thought about criminal responsibility, one has to consider briefly some of what he says about voluntariness and about choice.

In Book III of the *Ethics*, Aristotle takes up Plato’s view that wickedness is involuntary. As already indicated, Plato’s argument is clear: when a person acts wickedly, he must be unhappy. No one would voluntarily choose to be unhappy. Hence no one would voluntarily choose to act wickedly. Since people *do* act wickedly, it must be because they do not know; because they do not know, they are acting involuntarily; therefore, wickedness is involuntary.

To this Aristotle answers emphatically, “Wickedness is voluntary!”<sup>47</sup> For Aristotle, it is possible to know what is good and choose what is bad. For Plato, this would be an absurdity. If a person knew what would make him happy, why would he not choose to do what would make him unhappy? Put differently, for Plato, the defect of the wicked is one of knowledge and of understanding; for Aristotle, the defect is one of will.

It is important to see that Plato’s approach, carried to its logical conclusion, could easily destroy the entire structure of criminal law as we know it. How can a “criminal” be punished if he is not responsible for his actions? How can he be “responsible” if he did not know he was doing wrong, and thus was acting involuntarily? Plato does not, as we have seen, carry his view to this extreme. He does talk about the need for punishment, although it seems to take the form more of correction for some, and penalty (of banishment or death) for others. For Aristotle, however, individual moral responsibility for wickedness is and must be the *foundation* of criminal justice. And that moral responsibility begins with *choice*.

Not all voluntary acts, according to Aristotle, are the products of choice. An act done on the spur of the moment, for example, may be voluntary, but it will often not result from choice. Choice requires deliberation.

When man acts by choice, he is a truly free agent. And, to a very large extent, for Aristotle, we do choose the actions that give us a good or bad character. That is to say, we *choose* certain actions; by

47. *Ethics*, 1113b, 17.

repeating those actions over time they become *habits*; and those habits inculcate in us a certain *character*.

This is why Aristotle says that “virtue or excellence depends on ourselves, and so does vice,” since “where it is in our power to act, it is also in our power not to act, and where we can say ‘no,’ we can also say ‘yes.’”<sup>48</sup> Because we make the *initial choice*, we are *responsible* for the consequences of that choice, even if we did not choose each of the later stages when they occurred. When you throw a stone into a pond, you do not necessarily choose the concentric waves to reach to a certain point. But, in choosing the first action, you have chosen the inevitable consequences. As Harvey C. Mansfield has said in characterizing Aristotle’s philosophy on this point, if you choose to walk in the sun, you choose to perspire.<sup>49</sup> Similarly, if you choose to do wicked things, you choose to become wicked. If you choose to commit a crime, you choose to pay a penalty. Crime and punishment, then, become two necessary halves of the same equation.

Contemporary students of criminal justice may take offense at the apparent harshness of this approach. Did Aristotle not recognize, they want to say, that some people are born into conditions of such abject misery—extreme poverty, bad childhoods, discrimination—that crime, for them, is not chosen but is a way of life? Aristotle would not deny that such conditions exist. But he would ask why it is that some born in those conditions do not become criminals, while others born to a life of luxury do. At some point in our lives, we make *choices*—a choice to take drugs or stay off drugs, a choice to drink or stay sober, a choice to steal or not to steal. These choices have consequences, and we are responsible for these consequences. Therefore when we steal or rape or kill, we should be punished by society because we *deserve* to be punished. We have, in a sense, chosen the punishment in choosing the crime.

This is, to be sure, a retributivist reading of Aristotle’s penal philosophy, and it is by no means the only possible one. Scholars can and often do point to Aristotle’s references to “corrective treatments” and his theme of the need to promote virtue in the society, and conclude from this that he stands in the rehabilitation tradition on punishment. It is difficult to deny, however, that Aristotle fundamentally disagrees with two major precepts of much modern

48. *Ibid.*, 1135b, 5-7.

49. Lectures for Government 1060, Moral Reasoning 13, Harvard University, 1983-1987.

Aristotle  
Free will

(b/c we are  
not resp. for  
punishing him.)

Desert

rehabilitative theory—that crime is caused by society and that criminals lack moral responsibility for their acts.

## II. CRIMINAL JURISPRUDENCE IN THE EARLY MODERN ERA

### A. JUSTICE AND POLICE, JUSTICE AND MERCY FROM AUGUSTINE TO BECCARIA

Plato and Aristotle thus sum up for us the wisdom of the Greeks on criminal jurisprudence. It is not possible to give a detailed discussion of Roman penology here. One should, however, make passing mention of the fact that the great Roman jurist, Cicero, measured criminal law, as indeed all law, against the standard of natural law and universal justice. "As long as there is justice, a community will be able to maintain itself," Cicero wrote, "and as soon as justice goes, the community goes and anarchy sets in."<sup>50</sup>

Against that vision of justice and the state, St. Augustine raised his pen, in the last days before the ungovernable peoples of northern Europe swept down on the Greco-Roman world. As the great medievalist Dino Bigongiari reminds us, in his "violent debate with Cicero across the centuries" St. Augustine says that not "only does the removal of justice not lead to the breaking up of a state, but in fact there never has been a state that was maintained by justice."<sup>51</sup>

Augustine tells the story of the meeting between Aristotle's pupil, Alexander the Great, and a pirate who had been summoned before him for seizing ships in the Mediterranean. Young Alexander, the Emperor, asked the pirate "what he meant by keeping hostile possession of the sea." As Augustine puts it, the pirate "answered with bold pride, saying: 'What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor.'"<sup>52</sup>

Generalizing from this example, Augustine asks what Alexander's empire of enforceable peace can be called but "great robbery." For Augustine, in other words, all earthly justice and police is based in

50. Dino Bigongiari, "The Philosophical and Political Backgrounds of The Divine Comedy," a series of lectures at Columbia University, in *The Political Writings of St. Augustine* (Henry Paolucci, ed. 1962), p. 345, quoting Cicero.

51. *Ibid.*, p. 346.

52. St. Augustine, *City of God*, IV, 4, quoted in *The Political Writings of St. Augustine*, pp. 29-30.

piracy—a piracy which can only be softened by being tempered with mercy.

Augustine takes up what we might call the relation of justice and mercy, justice and police, in his letter to Macedonius:

It is a matter of great importance what intention a man has in showing leniency. Just as it is sometimes mercy to punish, so it may be cruelty to pardon. For, to use a well-worn case as an example, who would not truthfully say that a person is cruel who would allow a child to play with snakes because he was obstinately set on doing so? Who would not call another kind-hearted who would restrain the child even to the extent of beating him if words had no effect?<sup>53</sup>

Augustine concedes that when "we intercede for an offender who deserves condemnation," there may indeed be unhappy and unintended consequences. Yet, he says, that does not prove the intercession was wrong. Moving on, he makes an argument for severity, and then, in a famous passage, he says:

There is good, then, in your severity which works to secure our tranquility and there is good in our intercession which works to restrain your severity. Do not be displeased at being petitioned by the good, because the good are not displeased that you are feared by the wicked. Even the Apostle Paul used fear to check the evil deeds of men, fear not only of the judgment to come but even of your present instruments of torture, asserting that they form part of the plan of divine providence. . . . These words of the Apostle show the usefulness of your severity. . . . But . . . let nothing be done through desire of hurting, but all through love of helping, and nothing will be done cruelly, inhumanly. . . .<sup>54</sup>

From Aristotle's perspective, mercy is one of the extremes, opposed to the mean of justice, but even more opposed to the other extreme—injustice. With justice in the middle, the vice of defect is injustice; the vice of excess is mercy. Injustice gives less than one's due; mercy gives more.<sup>55</sup> For Augustine's part, he is pleading for mercy in the administration of the laws and demanding that Christian public officials heed those pleas. Yet, as one contemporary Augustinian scholar has noted, "at the same time, he warns all concerned with the maintenance of civil order not to undermine the foundations of

53. St. Augustine, Letters CLIII, quoted in *The Political Writings of St. Augustine*, p. 256.

54. *Ibid.*, pp. 258-59.

55. See *Nicomachean Ethics*, Martin Ostwald, trans., esp. Books II & V.

Cicero

Mercy

society by attempting to 'legalize' or 'legislate' mercy," as if justice could be the foundation of any earthly state.<sup>56</sup>

The Christianized law-enforcers of the Roman Empire showed little inclination to legislate mercy. But, in time, the Roman Church had to contend, almost without exception, with Christianized kings, and then with Holy Roman Emperors, and stronger temptations to legislate mercy and morality became evident. Ultimately, mercy became the boast of secular rulers. And that spirit has intensified in our own age. Sooner or later, nearly all American political or social scientists find comfort in standing up for the rights of humanity. The state, they say, should be compelled to promote social welfare from the cradle to the grave, and should be solicitous of the rights and needs of criminals, the poor, and the handicapped.

It was in that secular environment that Cesare Beccaria made his mark on the domain of justice and police/justice and mercy. In assessing Beccaria's seminal contribution to criminal jurisprudence, it is necessary to begin with some introductory perspectives on his place in the history of penology. From there one can turn to a considered exegesis of his book *On Crimes and Punishments* (1764), with a focus on his reflections on some of the questions we have hitherto been examining. Finally, it will be possible to make some generalizations about Beccaria as a point of departure for discussing, in some detail, first his sources in the criminal jurisprudence of Hobbes, Locke, Rousseau, and Montesquieu, and then his impact in Europe and America, and his influence on Bentham's penology.

Beccaria is important because he has been credited with "the glory of having expelled the use of torture from every tribunal throughout Christendom" and because his book is said to have had "more practical effect than any other treatise ever written in the long campaign against barbarism in criminal law and procedure."<sup>57</sup> But his book is also important because it is probably the first significant work ever written on criminal justice by an *amateur*. Beccaria was about twenty-five years old when he wrote it. He was not a professional lawyer. He was a sensitive young man who listened to what some people told him about the tortures and cruelties of the penal systems of Europe of his day.

56. *The Political Writings of St. Augustine*, Introduction, p. xxii.

57. Leon Radzinowicz, *A History of English Criminal Law* (1948), I, pp. 277-83 and Harry Elmer Barnes and Howard Becker, *Social Thought From Lore to Science* (1952), I, pp. 551-52, quoted in *On Crimes and Punishments* (H. Paolucci, trans. 1963), p. ix.

Machiavelli had provided what some might call a justification on the level of statecraft for that cruelty. Writing in *The Prince*, Machiavelli said:

A prince must not mind incurring the charge of cruelty for the purpose of keeping his subjects united and faithful; for, with very few examples, he will be more merciful than those who, from excess of tenderness, allow disorders to arise, from whence spring bloodshed and rapine; for these as a rule injure the whole community, while the executions carried out by the prince injure only individuals.<sup>58</sup>

Punishment, for Machiavelli, had to be severe and well publicized; he had high praise for the liberal use of capital punishment in ancient Rome, and generalized that "when it happens that some one does something evil in civic life, [the prince] must find such a means of punishing him which will be much talked about."<sup>59</sup> All of this cruelty was necessary, for reasons of state, because men, though "originally good and well educated," are easily "corrupted and become wicked" and "trample authority under foot because of too great indulgence."<sup>60</sup>

Beccaria heard about the system of criminal law that Machiavelli explained. Consulting his heart, he wrote a book suggesting what common sense dictates must be done to put an end to man's inhumanity to man in the administration of criminal law.

