PERGAMON

History of European Ideas 26 (2000) 177–199

History of European Ideas

www.elsevier.com/locate/histeuroideas

Cesare Beccaria's influence on English discussions of punishment, 1764–1789

Anthony J. Draper*

Bentham Project, Department of History, University College London, Gower Street, London WC1E 6BT, UK

Abstract

The impact of Beccaria's *On Crimes and Punishments* on English discussions of punishment in the twenty-five years following its publication is assessed, with attention being paid to Beccaria's combination of contractarian and early utilitarian thinking. It is argued that Beccaria's influence was particularly striking in England in that he stimulated two disparate strands of reform thinking. The first being exemplified in the work of William Eden, and taking the form of a contractarian, humanitarian version, which owed something to William Blackstone, but was ultimately quite distinct. The second represented in Jeremy Bentham's theory of punishment with its emphasis overwhelmingly on utilitarian calculation.

Of all the writings on punishment produced during the eighteenth century, a century so prominently marked by the profusion of ideas on the subject, Beccaria's small book *On Crimes and Punishments*[1] was [1], and remains, of distinct and considerable importance. The reasons for this importance have been established to some degree [2],[2] yet, as far as the English dimension is concerned, much remains to

*Tel.: +44-20-7679-1513; fax: +44-20-7679-8510.

E-mail address: a.draper@ucl.ac.uk (A.J. Draper).

[1] Cesare Beccaria Bonesara, *Dei delitti e delle pene*, Leghorn, false imprint Haarlem, 1764. The edition used here is R. Bellamy (Ed.), *On Crimes and Punishments and Other Writings*, Cambridge, 1995 (translated R. Davies) based on the first modern edition to follow the fifth Haarlem edition of 1766—the last version of the text overseen by Beccaria; henceforth *Crimes*. See Bellamy's 'Introduction', *On Crimes and Punishments and Other Writings*, p. xliv. A re-arranged French translation was produced by Morellet in 1766, and an English edition appeared in 1767.

[2] See, for example, [2] M. Maestro, *Voltaire and Beccaria as Reformers of Criminal Law*, New York, 1942, pp. 155–157. Maestro suggests that Beccaria's achievement was to 'put the question clearly, so as to make for the first time a definite issue of reforms in the criminal law', *On Crimes and Punishments and Other Writings*, p. 157.

0191-6599/01/$ - see front matter
PII: S0191-6599(01)00017-1

be done [3–13].[3] The aim of this paper, then, is to assess the impact of Beccaria's *On Crimes and Punishments* on English discussions of punishment in the twenty-five years following its publication.

Despite the controversy surrounding the authorship of *On Crimes and Punishments* it is now accepted that the theory contained in the work is essentially that of Cesare Beccaria [14].[4] It seems unlikely, however, that he would have developed his ideas had he not shared the company of the young intellectuals gathered in Milan during the 'springtime of the Enlightenment in Italy' [15]. Some form of collective effort certainly took place within this circle, and this originating context appears to have done much to enhance the dynamism and vigour of the work [16,17].[5] Considerable significance rests on the manner in which Beccaria's work reached beyond any narrowly provincial, and especially any individual, discussion of punishment and presented instead a range of general philosophical themes appropriate to all European states. In so doing, *On Crimes and Punishments* appealed alike to sovereigns, statesmen and philosophes. In this regard, the work held great importance for the English intellectual environment, where Beccaria's arguments drew wide and sustained acknowledgement from many sections of society. This is not to say that criticism of English penal practice and theory was

[3] The work of both Marcello Maestro and Franco Venturi has well described the various continental reactions to the work, which included the immediate and violent denunciations of Italian churchmen (in 1766 the Church of Rome placed *On Crimes and Punishments* on the Index), the praises offered by Parisian philosophes, and the adoption of its central tenets in revised penal codes prepared for the most powerful of European monarchs. See [3] M. Maestro, *Cesare Beccaria and the Origins of Penal Reform*, Philadelphia, 1973 (Chapter 3). F. Venturi, *Utopia and Reform in the Enlightenment*, Cambridge, 1971, p. 102.j and [5] S. Woolf (Ed.), *Italy and the Enlightenment: Studies in a Cosmopolitan Century*, London, 1972 (Chapter 6). Despite the extraordinary influence of *On Crimes and Punishments* surprisingly little scholarly attention has come from the Anglo-American world, and some important and influential discussions of eighteenth-century English penal theory neglect his contribution entirely. See, for example, [6] M. Ignatieff, *A Just Measure of Pain: the Penitentiary in the Industrial Revolution, 1750–1850*, New York, 1978. Exceptions can be found in [7] D.B. Davis, 'The movement to abolish capital punishment in America, 1787–1861', *American Historical Review* 63(1) (1957) 23–46, and [8] P.M. Spurlin, 'Beccaria's *Essay on Crimes and Punishments* in Eighteenth-Century America,' in: Theodore Besterman, (Ed.), *Studies on Voltaire and the Eighteenth Century*, Vol. 27, 1963, pp. 1489–1504. See also [9] H.L.A. Hart's, 'Bentham and Beccaria', *Essays on Bentham*, Oxford, 1982, pp. 40–52. And the series of articles by [10] D. Young, 'Cesare Beccaria: utilitarian or retributivist?', *Journal of Criminal Justice*, 11 (1983) 317–326, '"Let us content ourselves with praising the work while drawing a veil over its principles": eighteenth-century reactions to Beccaria's *On Crimes and Punishments*', *Justice Quarterly*, 1 (1984) 155–169; [12] D. Young, Property and Punishment in the Eighteenth Century: Beccaria and his critics. *The American Journal of Jurisprudence*, 31 (1986) 121–135. Also [13] H. Dunthorne, 'Beccaria and Britain', in: D.W. Howell, K.O. Morgan (Eds.), *Crime, Protest and Police in Modern British Society*', Cardiff, 1999, pp. 73–96.

[4] Note the discussion in [14] F. Venturi, *Utopia and Reform in the Enlightenment*, Cambridge, 1971, pp. 100–102.

[5] The group in which Beccaria played a significant role styled itself the 'Accadèmia dei pugni' (The Academy of Fists) due to local rumours of the ferocity of its debates. See, [16] Venturi, *Utopia and Reform*, p. 100. Other leading members of the Accadèmia were Pietro Verri, Alessandro Verri and Giambattista Biffi. See [17] Venturi, *Italy and the Enlightenment*, London, 1972 (Chapters 6, 7).

unheard of before Beccaria's work appeared. There are many examples of criticism being levelled both at the practices of English punishment and at the principles which supported them before 1764 [18–20].[6] Nevertheless, it is clear that the work was eagerly adopted, most obviously by lawyers and the rising middle classes, as a declaration of the fundamental principles that ought to underpin the application of the penal sanction in an 'improved' civilisation.[7]

Why was the work so popular? The combination of contractarianism and early utilitarian thinking must go some way to explaining the variety of perspectives from which Beccaria was able to be interpreted; there is little doubt that the blend of principles contained within *On Crimes and Punishments* facilitated his attraction to English as much as to continental social and political commentators. Nevertheless, it is a central contention of this essay that Beccaria's influence was particularly striking in England in that it stimulated two disparate strands of reform thinking. The first being exemplified in the work of William Eden [21,22],[8] and taking the form of a contractarian, humanitarian version, which owed something to William Blackstone, but was ultimately quite distinct [23–27].[9] The second represented in Jeremy Bentham's theory of punishment with its emphasis overwhelmingly on utilitarian calculation [28–31].[10] This distinctive development, this divided use to which

[6] A prominent example is [18] Mandeville's *An Enquiry into the Causes of the Frequent Executions at Tyburn*, London, 1725, in which he recounts the disgust felt whilst witnessing the wild scenes accompanying an execution. 'All the way, from *Newgate* to *Tyburn*, is one of continued Fair, for whores and rogues of the meaner sort', *An Enquiry into the Causes of the Frequent Executions at Tyburn*, p. 20. Mandeville, along with many others, believed an air of solemnity and awful horror at the dreadful fate of the condemned was an essential prerequisite if public executions were to be justified. The severity of certain penalties had also been attacked in 1758, by no less a figure than Lord Kames in his *Historical Law Tracts*, Edinburgh, 1758.

[7] All of the English theorists concentrated on here were Oxford trained lawyers.

[8] William Eden, *Principles of Penal Law*, London, 1771, henceforth *Principles*. A second edition appeared in the same year to which emendations and additions were made. A third edition appeared in Dublin in 1772, and a fourth in London in 1775. In 1772 Eden was appointed Under-Secretary of State in the Northern Department by Lord Suffolk, with whom he became a firm favourite. Eden was raised to the Peerage of Great Britain as Lord Auckland of West Auckland on 22 May 1793. See, *History of Parliament: The House of Commons 1754–1790*, L. Namier, J. Brooke (Eds.), Vol. ii, London, 1964.