In his Introduction to that book, Beccaria makes clear that he aims to be "a dispassionate student of human nature" who will, "by bringing the actions of a multitude of men into focus, consider them from this single point of view, the *greatest happiness shared by the greatest number*."<sup>61</sup> In other words, at the outset Beccaria sets himself the goal of being *objective* and of judging everything from the standard of *utility*. It is arguable that he achieves neither of these goals.

As the Introduction goes on, Beccaria makes clear what *he* wants to do in describing what few *others* have done. Few, he says, "have studied and fought against the cruelty of punishments and the irregularities of criminal procedures." His aim, in other words, is not to describe but to *fight*—to reform, and to "demolish the accumulated errors of centuries." Beccaria says that he will proceed

58. Niccolò Machiavelli, *The Prince*, Chapter XVII, in *The Prince and The Discourses* (Max Lerner, ed. 1950), p. 60.

59. *Ibid.*, Chapter XXI, p. 82.

60. *The Discourses*, Book I, Ch. XLII, p. 226, and Book III, Ch. XXIX, p. 471, in *The Prince and The Discourses*.

61. *On Crimes and Punishments*, p. 8.

with "geometric precision," but he is as emotional as can be in describing "cold-blooded barbarity, . . . the groans of the weak, . . . barbarous torments, . . . [and] the filth and horror of a prison." It is in this spirit of sentimentalism that Beccaria concludes his Introduction with these often-quoted words: "But if, by defending the rights of man and of unconquerable truth, I should help to save from the spasm and agonies of death some wretched victim of tyranny . . . , the thanks and tears of one innocent mortal in his transports of joy would console me for the contempt of all mankind."<sup>62</sup>

In his chapter on "The Origin of Punishments, And the Right to Punish," Beccaria calls on us to "consult the human heart," and, after giving a social-contract interpretation of the origins of government, he says that punishments "that exceed what is necessary for protection of the deposit of public security are by their very nature unjust." At the end of the next chapter, he concludes from this that, "even assuming that severity of punishments were not directly contrary to the public good and to the very purpose of preventing crimes, if it were possible to prove merely that such severity is useless, in that case . . . it would be contrary to justice itself."<sup>63</sup>

That last sentence is an interesting one, and worth considering in assessing Beccaria's theory of punishment. The word "useless" and the emphasis on prevention of crimes seem to put Beccaria squarely in the utilitarian/deterrence tradition. But a true utilitarian would not speak of "justice itself" and would not suggest, as Beccaria appears to do by negative inference, that if severe punishment were *useful*, it would still be "contrary to the public good" and therefore inappropriate.

In his chapter on the "Mildness of Punishments," Beccaria emphatically rejects the retributive approach to criminal justice. The "purpose of punishment," he declares, "is neither to torment and afflict a sensitive being, nor to undo a crime already committed. . . . Can the shrieks of a wretch recall from time, which never reverses its course, deeds already accomplished?" Instead, Beccaria tells us, the "purpose can only be to prevent the criminal from inflicting new injuries on its citizens and to deter others from similar acts."<sup>64</sup>

Here we have a hint of Plato's horror of revenge, which, as we saw in *Protagoras*, is worthy only of "the unreasonable fury of a

62. *Ibid.*, p. 10.

63. *Ibid.*, p. 14.

64. *Ibid.*, p. 42.

beast."<sup>65</sup> Mixed with that, we have here a foreshadowing of modern deterrence theory. But once again, although Beccaria adopts the Helvetian doctrine of utility—saying that for "a punishment to attain its end, the evil which it inflicts has only to exceed the advantage derivable from the crime"<sup>66</sup>—he uses it only to attack existing penal law, and then rejects the doctrine. Punishments must be chosen, he says, "which will make the strongest and most lasting impression on the minds of men," but also always they must "inflict the least torment on the body of the criminal."<sup>67</sup>

Other passages in Beccaria's treatise suggest this same fact—that underlying its surface utilitarianism of deterrence is an enlightened "religion of humanity." For example, Beccaria says that punishments should be prompt. But this is not only because "when the length of time that passes between the punishment and the misdeed is less, . . . the association of these two ideas *crime and punishment*" is enhanced and deterrence is strengthened. It is also because long pre-trial imprisonment and slow trials are cruel, especially when one considers the "anguish of a man under accusation" and the "tears" and "squalor" of a prisoner.<sup>68</sup>

Given Beccaria's humanitarianism, one might think that he would praise the use of mercy in sentencing and in the exercise of the pardoning power. Exactly the opposite is true, however. In his chapter on "The Certainty of Punishment," Beccaria says that, as "punishments become more mild, clemency and pardon become less necessary. Happy the nation in which they might some day be considered pernicious!" It is not that mercy has no place in the criminal justice system. Rather, for Beccaria, "it ought to shine in the code itself rather than in particular judgments." Perfect legislation leaves no need for pardoning by the judge or the executive, which only "foment[s] a flattering hope of impunity" in criminals.<sup>69</sup>

One should take note, here, of the obvious contrast with St. Augustine's reflections on justice and mercy, justice and police. For Augustine, as we have seen, the criminal *laws* can and should be *severe*, but *mercy* enters in with their *administration* when men of faith "intercede for an offender who deserves condemnation."<sup>70</sup> It was in this spirit of mercy that Pope John Paul II recently asked

65. *Protagoras*, 324b, in Plato: *The Collected Dialogues*, p. 321.

66. *On Crimes and Punishments*, p. 43.

67. *Ibid.*, p. 42.

68. *Ibid.*, p. 56.

69. *Ibid.*, pp. 58-59.

70. *The Political Writings of St. Augustine*, p. 257.

the Governor of Texas to commute the death sentence of a man who had been convicted of murdering a Roman Catholic nun. In some of the newspaper articles on that papal appeal, it was reported that the Governor's office, and others, seemed to express some surprise and regret that they had not heard similar pleas from the Pope on all other pending executions. Ideally, the articles seemed to suggest, mercy could work its way into the laws themselves so there would be no need for such extreme pleas.<sup>71</sup> This is precisely the position that Beccaria would take. As he puts it, let "the laws . . . be inexorable, and inexorable their executors in particular cases, and let the legislator be tender, indulgent, and humane."<sup>72</sup> For Augustine, on the other hand, that would be the height of self-righteousness.

This illustration points to the similarity between Beccaria's way of thinking about criminal justice and that of many modern penologists. Also like some contemporaries, Beccaria thought that it "is better to prevent crimes than to punish them."<sup>73</sup> To achieve that prevention, Beccaria says that laws must be simple and clear and not favor one class over another. Most of all, however, there must be an "enlightenment" of the human mind, in the face of which "the calumnies of ignorance are silenced and authority trembles if it be not armed with reason."<sup>74</sup>

In conclusion, then, what generalizations can we make about Beccaria and his approach to crime and punishment? As we have seen, he was not a utilitarian. He was a sentimental humanitarian. A calculating utilitarian can be cruel. Utility can produce results that are anything but humanitarian. Arguments of utility are not always enough to abolish capital punishment or torture. As consistent utilitarians have noted, these punishments may prove to be "useful" after all—they may be conducive to the greatest happiness of the greatest number.<sup>75</sup> But for Beccaria, love of humanity, particularly wretched humanity, always triumphed in the end.

Beccaria's perspective is that of a privileged aristocracy which has no more aristocratic function but retains an aristocratic sensitivity. He puts himself on a high moral plane, looking down on the people who usually feel the weight of criminal law. His thoughts are thus far removed from the experiences of men familiar with the difficult application of that law. His fresh detachment makes his writing

71. See *New York Times*, 8 January 1992.

72. *On Crimes and Punishments*, p. 59.

73. *Ibid.*, p. 93.

74. *Ibid.*, p. 95.

75. See James Q. Wilson, *Thinking About Crime* (1975/1985).

appealing to readers who are similarly removed from the practice of law enforcement, as well as to those others who feel compassion for the "mass of wretches" subjected to torture, harassment, and false accusation at the hands of the police.

Beccaria comes close to a position that many modern rehabilitationists take—that a criminal is not responsible for the brutality of his deeds. Harsh punishment itself is largely to blame, he says, since it "emboldens men to commit the very wrong it is supposed to prevent." That is why, Beccaria says, the "countries and times most notorious for severity of penalties have always been those in which the bloodiest and most inhumane of deeds were committed, for the same spirit of ferocity that guided the hand of the legislators also ruled that of the parricide and assassin."<sup>76</sup>

In his zeal to get torture and capital punishment abolished, Beccaria describes both as utterly brutal, and worse because perpetrated by responsible administrators of justice. A violent crime, committed by someone who is *not responsible* because he has been hardened by the cruelties of society, is, Beccaria says, followed by a violent punishment—a brutal punishment carried out by people who *are responsible* for their acts.

The modern rehabilitative spirit, which owes so much to Beccaria, is aptly captured by Jacques Barzun in his 1962 essay on capital punishment in *The American Scholar*:

Social science tends steadily to mark a preference for the troubled, the abnormal, the problem case. Whether it is poverty, mental disorder, delinquency or crime, the "patient material" monopolizes the interest of increasing groups of people among the most generous and learned. Psychiatry and moral liberalism go together; the application of law as we have known it is thus coming to be regarded as an historic prelude to social work, which may replace it entirely. Modern literature makes the most of this same outlook, caring only for the disturbed spirit, scorning as bourgeois those who pay their way and do *not* stab their friends. All the while the determinism of natural science reinforces the assumption that society causes its own evils.<sup>77</sup>

That is, in large measure, Beccaria's legacy to modern criminal justice. But where did Beccaria himself get—or, at least profess to get—his ideas on crime and its relation to human nature and politics?

76. *On Crimes and Punishments*, pp. 43-44.

77. Jacques Barzun, "In Fear of Capital Punishment," *The American Scholar* (Spring 1962), p. 184.

It is to a careful assessment of some of the giants among Beccaria's own sources that we must now turn.

B. BECCARIA'S ENLIGHTENMENT SOURCES: HOBBS, LOCKE, ROUSSEAU, AND MONTESQUIEU

One of the first passages in which Thomas Hobbes touches on the subject of punishment in his *Leviathan* occurs in Chapter XV, where he discusses the seventh law of nature. Sounding very much like what Beccaria would later say, Hobbes specifies that by this law, "we are forbidden to inflict punishment with any other design, than for correction of the offender or direction of others." Revenge, Hobbes goes on to say, which does not seek to correct and does not look to the "Example, and profit to come, is a triumph, or glorying in the hurt of another, tending to no end." This, he says, is "vain-glory," against reason, against nature, and is commonly called cruelty.<sup>78</sup>

Later, in Part II of *Leviathan* ("Of the Commonwealth"), Hobbes devotes two entire chapters to what he calls "Crime, Excuses, and Extenuations" and "Punishments and Rewards." He begins by distinguishing the meaning of crimes and sins. A crime, Hobbes says, is a sin "consisting in the Committing (by Deed, or Word) of that which the law forbiddeth, or the Omission of what it hath commanded." And, Hobbes goes on, it is plain that "every Crime is a sinne; but not every sinne is a crime."<sup>79</sup>

This distinction between sins and crimes is, of course, central to the positivist approach to jurisprudence for which Hobbes later became deservedly famous. It reappears in the distinction between morality and law in Oliver Wendell Holmes' essay "The Path of the Law," which is the most frequently cited law review article ever written.<sup>80</sup>

Hobbes' example also reminds us of contemporary American law. He points out that to "intend to steale, or to kill, is a sinne . . . for God that seeth the thoughts of man, can lay it to his charge; but till it appear by some thing done, or said, . . . it hath not the name of crime."<sup>81</sup> In our law today, an attempt to kill, or steal or

78. Thomas Hobbes, *Leviathan* (C.B. Macpherson, ed. 1985), Part I, Ch. 15, p. 210.

79. *Ibid.*, Part II, Ch. 27, p. 336.

80. Discussed in class, "Comparative Law Seminar: Foundations of Western Legal Thought," Professors Glendon and Rasmussen, December 5, 1991, Harvard Law School.

81. *Leviathan*, p. 336.

commit some other crime, generally requires some overt act taken in the execution of an idea or plan.

Hobbes goes on to say, in full consistency with his geometric model of statecraft in *Leviathan*, that where the civil law does not exist, as in the state of nature, there is no crime. In such a "state," every man is his own judge and is "accused onely by his own Conscience."<sup>82</sup>

Hobbes next sounds a bit like Plato in saying that the "source of every Crime, is in some defect of the Understanding; or some error in Reasoning, or some sudden force of the Passions."<sup>83</sup> He takes up the excuse of ignorance—ignorance of the law, of the sovereign, and of the penalty. A parallel to Aristotle seems apparent where Hobbes says that ignorance "of the Law of Nature Excuseth no man; because every man that hath attained to the use of Reason, is supposed to know he ought not to do to another, what he would not have done to himself."<sup>84</sup>

Aristotle does not, and would not have put it this way, of course, but he does say in the *Ethics* that ignorance in moral choice does not make an act excusable, it makes it wicked.<sup>85</sup> For instance, Aristotle would point out that we do not allow a person accused of killing someone to argue, "I didn't know it was wrong to kill." We do, however, allow them to argue, "I didn't know I was killing this person." To take Hobbes' example of *stealing*, we can, in Aristotle's terms, construct a syllogism: "Taking something that does not belong to you is wrong; this book (coat, bicycle, etc.) does not belong to me; hence I should not take it." Aristotle would say, if you are ignorant of the second part of the syllogism—that the book does not belong to you (you mistakenly think it is yours), then perhaps you can be excused. But if you do not know the *first* step, if you do not know that it is wrong to take something that does not belong to you, then you lack moral virtue and have no excuse to escape punishment. Hobbes seems to be saying something similar when he declares that "Ignorance of the Law of Nature Excuseth no man."

Hobbes also seems to stand in the Aristotelian tradition when he says that ignorance of the penalty also will not excuse because "whosoever voluntarily doth any action, accepteth all the known consequences of it," including the punishment.<sup>86</sup> Hobbes begins to sound like a modern retributivist when he says that "he which does

82. *Ibid.*, p. 337.

83. *Ibid.*

84. *Ibid.*, pp. 337-38.

85. *Nicomachean Ethics* (Martin Ostwald, ed.) Book III, Ch. 1, at p. 55.

86. *Leviathan*, p. 338.

Injury, without other limitation than that of his own will, *should* suffer punishment without other limitation, than that of his will whose law is thereby violated."<sup>87</sup>

It would be a mistake, however, to place Hobbes in the Aristotelian tradition of criminal jurisprudence, as it would be to link him to Aristotle with respect to virtually any aspect of his philosophy. In the very next paragraph, he returns to the tone that so pleased Beccaria many years later. When men, he says, "compare the benefit of their Injustice, with the harm of their punishment, by necessity of Nature they choose that which appeareth best for themselves."<sup>88</sup>

Hobbes goes on to consider the causes of crime—in *false principles of right and wrong* (he seems to have Machiavelli in mind when he speaks of those for whom "Justice is but a vain word" and when he says that "whatsoever a man can get by his own Industry, and hazard, is his own"<sup>89</sup>), and in the *passions*. Because of the different causes, he says, we must conclude that "all Crimes are not . . . of the same alloy." He speaks of *excuse*, by which there is no crime, and *extenuation*, by which the crime is made less severe, illustrating his points with many examples, some of which would look familiar to a modern American lawyer.<sup>90</sup> Moreover, it is not such a very long step from what Hobbes says of the degrees of crime to some of the things Beccaria and Montesquieu will later say about ensuring that the punishment fits the crime.

Hobbes himself turns to the subject of punishment in the next chapter. A punishment, he says, "is an Evill inflicted by publique Authority . . . to the end that the will of men may thereby the better be disposed to obedience." How can it be that the sovereign has this right to punish, since no man can be bound by a covenant not to resist violence and thus it cannot be presumed that he "gave any right to another to lay violent hands upon his person"? But the right of the sovereign to punish, Hobbes says, "is not grounded on any concession, or gift of the Subjects." In a rather convoluted argument, Hobbes explains:

For the Subjects did not give the Sovereign that right; but only in laying down theirs, strengthened him to use his own, as he should think fit, for the preservation of them all: so that it was not given, but left to him, and to him onely.<sup>91</sup>

87. *Ibid.*, p. 339.

88. *Ibid.*

89. *Ibid.*, p. 340.

90. *Ibid.*, pp. 341-53.

91. *Ibid.*, p. 354.

Hobbes makes very clear that, like Beccaria after him, his focus is on punishment as *deterrent* and as *corrective*. He says that "all evill which is inflicted without intention, or possibility of disposing the Delinquent, or (by his example) other men, to obey the Lawes, is not Punishment; but an act of hostility."<sup>92</sup> In our modern terms, Hobbes would say that an act that does not aim at *specific* or *general deterrence* or correction cannot be called punishment.

Punishment is not revenge, Hobbes stresses. It is "of the nature of Punishment, to have for end, the disposing of men to obey the Law." Hobbes goes on to give us a catalogue of punishments—corporal, capital, imprisonment, ignominy, exile, and so forth—judging everything by the standard of how much "good to the Common-wealth" results "by Punishing." For example, he says that even third and fourth generations of "declared Rebels" can be punished, to deter a frightful relapse into the state of war.<sup>93</sup>

Hobbes returns briefly to the subject of punishment in Chapter XXX, in discussing "the Office of the Sovereign Representative." There, he says again that "the end of punishing is not revenge, and discharge of choler; but correction, either of the offender, or of others by his example."<sup>94</sup> From this it follows, Hobbes says, that the most severe punishments should be reserved for crimes that are the most dangerous to the public, such as treason, which Frederic William Maitland also lists at the top of his hierarchy of crimes in *The Constitutional History of England*.<sup>95</sup> In our modern terms, Hobbes is speaking the language of general deterrence when he says that the "Punishment of the Leaders and teachers in a Commotion . . . can profit the Common-wealth by their example."<sup>96</sup>

In sum, like Plato's *Protagoras* before him and Beccaria after him, Hobbes says that punishment must "look not at the greatnesse of the evill past, but the greatnesse of the good to follow"<sup>97</sup>—must focus, in other words, on reformation and deterrence, not on retribution. Like Plato, Hobbes apparently believed that "correction" of some offenders was possible, but not of all. Some criminals were, for him, like a "stone which by the asperity, and irregularity of Figure, takes more room from others than itselfe fills; and for the

92. *Ibid.*, p. 355.

93. *Ibid.*, pp. 355-60.

94. *Ibid.*, p. 389.

95. Frederic William Maitland, *The Constitutional History of England* (1920), p. 226.

96. *Leviathan*, p. 390.

97. *Ibid.*, Part I, Ch. 15, p. 210.

hardness, cannot be easily made plain." Such a stone "hindereth the building" and must be "cast away as unprofitable, and troublesome"; similarly, for Hobbes, a man who "by asperity of Nature . . . [and] stubbornness of his Passions, cannot be corrected, is to be left, or cast out of Society as cumbersome thereunto."<sup>98</sup>

John Locke takes up the subject of crime and punishment in Chapter II of his *Second Treatise of Government*, in his discussion of the state of nature. It is plain, Locke says, that in that state, "the execution of the law of nature is . . . put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree, as may hinder its violation." Laws, Locke says, are in vain if no one has the power to execute them.

What is this power to execute the law of nature? It is, Locke says, "no absolute or arbitrary power to use a criminal, when he has got him in his hands, according to the passionate heats, or boundless extravagancy of his own will; but only to retribute to him, so far as calm reason and conscience dictates, what is proportionate to his transgression, which is so much as may serve for *reparation* and *restraint*. For these two are the only reasons why one man may lawfully do harm to another, which is that we call *punishment*."<sup>99</sup>

The use of the words "retribute" and "proportionate" in this passage almost suggest that Locke might be open to an Aristotelian perspective on punishment. But the words Locke wants to focus on are *reparation* and *restraint*.

He takes up the meaning of restraint first. The violator of the law of nature, he says, has proved that he is "dangerous to mankind" because he "declares himself to live by another rule, than that of *reason* and common equity." So each man, in the state of nature, has power to punish such a transgressor in order to "make him repent the doing of it, and thereby deter him, and by his example others, from doing the like mischief." This is *deterrence*, and Locke makes it plain that it is "upon this ground" that "every man hath a right to punish the offender, and be executioner of the law of nature."<sup>100</sup>

So much for "restraint." What of reparation? When the law is violated, Locke says, there is "commonly *injury* done to some person or other." That victim, then, "has besides the right of punishment common to him with other men, a particular right to seek *reparation*

98. *Ibid.*, p. 209.

99. John Locke, *Second Treatise of Government* (R. Cox, ed. 1982), p. 5.

100. *Ibid.*, pp. 5-6.

from him that has done it."<sup>101</sup> Locke then seems to be using the word reparation in the way that we might use *compensation*, just as he appears to use restraint where we would use *deterrence*.