[9] Sir William Blackstone (1723–1780), judge and Oxford's first Vinerian Professor of English Law, whose *Commentaries on the Laws of England*, 4 Vols. Oxford, 1765–1769, instantly became—and for generations remained—the most influential treatise on English law. Blackstone's project continues to be widely discussed today. See, for examples from a huge literature, D. Lieberman, *The Province of Legislation Determined*, Cambridge, 1989, Part I; A. Watson, 'The Structure of Blackstone's *Commentaries*' in *Yale Law Journal* 97 (1988) 795–821; M. Lobban, 'Blackstone and the Science of Law' in *Historical Journal* 28 (1987) 311–335; and S.F.C. Milsom, 'The Nature of Blackstone's Achievement' in *Oxford Journal of Legal Studies* 1 (1981) 1–12.

[10] Jeremy Bentham, jurist, radical legal reformer and philosopher, generally regarded as the founder of modern utilitarianism. His work most relevant to penal reform includes, *A Fragment on Government*, London, 1776, *An Introduction to the Principles of Morals and Legislation*, London, 1789, and *Théorie des peines et des récompenses*, Paris, 1811. The latter being edited by Etienne Dumont from manuscripts produced by Bentham between 1776 and 1780, and the punishment volume being published later in English recension as *The Rationale of Punishment*, R. Smith (Ed.), London, 1830.

Beccaria's work was put, had, and continues to have, profound consequences for English approaches to punishment, and the debt owed to Beccaria has yet to be adequately explored [32–34].[11]

1. Beccaria and the English view of punishment

Beccaria combined his assault on prevailing justifications of punishment with an attack on the contemporary practices with which he was familiar. Against the European-wide application of state punishment on the principles of public vengeance and retribution Beccaria's views were raised in marked contrast.[12] The catalogue of brutalities waged against the body of the offender in the name of punishment was extensive—flesh being torn with red-hot pincers, limbs being scorched with boiling sulphurs, and bodies being tortuously dismembered and burned.[13] Such inflictions resulted from penal principles which demanded vengeful retaliation by the state. The rituals of judicial torture, and the required aggravations in the infliction of death emphasised the common conception of punishment as an expiation of sin. Such excesses of violence glorified the overwhelming power of the sovereign authority, and illustrated the need felt by the state to strip away the individual human dignity of the criminal piece by physical piece. Most importantly, any concept of natural or human right, even to self-defence, was absent as individuals were restrained for the extended infliction of the greatest severities imaginable to the authorised judicial power. This was the combined theory that Beccaria reacted against, judging it to encompass little more than 'premeditated pomp and slow tortures'.[14] For Beccaria, no justification could be found for such extremes of violence.

The manner in which his short work intrinsically assaulted these traditional concepts was the cause for much of its popularity. Many still see *On Crimes and Punishments* as 'the protest of evident justice and humanity against an archaic, cruel and repressive system [35].' Others, however, have been more critical, condemning

[11] Although the writings of Blackstone, Eden and Bentham are concentrated on here, this by no means implies that other thinkers are supposed to have been any less influential. Indeed, some, such as Samuel Romilly for instance, may rightly be regarded as having been more influential than the thinkers examined here, in terms both of the practical reforms achieved and the changes promoted in popular opinion.

[12] In this he formed part of a movement led by Enlightenment reformers such as Voltaire, who, in 1769, could hardly have chosen a better example to illustrate the applied nature of this prevailing mid-century theory than the 1757 execution of Damiens for the attempted murder of Louis XV (though this was to be the last infliction of this particular punishment). See *Histoire du Parlement de Paris*, in: Moland (Ed.), *Ouvres complètes*, Paris, 1877–1885, pp. 98–99. Voltaire's original source was *Pièces originales et procédures du procès fait à Robert-Francois Damiens*, Vol. iii, Paris, 1757. The incident was used to equally dramatic effect by Michel Foucault in his now famous genealogy *Surveiller et punir: Naissance de la prison*, Paris, 1975, translated as *Discipline and Punish: The Birth of the Prison*, London, 1977, pp. 3–5.

[13] All of these punishments were inflicted on Damiens in 1757.

[14] Beccaria, *Crimes*, p. 65.

the flawed iconoclasm of his 'enlightened' philosophy [36,37],[15] or condemning the polemic element of the piece, and, on occasion, concluding that it adds up to nothing other than 'a pleading for bourgeois interests… and efficient rather than humane justice'.[16] But from whichever angle Beccaria is approached, one cannot fail to appreciate his passionate and sincere concern for the inequality in, and failure of, conventional punishment as practised in the Europe of the 1760s.