At first, it appears that Locke wants to link both reparation and restraint as parts (or sub-parts) of punishment. But then he makes clear that punishment (for restraint) is distinct from reparation: "From these *two distinct rights*, the one of *punishing* the crime for *restraint*, and preventing the like offence, which right of punishing is in everybody; the other of taking *reparation*, which belongs only to the injured party, comes it to pass that the magistrate, who, by being magistrate hath the common right of punishing put into his hands, can often . . . *remit* the punishment of criminal offenders by his own authority, but yet cannot *remit* the satisfaction due to any private man, for the damage he has received." Punishment means prevention—prevention by deterring the offender and would-be offenders from doing the same thing again, and also by securing the public from the person who, "having renounced reason, . . . [has] declared war against all mankind."<sup>102</sup>

Locke is a bit difficult, at times, to classify neatly into one of the traditions of criminal jurisprudence. He frequently likes to use the language of what we would call retribution, as, for example, where he quotes the Bible: "*Whoso sheddeth man's blood, by man shall his blood be shed*."<sup>103</sup> It is never long, however, before he returns to the very sort of deterrence calculus that Beccaria and later Bentham employed: "each transgression may be *punished* to that *degree*, and with so much *severity* as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like."<sup>104</sup>

Jean-Jacques Rousseau takes up the subject of punishment in his chapter on "The Right of Life and Death" in *The Social Contract*. How is it that persons, who individually have no right to end their own lives, "can transfer to the Sovereign a right which they do not possess"? Rousseau answers that this question is only difficult because it is wrongly presented. Every man, he says, "has a right to risk his own life in order to preserve it." For example, Rousseau says, a man who jumps out of a window to escape a fire is not guilty of suicide.

101. *Ibid.*, p. 6.

102. *Ibid.*, p. 7.

103. Genesis 9:6, in *Ibid.*

104. *Ibid.*

When we enter the social contract, says Rousseau, continuing the analogy, we enter a "social treaty [which] has for its end the preservation of the contracting parties. He who wills the end wills the means also, and the means must involve some risks, and even some losses." For Rousseau, it is for our own preservation that we enter into an agreement to form a commonwealth and create a sovereign, with power ultimately to put us to death if we transgress the law. So far, he sounds like Hobbes, and even Locke. But Rousseau does not stop there. He goes on:

He who wishes to preserve his life at others' expense should also, when it is necessary, be ready to give it up for their sake. Furthermore, the citizen is no longer the judge of the dangers to which the law desires him to expose himself; and when the prince says to him: "It is expedient for the state that you should die," he ought to die, because it is only on that condition that he has been living in security up to the present, and because his life is no longer a mere bounty of nature, but a gift made conditionally by the State.<sup>105</sup>

His life is "a gift made conditionally by the State"! That is "strong stuff," and it is from passages like this that some have drawn a defense of totalitarianism from Rousseau's arguments. But Rousseau goes on to make his point again, in terms of the social contract: "It is in order that we may not fall victims to an assassin that we consent to die if we ourselves turn assassins."<sup>106</sup>

Like Locke, Rousseau says that a "malefactor, by attacking social rights, becomes on forfeit a rebel . . . [and] ceases to be a member of [society]; he even makes war upon it." For Rousseau, however, such a person is also "a traitor to his country, . . . not a moral person, but merely a man." In putting such a one to death, "we slay not so much the citizen as an enemy." Capital punishment, then, is derived from "the right of war . . . to kill the vanquished."<sup>107</sup>

Rousseau appears to stress that the guilty person *deserves* punishment. As such, his approach seems, at first glance, closer to the Aristotelian retributive tradition. But then he goes on, with a change of tone. Reflecting the sociological wisdom of which only Montesquieu was a true master in the Enlightenment, he writes that "frequent punishments are always a sign of weakness or remission on the part of the government." Then Rousseau surprises us with a

105. Jean-Jacques Rousseau, *The Social Contract*, in *The Social Contract and Discourses* (G.D.H. Cole, trans. 1973), pp. 208-09.

106. *Ibid.*, p. 209.

107. *Ibid.*

remarkably brief but eloquent defense of the rehabilitative ideal in punishment: "There is not a single ill-doer who could not be turned to some good." The state, he says, sounding very much like Beccaria, "has no right to put to death, even for the sake of making an example, any one whom it can leave alive without danger."<sup>108</sup>

"In a well governed state," Rousseau declares, "there are few punishments, not because there are many pardons, but because criminals are rare." They are rare because the legislator will have so changed human nature, that men will, at least for the most part, not be disposed to break the social contract and make war upon their fellow citizens. Only then will the state be dominated by "the just man who has never offended, and has never himself stood in need of pardon."<sup>109</sup> In such a state, there will be less of a need—Rousseau does not say no need—for criminal laws, which are, he later says, "at bottom, . . . less a particular class of law than the sanction behind all the rest."<sup>110</sup>

In his *Discourse on Political Economy*, Rousseau again stresses the theme of *prevention* of crime through changing human nature. "An imbecile who is obeyed can, like anyone else, punish crimes," he says. "The true statesman knows how to prevent them."<sup>111</sup> Legislators, says Rousseau, should remember this admonition: "It is not enough to say to citizens, be good. They must be taught to be so."<sup>112</sup>

Rousseau thus gives us a mixture of retribution, rehabilitation, and deterrence. In his emphasis on correction of the offender and prevention of crime, however, he stands very close to Hobbes and Locke, both of whom, as we have seen, greatly influenced Beccaria.<sup>113</sup>

Beccaria was also strongly influenced by Montesquieu, most of whose observations on crime can be found in Book XII of *The Spirit of the Laws*—a chapter which has been called the "Magna Carta of criminals."<sup>114</sup> Montesquieu there begins with his often-quoted statement that it is "on the goodness of criminal laws that the liberty of the subject principally depends." He makes it plain that his focus is on

108. *Ibid.*

109. *Ibid.*, p. 210.

110. *Ibid.*, p. 228.

111. Jean-Jacques Rousseau, "Discourse on Political Economy," in *On the Social Contract, with Geneva Manuscript and Political Economy* (R.D. Masters, ed. 1978), p. 215.

112. *Ibid.*, p. 218.

113. See Paolucci's Introduction to Beccaria's *On Crimes and Punishments*.

114. *Ibid.*, p. 9.

criminal procedure at this point, giving examples of unfair procedures from ancient times and sketchily summarizing some medieval and early modern reforms.<sup>115</sup>

Like Beccaria, Montesquieu's focus is on reform; also like Beccaria, he concludes that the question of the "rules to be observed in criminal judgments, is more interesting to mankind than any other thing in the world." And Montesquieu adds his witty observation that, "supposing a state to have the best laws imaginable in this respect, a person tried under that state, and condemned to be hanged the next day, would have much more liberty than a pasha enjoys in Turkey."<sup>116</sup>

Montesquieu, like Beccaria, proceeds in a scientific manner in analyzing crime. Liberty, he says, "is in perfection when criminal laws derive each punishment from the particular nature of the crime. There are then no arbitrary decisions; the punishment does not flow from the capriciousness of the legislator, but from the very nature of the thing; and man uses no violence to man."<sup>117</sup>

Montesquieu then distinguishes "four sorts of crimes"—those against religion, against morals, against public tranquility, and those prejudicial to the security of the subject. In considering first offenses against religion and morals offenses, he sounds very similar to Locke in the *First Letter Concerning Toleration*, in arguing that "where there is no public act, there can be no criminal matter, the whole passes between man and God, who knows the measure and time of His vengeance."<sup>118</sup>

When he takes up crimes that threaten tranquility and security, Montesquieu says some things that sound consistent with the Aristotelian retributionist tradition. He speaks of a "kind of retaliation, by which the society refuses security to a member, who has actually or intentionally deprived another of his security." He also says that a "man deserves death when he has violated the security of the subject so far as to deprive, or attempt to deprive, another man of his life." Beccaria would not say that. Nor would Beccaria conclude, as Montesquieu does here, that the "punishment of death is the remedy, as it were, of a sick society."<sup>119</sup>

115. Baron De Montesquieu, *The Spirit of the Laws*, 2 vols. in one (T. Nugent, trans. 1949), Vol. I, p. 184.

116. *Ibid.*

117. *Ibid.*, p. 185.

118. *Ibid.*

119. *Ibid.*, p. 187.

Like Beccaria, Montesquieu goes on to consider the crimes of witchcraft and heresy, giving these a more particularized examination than his Italian follower, and crimes against nature, which, he says, "will never make any great progress in society unless people are prompted to it by some particular custom, as among the Greeks, when the youths of that country performed all their exercises naked."<sup>120</sup>

Montesquieu takes up the "crime of high treason," considering in detail the documented dangers of leaving that crime vague and indeterminate. First Amendment advocates in the United States today would find much to praise in Montesquieu's warning that people should not be found guilty of treason for "indiscreet speeches," since words alone "do not constitute an overt act; they remain only an idea."<sup>121</sup>

Montesquieu goes on to consider several other aspects of criminal justice and its history in Book XII. It is, however, also in Book VI that he gives us some of his most insightful comments on the matter.

Montesquieu begins by considering the "Severity of Punishments in different Governments." In "moderate governments," he says, "the love of one's country, shame, and the fear of blame are *restraining* motives, capable of *preventing* a multitude of crimes. . . . The civil laws have therefore a softer way of *correcting*, and do not require so much force and severity."<sup>122</sup> There we have, in three words, the lesson of the Enlightenment tradition on the purposes of criminal punishment: restraint, prevention, and correction of crime. Lest his point be lost, Montesquieu goes on to make it more plainly: "In those states a good legislator is less bent upon punishing than preventing crimes."<sup>123</sup>

Montesquieu, like Rousseau, casts his eye across the world and notes that in "despotic governments, . . . punishments ought to be more severe," whereas in "moderate governments," "lenity reigns." As an example of the latter, he cites the people of Rome: "Such was the force of [their] probity that the legislator had frequently no further occasion than to point out the right road, and they were such to follow it; one would imagine that instead of precepts it was sufficient to give them counsels."<sup>124</sup>

Like Beccaria, Montesquieu decries torture and excessive punishment. "Let us follow nature," he says, "who has given shame

120. See *On Crimes and Punishments*, p. 85, footnote 43 by the editor.

121. *The Spirit of the Laws*, p. 193.

122. *Ibid.*, p. 81.

123. *Ibid.*

124. *Ibid.*, p. 82.

to man for his scourge; and let the heaviest part of the punishment be the infamy attending it." As an example of excessive punishment, he cites Japan, where "almost all crimes are punished with death." Men in such a state are not "mended or deterred" but rather are "hardened, by the continual prospect of punishments."<sup>125</sup>

Beccaria devotes an entire chapter of his book to "Proportion Between Crimes and Punishments." Montesquieu speaks, in Section 16 of Book VI, of the "essential point that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a smaller, and that which is more pernicious to society rather than that which is less." Different crimes should receive different penalties; otherwise, there is no deterrence. In Russia, Montesquieu observes, "where the punishment of robbery and murder is the same, [robbers] always murder. The dead, they say, tell no tales."<sup>126</sup>

Toward the end of Book VI, Montesquieu returns to the subject of *torture*, reminding us that "many men of learning and genius have written against the custom," and that "nature cries out aloud, and asserts her rights."<sup>127</sup> Beccaria, one must recall, devotes one of his most "celebrated" chapters to the condemnation of torture.<sup>128</sup>

In closing Book VI, Montesquieu briefly touches on "retaliation," saying that it is "very frequent in despotic countries, where they are fond of simple laws." He also mentions the "clemency," or *mercy*, of the prince, which, he says, is a characteristic of monarchies, though not of despotisms, where it is not customary, or republics, where it is not necessary.<sup>129</sup> He returns to this latter subject briefly in Book XXIV, where he notes that the Romans had "inexpiable crimes"—crimes for which no amends, or atonement, could be made. The Pagan religions could have inexpiable crimes, he says, but Christianity cannot. While "it gives fear and hope to all, it makes us sufficiently sensible that though there is no crime in its own nature inexpiable, yet a whole criminal life may be so; [and] that it is extremely dangerous to affront mercy by new crimes and new expiations."<sup>130</sup>

In sum, then, like Aristotle, Montesquieu is willing to concede that retribution is often necessary; like modern retributivists, he says that

125. *Ibid.*, p. 85.

126. *Ibid.*, p. 90.

127. *Ibid.*, p. 91.

128. *On Crimes and Punishments*, pp. 30-36.

129. *The Spirit of the Laws*, p. 92.

130. *Ibid.*, Vol. II, p. 34.

the death penalty is sometimes "deserved." But from his sociological perspective, Montesquieu believed that such "retaliation" is most appropriate in despotic countries. In more moderate republics, for Montesquieu as for Beccaria, Hobbes, Locke, and Rousseau, the focus must be on *prevention* of crimes, not retribution.

Taken together, then, Hobbes, Locke, Rousseau, and Montesquieu show us the Enlightenment tradition in criminal justice philosophy from which Beccaria drew so heavily. But what of Beccaria's own considerable influence? A brief examination of Beccaria's immediate impact in Europe and America and then of his influence on Bentham's jurisprudence is necessary to understand the relevance of Beccaria's Enlightenment perspective for today's criminology.

#### C. BECCARIA'S IMPACT IN EUROPE AND AMERICA AND HIS INFLUENCE ON BENTHAMITE UTILITARIANISM

Two years after the original anonymous publication, in Tuscany, of Beccaria's *On Crimes and Punishments*, a French translation was completed by the Abbé Morellet. With amazing rapidity, the book became the toast of salons and courts from Paris to Vienna. As Henry Paolucci puts it in the introduction to his contemporary edition of Beccaria's work, "as if an exposed nerve had been touched, all Europe was stirred to excitement."<sup>131</sup> Beccaria became a world celebrity. Voltaire praised his book as "*le code de l'humanité*," translating it himself and writing a long commentary on it. Diderot did the same thing. In Prussia, Frederick II wrote to Voltaire that Beccaria's book was so perfect that it "left hardly anything to be gleaned after him." Maria Teresa of Austria and the Grand Duke Leopold of Tuscany declared that they would reform their criminal laws in keeping with Beccaria's principles. Catherine the Great of Russia even called on Beccaria to come and live for a time at her court and supervise the reforms of criminal law personally.<sup>132</sup>

It is not possible here to survey all of the ways in which Beccaria influenced continental jurisprudence in the late eighteenth century. With his attacks on torture and his stress on the plight of the oppressed, his impact, especially on revolutionary France, was surely considerable. It is worth, however, pointing out in passing one passage from Article VIII of the French "Declaration of the Rights of Man and of the Citizen," which was adopted by the National

131. Introduction to *On Crimes and Punishments*, p. x.

132. Phillipson, *Three Criminal Law Reformers*, cited in *On Crimes and Punishments*, p. x.

Assembly of France on August 26, 1789, and which states the purpose of punishment in words almost identical to those of Beccaria:

The law ought to impose no other penalties, but such as are absolutely and evidently necessary; and no one ought to be punished, but in virtue of a law promulgated before the offense, and legally applied.<sup>133</sup>

The influence of Beccaria's book on the American founding fathers was also staggering. Within six years of the first English translation of 1767, a reprint of that edition was issued in New York. In 1776, an edition including Voltaire's commentary appeared in Philadelphia. In the next several years, other editions were published in different American cities. This publication history is significant when one considers how long it took for other important Enlightenment works of philosophy to be published in America—Rousseau's *Confessions* not until 1796 and Montesquieu's *Spirit of the Laws* not until 1802.<sup>134</sup>

One of the earliest translations of *On Crimes and Punishments*, a London 1775 edition, was in the library of John Adams. As Adolph Caso tells us in his book, *America's Italian Founding Fathers*, in that book "the Coat of Arms of John Adams, stamped on the first page, bears the inscription in Latin: '*Libertatem/ Amicitiam/ Retinebis/ Et Fidem*,' which may be translated, 'You will retain liberty, friendship, and faith.'<sup>135</sup>

Beccaria's ideas obviously made a considerable impression on Adams, who quoted one of Beccaria's most memorable lines in his famous defense of the British soldiers in the Boston Massacre trial.<sup>136</sup> Years later, John Quincy Adams reported that many of the participants in that trial still recalled "the electric effect produced upon the jury and upon the immense and excited auditory, by the first sentence by which [John Adams] opened his defense, which was [a] citation from the then recently published work of Beccaria."<sup>137</sup> Sixteen years later, Adams wrote in his diary, first in English then in the original Italian, another quotation from Beccaria: "Every Act of Authority, of one Man over another for which there is not an absolute Necessity, is tyrannical."<sup>138</sup>

133. "Declaration of the Rights of Man and of the Citizen," Article VIII, quoted in *On Crimes and Punishments*, note 47, p. 99.

134. Adolph Caso, *America's Italian Founding Fathers* (1975), p. 42.

135. *Ibid.*, p. 237.

136. *On Crimes and Punishments*, Introduction, p. xi.

137. *Ibid.*

138. *America's Italian Founding Fathers*, p. 17.

Nor was Adams alone in his admiration for and use of Beccaria's work. In *Jefferson: The Road to Glory: 1743-1776*, Marie Kimball states that Jefferson had "no less than twenty-six extracts from Beccaria" and thus "absorbed Beccaria's ideas."<sup>139</sup> In his *Ideological Origins of the American Revolution*, Bernard Bailyn says that in "pamphlet after pamphlet the American writers cited . . . Beccaria on the reform of criminal law."<sup>140</sup>

As Caso points out in his previously cited book, however, Beccaria's influence was by no means restricted to criminal law reform. His concern with "the overall betterment of human life" and with basic human liberties no doubt helped inspire the American founding documents—the Declaration of Independence, the Constitution, and the Bill of Rights.<sup>141</sup> In short, as Caso concludes, Beccaria's treatise was perhaps "more influential than any other single book" in America during "the revolutionary period."<sup>142</sup>

Turning from America back to Europe, and back to our survey of the history of criminal jurisprudence, we must note the considerable influence of Beccaria's book on utilitarian approaches to penology. Nowhere is this influence more apparent than in the life and writings of Jeremy Bentham.

There is evidence that Bentham read Beccaria's treatise when he was twenty-eight years old—an age at which he was, as H.L.A. Hart puts it in his *Essays on Bentham*, still "young and impressionable enough to be very open to influence and yet . . . already deeply engaged in thinking out his own vast and detailed theories of punishment."<sup>143</sup> In years to come, Bentham would repeatedly acknowledge the debt he owed to Beccaria. "Oh my master, first evangelist of Reason," he wrote, "you who have made so many useful excursions into the path of utility, what is there left for us to do?—Never to turn aside from that path."<sup>144</sup> Late in his life, Bentham did express some uncertainty about whether it had been Beccaria or Priestley who had taught him the central maxim of the "greatest happiness of the greatest number," but, as Hart puts it, Bentham "never had any doubt that it was Beccaria who had suggested to him the ways in which this general principle might be made precise

139. *Ibid.*, p. 26.

140. *Ibid.*, p. 18.

141. *Ibid.*, pp. 9, 13, 18, 32.

142. *Ibid.*, p. 9.

143. H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (1982), p. 44.

144. Quoted in *On Crimes and Punishments*, Introduction, p. xi.

and used in framing good laws." Thus, Bentham openly said that it "was from Beccaria's little treatise . . . that I drew . . . the first hint of the principle by which the precision and clearness and incontestableness of mathematical calculations are introduced for the first time into the field of morals." Bentham also said that Beccaria's discussion of the death penalty is so perfect "that to treat it after him is a work that may well be dispensed with."<sup>145</sup>

Bentham admired Beccaria because he was the first to separate clearly the law as it is from the law as it should be—distinguishing between what Bentham himself called "expository jurisprudence" and "censorial jurisprudence." For Bentham, Beccaria was to be credited with a "uniformly censorial" work—one that did not attempt merely to describe the way the law worked but set out consciously to reform it.<sup>146</sup> As Karl Marx would later state in his *Theses on Feuerbach*, "philosophers have only interpreted the world . . . ; the point, however, is to change it."<sup>147</sup>

In sum, then, there can be no question that Bentham was heavily influenced by Beccaria. One can look through any edition of Bentham's collected works, and find many references to Beccaria. Moreover, as Hart reminds us, "Beccaria's influence on [Bentham] was much deeper and more pervasive than could be disclosed by any list of passages however complete in which Bentham acknowledges Beccaria's influence by name."<sup>148</sup>

Still, Bentham did find much to criticize in Beccaria. He sometimes complained that Beccaria had been too lazy to formulate new and more equitable laws to replace the ones he destroyed by his powerful critiques. Bentham would not have been pleased, for example, with the reason Beccaria gives for not cataloguing the different sorts of crimes and punishments—that the result would be a project of "enormous and boring detail."<sup>149</sup> Similarly, Bentham certainly did not like Beccaria's references to men's "natural rights" or to "the nature of things." All of this, for Bentham, was, of course, "nonsense upon stilts." As he wrote, "pleasures and pains are what interest me."<sup>150</sup>

145. *Essays on Bentham: Studies in Jurisprudence and Political Theory*, p. 41.

146. *Ibid.*

147. Karl Marx, *Eleventh Thesis on Feuerbach* in *The Marx-Engels Reader* (R. Tucker, ed. 1978), p. 145.

148. *Essays on Bentham: Studies in Jurisprudence and Political Theory*, p. 42.

149. *Ibid.*, p. 49.

150. *Ibid.*, p. 50.

This points to a more fundamental difference between Beccaria and Bentham, already mentioned in my discussion of *On Crimes and Punishments*: Beccaria's humanitarianism must be contrasted with Bentham's utilitarianism. As H.L.A. Hart puts it, "there is in Beccaria a respect for the dignity and value of the individual person which is absent in Bentham." Thus Beccaria could write that "there is no liberty when . . . a man can cease to be a person and become a thing." For Bentham, by contrast, slavery was only undesirable because it produced more pain than pleasure, and thus had to be discarded for reasons of utility.<sup>151</sup>

In the context of *criminal* jurisprudence, this difference becomes apparent when one examines the relevant pages of Bentham's *Introduction to the Principles of Morals and Legislation*. Some critics say that this book focuses primarily on criminal law, tending to overlook other functions the law serves. In his book, *Bentham and the Common Law Tradition*, Gerald Postema denies this, and there certainly is considerable support for his contention that Bentham's book is not just about criminal justice.<sup>152</sup> Nevertheless, Bentham does say a great deal about crime and punishment in this book—enough, surely, to permit us to make some assessment of his overall contribution to the history of criminal jurisprudence.

Bentham begins his chapter on "Cases Unmeet for Punishment" by saying that "all punishment is mischief; all punishment in itself is evil." According to the maxim of utility, he goes on, punishment ought to be allowed, if it is allowed at all, only "in as far as it promises to exclude a greater evil."<sup>153</sup>

In a footnote to these introductory remarks, Bentham makes clear that, like the philosophers of the Enlightenment and Beccaria before him, his focus is on *rehabilitation* and *deterrence*:

The immediate principal end of punishment is to control action. This action is either that of the offender, or of others: that of the offender it controls by its influence, either on his will, in which case it is said to operate in the way of *reformation*; or on his physical power, in which case it is said to operate by *disablement*: that of others it can influence no otherwise than by its influence over their wills; in which case it is said to operate in the way of *example*.<sup>154</sup>

151. *Ibid.*, p. 51.

152. Gerald Postema, *Bentham and the Common Law Tradition* (1986), p. 178.

153. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (J.H. Burns and H.L.A. Hart, eds. 1970), p. 158.

154. *Ibid.*

*Bentham*

From this, Bentham concludes that punishment should not be imposed where "there is no mischief for it to prevent," where it cannot prevent mischief, "where the mischief it would produce would be greater than what it prevented," or where "the mischief may be prevented . . . at a cheaper rate."<sup>155</sup>

Much of what Bentham says here—and in the next chapter, on "The Proportion Between Punishments And Offences"—is very similar to Beccaria. But Bentham also expresses a willingness to accept extremely severe punishment for the sake of deterrence or reformation, something that Beccaria's humanitarianism does not permit him to do. "The value of the punishment," Bentham says, "must not be less in any case than what is sufficient to outweigh that of the profit of the offence."<sup>156</sup> Indeed, Bentham adds, "it may sometimes be of use . . . to stretch a little beyond that quantity [of punishment] which, on other accounts, would be strictly necessary."<sup>157</sup> And, in discussing *reformation*, Bentham says that "the greater the punishment a man has experienced, the stronger is the tendency it has to create in him an aversion towards the offence."<sup>158</sup>

With Bentham, then, we get a late eighteenth-century, early nineteenth-century affirmation, from a distinctly utilitarian perspective, of the principal goals of Enlightenment criminal jurisprudence: deterrence and correction/reformation. As we have seen, these aims are expressed in the language of social-contract theory by Hobbes and Locke, mixed with appeals to civic virtue in Rousseau, and pursued from the perspective of comparative sociology in Montesquieu. In Beccaria, they are argued with the flavor of a critical humanitarianism; in Bentham, they are advocated as part of the argument for utility. In all of these very different forms, this emphasis on deterrence and correction reached a height that has continued in contemporary criminal jurisprudence. But what of the idea, traceable back to Aristotle, that criminals should be punished, not because they can be corrected or because they or others can be deterred, but because they are morally responsible for their acts and thus *deserve* punishment? For the resurrection of this idea—and a critique of deterrence and reformation—we must look to the writings of two philosophers of modernity, Kant and Hegel. Each of these two giants, but especially Hegel, can tell us a great deal about the limits of the

155. *Ibid.*, p. 159.

156. *Ibid.*, p. 166.

157. *Ibid.*, p. 171.

158. *Ibid.*, p. 180.

Enlightenment approaches. It is therefore to a careful consideration of some of their reflections on crime and punishment that we must next turn.

### III. CRIMINAL JURISPRUDENCE IN THE MODERN ERA: KANT, HEGEL, AND SOME REFLECTIONS ON CONTEMPORARY SOCIOLOGY

The last section of the paper brought the survey of the history of criminal jurisprudence through the Enlightenment, considering the philosophies of Beccaria, Hobbes, Locke, Rousseau, and Montesquieu, as well as the contribution of Bentham, the founder of modern utilitarianism, to punitive theory. This section will first look briefly at Kant's reflections on crime and punishment and then analyze in more detail Hegel's approach. Then the paper will bring the subject into the twentieth century by commenting on the contribution of contemporary sociology, with a few observations from Holmes's "The Path of the Law" to show the continuing relevance of many of these ideas for contemporary (post-realist) American law.

Many of Kant's reflections on crime and criminal justice are concentrated in his section on public law in Part I of his *Metaphysics of Morals*. There, he defines the right to punish as "the right that the magistrate has to inflict pain on a subject in consequence of his having committed a crime."<sup>159</sup> And Kant calls a crime an "intentional transgression (that is, one accompanied by the consciousness that it is a transgression)."<sup>160</sup> Kant distinguishes public and private crimes, and, reflecting the influence of Rousseau, speaks of crimes that make the person committing them "unfit to be a citizen."<sup>161</sup>

From this introduction to the subject, Kant moves on to a concise statement of his view of the purpose of punishment:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things. . . . He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or his fellow citizens.<sup>162</sup>

159. Immanuel Kant, *The Metaphysical Elements of Justice*, Part I of *The Metaphysics of Morals* (J. Ladd, trans. 1965), p. 99.

160. *Ibid.*, p. 25.

161. *Ibid.*, p. 99.

162. *Ibid.*, p. 100.

Kant -  
- right by  
- purpose of  
punishment

Kant's theory of punishment is thus well grounded in his moral philosophy. Kantian morality dictates that we treat each other person as an end in himself; the ideal society would be a "kingdom of ends" in which each person's right *as a person* was respected. A criminal is not treated as a person, his *right* as a person is not respected, if he is "used merely as a means" to some social good, such as deterrence. A criminal can and should be punished only if he *deserves* punishment.

It is important to note that Kant is not denying that utilitarian considerations, such as those of deterrence, should play a role in criminal justice. He is only saying that desert must come first. As he puts it in the words already quoted, the criminal "must first be found to be deserving of punishment *before* any consideration is given to the utility of this punishment for himself or for his fellow citizens." Making the connection to his ethics more plain, Kant goes on to say that the "law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal."<sup>163</sup>

Kant says that "any undeserved evil you inflict on someone else among the people is one that you do to yourself." Thus, he later explains, if you steal, you are actually stealing from yourself because you are making everyone's ownership less secure and thus robbing yourself of secure ownership. If you kill another, you are killing yourself, depriving yourself of the right to life.<sup>164</sup>

Turning more precisely to the subject of murder, Kant says emphatically that a murderer "must die." The law of retribution (*ius talionis*) dictates this, but it must be a *judicial* retribution; private revenge will not do. The murderer must not be tortured or maltreated, says Kant, agreeing with Beccaria. But, Kant insists, he *must* be put to death.

The murderer is not put to death because his execution will deter others. He is put to death because only the death penalty can establish an equality between the crime and the punishment; only the punishment of death *fits* the crime of murder. As Kant puts it, even "if a civil society were to dissolve itself by common agreement of all its members, . . . the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the blood-guilt thereof will not be fixed on the

163. *Ibid.*164. *Ibid.*, p. 102.

people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice."<sup>165</sup>

Kant considers Beccaria's argument against the death penalty. Beccaria, he says, in a splendid characterization, was "moved by sympathetic sentimentality and an affectation of humanitarianism" to argue that the death penalty is not legitimate because "it could not be contained in the original social contract, inasmuch as this would imply that every one of the people has agreed to forfeit his life if he murders another, . . . but such an agreement would be impossible for no one can dispose of his own life." Kant answers that the social contract does not contain a promise to allow yourself to be punished and put to death; "if the only ground that authorizes the punishment of an evil doer were a promise that expresses his willingness to be punished, then it would have to be left up to him to find himself liable to punishment, and the criminal would be his own judge."<sup>166</sup>

Kant's reflections on the need for capital punishment for murderers suggest some general conclusions about his approach to criminal jurisprudence. Though often called the greatest of the Enlightenment philosophers, Kant is very different from his late seventeenth- and eighteenth-century counterparts in his approach to crime and punishment. Unlike Hobbes, Locke, and Beccaria, for example, his focus is neither on deterrence nor on correction, but rather on retribution. This means, in his words, that the criminal must draw "the evil deed back onto himself . . . [and suffer] that which according to the spirit of the penal law—even if not to the letter thereof—is the same as what he has inflicted on others."<sup>167</sup>

Another philosopher who took a retributivist perspective toward crime and punishment and who also favored the death penalty for the worst of crimes was Georg Wilhelm Friedrich Hegel. As Peter Steinberger argues in his 1983 essay, "Hegel on Crime and Punishment" in the *American Political Science Review*, the "concepts of crime and punishment play a central role in Hegel's *Philosophy of Right*."<sup>168</sup> A lawyer who wants to know about criminal jurisprudence must surely study Hegel's reflections on the subject in this seminal book, which has been called "a vast ocean into which

165. *Ibid.*166. *Ibid.*, p. 105.167. *Ibid.*, p. 133.168. Peter Steinberger, "Hegel on Crime and Punishment," 77 *Amer. Pol. Sci. R.* (Dec. 1983), p. 858.

all kinds of political thinkers, left, right, and center, have very profitably dipped their buckets."<sup>169</sup>

In a nation like our own in which all the people are sovereign, every person, as citizen—indeed as human being—can benefit from what Hegel says about the criminal law. Hegel himself explains why:

The legal profession, possessed of a special knowledge of the law, often claims this knowledge as its monopoly and refuses to allow any layman to discuss the subject. Physicists similarly have taken amiss Goethe's theory about colors because he did not belong to their craft. But we do not need to be shoemakers to know if our shoes fit, and just as little have we any need to be professionals to acquire knowledge of matters of universal interest. Law is concerned with freedom, the worthiest and the holiest thing in man, the thing man must know if it is to have obligatory force for him.<sup>170</sup>

In taking up Hegel's contribution, one must focus on the relevant passages in *The Philosophy of Right*, looking at Hegel's definition of crime and on what he says about punishment—what it is and why other theorists are wrong about what it should be. In so doing, one can give attention to how Hegel fits in to the three traditions of criminal jurisprudence previously identified.

Hegel first speaks of crime in *The Philosophy of Right* in his first section, on "Abstract Right," and he defines it in relation to wrong, to freedom, and to coercion. There are, he says, three categories of wrong—non-malicious wrong (civil offense); fraud; and crime.<sup>171</sup> After briefly considering the first two of these, Hegel turns to crime, but only after he has laid the foundation by referring to the freedom of the will. The free will, Hegel says, cannot be coerced. Coercion, "taken abstractly, is wrong." But, Hegel adds, under certain circumstances, coercion is not only right but necessary—"as a second act of coercion which is the annulment of one that has preceded." "Abstract right," then, "is a right to coerce." A crime is "an exercise of force which infringes the existence of freedom in its concrete sense, infringes the right as right."<sup>172</sup>

Crime, Hegel says, is the negation not only of the particular but also of the universal. That is to say, when a criminal steals another person's property, he is not only denying that person's right to own

169. Henry Paolucci, *A Brief History of Political Thought and Statecraft* (1979), p. 38.

170. *Hegel's Philosophy of Right* (T.M. Knox, trans.), pp. 272-73.

171. *Ibid.*, pp. 64-66.

172. *Ibid.*, p. 67.

that piece of property, he is denying the right to property *in itself*. As Steinberger explains, this "is largely what Hegel means when he identifies crime as the 'infringement of right as right' and as a 'negatively infinite judgement.'"<sup>173</sup>

Steinberger goes on to note that clearly, for Hegel, therefore, "something must be done about crime." That "something," of course, is punishment, and punishment, for Hegel, is the "negation of the negation" that is crime. The "infringement of right as right," which is to say crime, he says, "is something that happens and has positive existence in the external world, though inherently it is nothing at all." Inherently, crime is a nullity, but the manifestation of its nullity can only come through "the annihilation of the infringement"—that is to say, through *punishment*, which is the "right" actualized.<sup>174</sup> Punishment must follow the crime; the "nullity . . . must reveal itself to be such, [must] . . . manifest itself as vulnerable."<sup>175</sup>

Steinberger correctly explains some of the implications of this Hegelian approach to punishment:

The stance that the criminal implicitly adopts, that there are no rights, must be rejected and annulled if rights are to have actuality and force. For Hegel, punishment is precisely this annulment. Its function is to erase, restore the right to own property, . . . reestablish the possibility of freedom's actualization, and recover thereby the (at least partial) truth of the Notion of Right.<sup>176</sup>

The broader implications of what Hegel is saying, however, must not be missed. As we have seen, punishment, for Hegel, is the negation of a prior negation, crime. Through punishment, in other words, the negation of crime is negated by an act which crime itself requires to be complete as a negative act. Without punishment, crime could seem to be positive for the criminal. That is the way the world sees it, when criminals become rulers (like Cain and Romulus, and the American founding fathers). What negates the negation by which states come into being as great robberies? History, Hegel says. But history also raises up high art, high religion, and high philosophy. And, Hegel says, in the midst of that we have the ultimate negation of the negation: God's negation of himself, his death on the cross, which is the death of death. "Death, thou shalt die," as John Donne wrote, and that death of death is mercy.

173. "Hegel On Crime and Punishment", p. 860.

174. *Hegel's Philosophy of Right*, p. 69.

175. *Ibid.*, p. 246, note 61.

176. "Hegel on Crime and Punishment", p. 860.

The purpose of punishment, for Hegel, is neither deterrence nor reformation. This, he says, is a chief error of those contemporary students of the positive science of law, who treat both crime and its annulment (punishment) "as if they were unqualified evils" and regard punishment "as a preventive, a deterrent, a threat, as reformatory." Hegel answers that "it is not merely a question of an evil . . . ; the precise point at issue is wrong and the righting of it." This, he avers, is "the primary and fundamental attitude in considering crime."<sup>177</sup>

Like Aristotle, Hegel's position on crime begins from the perspective that man is a *free agent*, capable of *choosing* between right and wrong. Hegel is impatient with "trivial psychological ideas of stimuli, impulses too strong for reason, and psychological factors coercing and working on our ideas (as if freedom were not equally capable of thrusting an idea aside and reducing it to something fortuitous!)." Like Kant, Hegel does not deny that utilitarian considerations of deterrence or rehabilitation can play a role in modes of punishment. He is asserting only that "all such considerations presuppose as their foundation the fact that punishment is inherently and actually just." To make it just, one has only to understand that the crime must be annulled, "not because it is the producing of an evil, but because it is the infringement of the right."<sup>178</sup>

Advocates of deterrence, in Hegel's view, do not understand this true nature of punishment. They do not see that, even if it did not deter the crime, punishment would be necessary to "right the wrong." And if we could find a substitute for punishment that would deter better, we would still need punishment. As Steinberger puts it, it is not that deterrence is a bad thing, for Hegel, but rather "that it is beside the point. Mere deterrence fails to 'erase' the crime that has already been committed and thus fails to negate the negation."<sup>179</sup>

It is at this point in his discussion that Hegel explicitly refers to the opinion of Beccaria, denying "to the state the right of inflicting capital punishment." Like Kant, Hegel says that Beccaria's reason for this opinion "was that it could not be presumed that the readiness of individuals to allow themselves to be executed was included in the social contract." Unlike Kant, Hegel answers that "the state is not a contract at all."<sup>180</sup> Sounding a bit like Edmund Burke, who wrote

177. *Hegel's Philosophy of Right*, p. 70.

178. *Ibid.*

179. "Hegel on Crime and Punishment," p. 861.

180. *Hegel's Philosophy of Right*, p. 71.

in his *Reflections on the Revolution in France* that the state, more than a mere contract, is a "partnership in all science; a partnership in all art; a partnership in every virtue, and in all perfection . . . between those who are living, those who are dead, and those who are to be born,"<sup>181</sup> Hegel says here that the state is "that higher entity which even lays claim to this very life and property [of its members] and demands its sacrifice."<sup>182</sup>

In his supplementary note to this passage, Hegel explains that Beccaria is right to think that people have to give their consent to be punished. But, he says, "the criminal gives his consent already by his very act." Hegel goes on to note that there have been "beneficial effects" from Beccaria's campaign against the death penalty: "Capital punishment has in consequence become rarer as in fact it should be with this most extreme punishment."<sup>183</sup>

In his support for capital punishment, Hegel shows himself to be in agreement with Kant. He also agrees with Kant when he says that, "by being punished," a criminal "is honored as a rational being." This "due of honor" is only possible, however, if "the concept and measure of his punishment are derived from his act." There is no such honor "if he is treated either as a harmful animal who has to be made harmless, or with a view to deterring or reforming him."<sup>184</sup>

In his explanatory note, Hegel elaborates on his critique of punishment as deterrence or as preventive threat: "To base a justification of punishment on threat is to liken it to the act of a man who lifts his stick to a dog. It is to treat a man like a dog, instead of with the freedom and respect due to him as a man."<sup>185</sup> For Hegel, a criminal is therefore, by definition, a free person who has freely chosen to act in a way contrary to law and thus deserves punishment; by punishing him, we honor his freedom and responsibility by making him pay the price of his transgression.<sup>186</sup>

If the purpose of punishment is not deterrence, for Hegel, what is it? The answer, which should already be apparent, is *retribution*, but retribution, one might say, with a difference. Hegel says that "the universal feeling of nations and individuals about crime is and has been that it deserves punishment, that as the criminal has done, so should it be done to him." This widely held view reflects, in a

181. Edmund Burke, *Reflections on the Revolution in France* (1961), p. 110.

182. *Hegel's Philosophy of Right*, p. 71.

183. *Ibid.*, p. 247, note 63.

184. *Ibid.*, p. 71.

185. *Ibid.*, p. 246, note 62.

186. "Hegel on Crime and Punishment," p. 861.

superficial sort of way, the truth of the "necessary connexion between crime and punishment." Nevertheless, Hegel adds, this "connexion," this relationship of crime and punishment "appears to the understanding as 'equality.'" And so, it is said, that the punishment must be exactly the same as the crime—"an eye for an eye, a tooth for a tooth—and then you can go on to suppose that the criminal has only one eye or no teeth." This, of course, says Hegel, is an absurdity; "specific equality" is not what we mean by "retribution," "the annulment of the crime." Rather, the crime and the punishment must be equal "only in respect of their implicit character, i.e. in respect of their 'value.'" So, for example, he says, in "form" there is an inequality "between theft and robbery on the one hand, and fines, imprisonment, etc. on the other. In respect to their 'value,' however, . . . they are comparable."<sup>187</sup>

Retribution, for Hegel, as for the other retributivist philosophers we have seen, is *not* revenge. Revenge "is an act of subjective will" and thus "becomes a new transgression." The proper approach to punishment "is the demand for justice freed from subjective interest and a subjective form, . . . it is the demand for justice not as revenge but as punishment."<sup>188</sup> As Steinberger puts it, punishment, "the negation of the negation, . . . is in effect a statement, a declaration that the act of a criminal is a crime and that Right, although apparently annulled by crime, is in fact universal and eternal."<sup>189</sup>

In concluding his assessment of Hegel's retributivism, Steinberger notes that, in this as in other areas, Hegel's "theory is by no means airily abstract or irrelevantly metaphysical."<sup>190</sup> Put differently, Hegel's approach, like Aristotle's, is *developmental*. He argued against the Enlightenment Philosophes for their belief that they could set reason up *against* history instead of discovering the reason *in* history. And yet, as one contemporary Hegel scholar has noted, "in every field that Hegel approached historically, his influence . . . has been that, not of a backward-looking antiquarian, but of a trail blazer."<sup>191</sup> As Professor Carl Friedrich of Harvard wrote, we "may be critically inclined toward this Hegelian heritage, but we cannot gainsay its influence."<sup>192</sup>

187. *Hegel's Philosophy of Right*, p. 72.

188. *Ibid.*, p. 73.

189. "Hegel on Crime and Punishment," p. 861.

190. *Ibid.*, p. 869.

191. *A Brief History of Political Thought*, p. 44.

192. *Ibid.*

That Hegelian "influence" has extended around the world. It has been said, for example, that Hegel "did more than anyone else to open up the cultures of the Near and Far East" to "the importance of their own national histories." According to the great cultural archeologist W.F. Albright, Hegel was the first to bring together "the data of history in a rational synthesis, exhibiting the progress of humanity from its Asiatic cradle to modern Western Europe and clearly recognizing the fact of cultural evolution."<sup>193</sup>

One field that has benefited enormously from Hegel's insights on world history has been comparative sociology. Some say that this science began with Aristotle; surely it flourished in the writing of Montesquieu. But sociology truly came into its own, as it were, in the late nineteenth and early twentieth centuries in the writing of Emile Durkheim.

In their previously cited book *Crime and Human Nature*, James Q. Wilson and Richard Herrnstein quote Durkheim on the importance of comparative sociology in their chapter on "Crime Across Cultures": "Comparative sociology is not a particular branch of sociology, it is sociology itself."<sup>194</sup> They also note that Durkheim tended to try "to find 'social' explanations for social facts such as crime."<sup>195</sup> They remind us that, like Rousseau, Durkheim said that we "must . . . seek the explanation of social life in the nature of society itself."<sup>196</sup>

Wilson himself is quite critical of the sociological approach to combatting crime in his 1975 book *Thinking About Crime*. He calls any attempt "to reduce crime by attacking its root causes" largely "futile": "we do not know what these root causes" are, and "the most likely candidates for such causes, human character and the intimate social settings in which it was formed," are "beyond the reach of public policy in a free society."<sup>197</sup> But what of Durkheim's own perspective on crime? Can Durkheim's analysis—and the mode of analysis that his school represents—tell us something about the twentieth-century contribution to criminal jurisprudence?

In the introductory chapter to his book *Wayward Puritans: A Study in the Sociology of Deviance*, Kai Erikson summarizes Durkheim's position on crime and punishment. Crime, for Durkheim, is "really a natural kind of social activity, 'an integral part of all healthy societies.'" It performs a necessary role for society by

193. *Ibid.*, pp. 44-45.

194. *Crime and Human Nature*, p. 439.

195. *Ibid.*, p. 215.

196. *Ibid.*, p. 24.

197. *On Character: Essays by James Q. Wilson* (1991), p. 1.

"drawing people together in a common posture of anger and indignation." It "quickens the tempo of interaction in the group and creates a climate in which the private sentiments of many separate persons are fused together into a common sense of morality." A crime is a deviant act, and, like a war or other crisis, it makes people conscious of their common good, their common identity—what Rousseau called "the general will," and what Durkheim called "the collective conscience" of the community.<sup>198</sup>

Extrapolating from Durkheim's analysis, Erikson notes "that there are no objective properties which all deviant acts can be said to share in common. . . . Behavior which qualifies one man for prison may qualify another for sainthood." Crime in particular, and deviance in general, "is not a property inherent in any particular kind of behavior; it is a property conferred upon that behavior by the people who come into direct or indirect contact with it."<sup>199</sup> It is to them and an understanding of their "standards" that we must turn to understand crime.

Erikson asks why it is that a society assigns "one form of behavior rather than another to the deviant class." It is not always because it is "harmful to group life," he says. After all, Erikson points out, it cannot really be said, in our own time, that prostitution or marijuana smoking "endanger the health of the social order."<sup>200</sup> To understand why these and other acts come to be labelled "crimes," Erikson says, we need to have a better awareness of the nature of "community."

A "community"—in German, *gemeinschaft*—is, for Erikson, a group of people who "spend most of their lives in close contact with one another, sharing a common sphere of experience which makes them feel that they belong to a special 'kind' and live in a special 'place.'" Communities need to maintain boundaries; their members thus restrict their way of life within particular limits, regarding behavior that passes beyond those limits as immoral, improper, anti-social, and, indeed, criminal. People inside the community need to learn about where the line is between acceptable "in" behavior and unacceptable "out" behavior; criminal trials "act as boundary-maintaining devices" by teaching the community members about those lines. The people inside learn that they are inside, and learn

198. Kai T. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (1966), p. 4.

199. *Ibid.*, p. 6.

200. *Ibid.*, p. 8.

to feel secure at being inside, by comparing their activity with that of the deviant or criminal, "the person whose activities have moved outside the margins of the group." Erikson's thesis, in short, is that "deviant forms of behavior, by marking the outer edges of group life, give the inner structure its special character and thus supply the framework within which the people of the group develop an orderly sense of their own cultural identity."<sup>201</sup>

As it is developed, Erikson's argument shows similarities with much of the rehabilitative tradition in criminal jurisprudence. Like many modern rehabilitationists, he says that "deviant forms of conduct often seem to derive nourishment from the very agencies devised to inhibit them." With an eye on prisons, he laments that "many of the institutions designed to discourage deviant behavior actually operate in such a way as to perpetuate it."<sup>202</sup> This is almost exactly the modern rehabilitationist perspective! And he owes a great deal to Beccaria, especially in the sentimental nature of his observation that we, unfortunately, "do not really expect deviants to change very much as they are processed through the control agencies we provide for them."<sup>203</sup> Erikson also sounds a bit like Plato in using medical imagery to describe a prisoner as a "patient," a verdict as a "diagnosis." Even Aristotle would have some praise for the way in which Erikson recognizes the different crimes of different societies. But on the whole, Erikson's approach, like Durkheim's, is thoroughly un-Aristotelian, especially in its apparent fondness for rehabilitation.

In sum, an analysis of Erikson's approach shows how Durkheim's sociological perspective draws on, and departs from, the other traditions in the history of criminal jurisprudence. And there can be no doubt that the writings of Durkheim and others in sociology considerably influenced the literature on social deviance and crime in twentieth-century America. But what of the other traditions—of retribution, deterrence, and rehabilitation? To what extent have they survived into twentieth-century American criminal jurisprudence? We can see a foreshadowing of how they have all played a significant role by looking at just one paragraph from Oliver Wendell Holmes' (1897) essay "The Path of the Law," which is, as already noted, the most widely cited law review article ever written and which obviously had an enormous impact on contemporary (post-realist) American legal thought.<sup>204</sup>

201. *Ibid.*, p. 13.

202. *Ibid.*, p. 14.

203. *Ibid.*, p. 15.

204. Oliver Wendell Holmes, "The Path of The Law," 10 *Harv. L. Rev.* (1897), p. 457.

Holmes refuses merely to accept tradition in matters of criminal justice, where "fundamental questions still await a better answer than that we do as our fathers have done." He also will not accept a "blind guess" about the most important question, which Holmes poses in a thoroughly utilitarian manner: whether "the criminal law in its present form does more good than harm." Instead, he turns to science, again reflecting the legacy of utilitarianism but also of the Enlightenment's Age of Reason. He sounds very much like Beccaria as well as modern rehabilitationists in speaking of the effect of the criminal justice system "in degrading prisoners and in plunging them further into crime." He shows Beccaria's humanitarianism by asking "whether fine and imprisonment do not fall more heavily on a criminal's wife and children than on himself."

Holmes does not dwell on these matters, however, focusing instead on "more far-reaching questions." "Does punishment deter?," he asks. "Do we deal with criminals on proper principles?" Then, for the first time, Holmes shows the continuity of the retributivist tradition by pointing to the limits of deterrence and rehabilitation: "If the typical criminal is a degenerate, . . . it is idle to talk of deterring him by the classical method of imprisonment. He must be got rid of: he cannot be improved, or frightened out of his structural reaction." Here Holmes shows an awareness of the belief, dating back to Plato and Aristotle, as we have seen, that some criminals cannot be deterred or rehabilitated.

But of course, Holmes puts this proposition as a hypothetical: "If the typical criminal is a degenerate, . . ." He then quickly returns to show the deterrence perspective on the other side: "If, on the other hand, crime, like normal human conduct, is mainly a matter of imitation, punishment fairly may be expected to help to keep it out of fashion." There is, Holmes goes on to say, evidence on both sides; "men of science" find support for the retributivists' skepticism about deterrence and rehabilitation, while statistics support the deterrence perspective. For his own part, Holmes does not decide the question. "However this may be," he says, "there is weighty authority for the belief that, . . . 'not the nature of the crime, but the dangerousness of the criminal, constitutes the only reasonable legal criterion to guide the inevitable social reaction against the criminal.'"

Holmes' concluding emphasis on "the dangerousness of the criminal" and his preference for scientific analysis throughout the passage appear to show an inclination to the utilitarian/deterrence tradition. But ultimately he leaves the question of why we punish

unanswered. We in late twentieth-century America do not have that luxury. One does not have to be a criminologist to perceive that America is presently going through a serious criminal justice crisis. Our jails are overflowing; we incarcerate more people per capita than any other nation in the world. And yet we are by far the most violent nation in the West. As crime rates rise, as drug-related violence grows in intensity in our inner cities, we have to decide what the purpose of our criminal justice system is and should be. In short, why do we punish? Is it for retribution, for deterrence, or for rehabilitation? Or should we use the insights of the past to arrive at some new perspective? It is not possible, in this article, to present a definitive analysis that answers these questions. The next, the final section, however, will provide the foundation for that analysis by enumerating some of the lessons which might be drawn from our historical survey.

#### CONCLUSION

Now that the history of criminal jurisprudence has been traced, what lessons can be drawn from this long narrative? First, one can conclude that each of the three main contemporary approaches to crime and punishment has roots that reach far back in the history of philosophy. Retributionists, for example, can look to the writings of Aristotle, Kant, and Hegel for many of their ideas. Utilitarian advocates of deterrence can find inspiration in some of the words of Hobbes, Locke, and Beccaria, as well as Bentham. Rehabilitationists, for their part, can be encouraged to believe that some criminals can be made to see the error of their ways by reading Plato and Rousseau, among others.

Second, it would appear that many of the most important insights in criminal justice were first taught, not in recent times, but centuries and sometimes even millennia ago. We have, for instance, "known" at least since the time of Plato that many criminals cannot be rehabilitated. And both Plato and Aristotle reminded us that criminal punishment is a necessary evil; as Aristotle put it in his *Politics*, just punishments "are good only because we cannot do without them [and] it would be better that neither individuals nor states should need anything of the sort."<sup>205</sup>

But if the roots run far back and the lessons are old, does that mean that contemporary philosophy has nothing to contribute to

205. *On Crimes and Punishments*, p. 13, editor's note 19.

modern criminology? Not at all. The sociological work of Durkheim and Erikson, for example, reminds us that criminal law cannot be the same in all cultures. There are different peoples with different values and traditions in the world today, just as there were when Aristotle compared the Greeks with the peoples of the East and the West, whose different attitudes and character suited them for different forms of government and law.<sup>206</sup> To say this is not to be ethnocentric or to deny the possibility of comparison. As Maitland taught us, we can learn a great deal about the comparative law of two countries even if all we do is study how each deals with murder. But it is often wrong to impose our American and even western perspectives on crime and punishment in other lands with different cultures and at different stages of development.

Do our professors of criminal justice, then, have to content themselves with repeating the lessons of the remote and recent past? What is the *new* challenge, the *new* work of criminal jurisprudence? It is what one might call a "dilemma of liberalism." As we have seen, the liberal tradition has been, in many ways, openly hostile to the idea of punishment for the sake of retribution ever since the time of Hobbes, Locke, Rousseau, and especially Beccaria. American criminology surely needs the wisdom of this liberal tradition, with its emphasis on procedural forms and individual rights. But if we now believe, as many scholars and practitioners are urging, that punishment is ultimately justified, if at all, not because it deters or corrects but because it is *deserved*, then we will have to find a way to unite with liberalism the lessons of Aristotle, Kant, and Hegel on the significance of choice and moral responsibility. Perhaps it is only when we have reconciled this tension between the liberal and Aristotelian traditions that we can act prudently to restore our domestic tranquility and, in the words of Lincoln, "do all which may achieve and cherish a just and lasting peace, among ourselves, and with all nations."<sup>207</sup>

206. *A Brief History of Political Thought and Statecraft*, pp. 10, 15.

207. Abraham Lincoln, Second Inaugural Address, in *The Political Thought of Abraham Lincoln* (R. Current, ed. 1967), p. 315.

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