Beccaria's own justifications for the institution of punishment were drawn from a wide range of philosophical sources, the more prominent of which included: the natural law theories of Montesquieu, the contractarian thinking of Locke and Rousseau, the use of 'happiness' as an end in itself as found in Hutcheson's and Maupertuis's early discussions, the materialist sensationalism of Helvétius, and the empirical psychology of Condillac [38–42].[17] Beccaria was part of a thriving intellectual milieu where liberal concepts of contractarian egalitarianism were fermenting alongside materialist notions of hedonistic calculation and social causation. This variety he gathered together in the construction of his fundamental principle that the purpose of punishment is,

> … nothing other than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise. Therefore, punishments and the means adopted for inflicting them should, consistent with proportionality, be so selected as to make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.[18]

The key principles for Beccaria, therefore, were that the end of punishment should be deterrence, that this necessarily implied a complete separation of crime from ideas of sin, and that the value of punishment must somehow be measured in terms of the harm done to society by the offence and considered in relation to the prevention of further similar offences in future. The idea that all society should strive towards '*the greatest happiness shared among the greater number*'[19]—a term inspired by Helvétius who, in turn, had developed the ideas of Hutcheson [43,44][20]—emphasised a materialist, calculative proportioning of social pain and pleasure, which could

[15] The earliest and most virulent criticism came from a Vallomborsian monk, Father Facchinei. See [36] Maestro, *Cesare Beccaria and the Origins of Penal Reform*, p. 35; and [37] Venturi, *Utopia and Reform in the Enlightenment*, p. 102.

[16] Young, Introduction, *On Crimes and Punishments*, p. xiv.

[17] [38] Charles Louis de Secondat, Baron de Montesquieu, *De l'esprit des lois*, 2 Vols., Geneva, 1748. [39] Francis Hutcheson, *An Inquiry into the Original of our Ideas of Beauty and Virtue*, 4th Edition, London, 1738). [40] Pierre Louis Moreau de Maupertuis, *Oeuvres*, Lyons, 1768. [41] Claude Adrien Helvétius, *De l'esprit*, Paris, 1758. [42] Étienne Bonnet de Mably de Condillac, *Traité des systèmes*, Paris, 1754.

[18] Beccaria, *Crimes*, p. 31.

[19] Beccaria, *Crimes*, p. 7. Note that for Beccaria happiness was to be 'shared amongst' the greatest number and was not 'of' the greatest number as in Bentham's later formulation.

[20] See Helvétius, *De l'esprit*, p. 175; and compare Hutcheson, *An Inquiry into the Original of our Ideas of Beauty and Virtue*, p. 181. For a discussion see R. Shackleton, 'The Greatest happiness of the greatest number: the history of Bentham's phrase', in *Studies on Voltaire and the Eighteenth Century*, Vol. 90, 1972, pp. 1466–1467.

provide a 'scientific' basis for a graduated scale of punishments able to be applied both certainly and quickly.

Yet in tandem with this use of the Helvétian emphasis on the value of pain and pleasure in the assessment of punishment, Beccaria also provided a contractarian vision of civil organisation. He asserted that all should be equal before the law, that each individual citizen possessed natural rights, and that being party to the contract did not imply any justification either for the use of judicial torture or the death penalty.[21] The criteria for punishment were such that, in the process of deterring, compassionate human nature—both of those found guilty and of the innocent witnesses of their punishments—ought to be respected.

The international transmission of ideas in eighteenth-century Europe provided for an easy dissemination of social and political theories, and of course there is nothing surprising in finding the English analysis of punishment well connected with continental discussions. Beccaria's ideas were widely, and remarkably quickly, incorporated into English penal theory debate. Indeed, the speed of Beccaria's adoption as a preeminent guide for reformist thought provides one of the problems in untangling the path which his influence took, since individuals from across the political spectrum embraced his ideas for promotion [45,46].[22]

As on the European mainland, the reception of *On Crimes and Punishments* in England was both immediate and predominantly favourable. The most significant adoption of his ideas in the 1760s was in the work of William Blackstone, whose fourth and final volume of *Commentaries on the Laws of England* contained direct references to Beccaria,[23] and supported several of his positions. Yet the presence of Beccaria in Blackstone's work, whilst obviously indicating the depths to which Beccaria's ideas had penetrated the English establishment, by no means implies that all Beccaria's central tenets had been accepted. In fact, it has been argued that the use and lionizing of Beccaria in England was in some quarters deceptive, with much attention being paid to his early utilitarianism whilst crucial positions emphasising his contractarian, rights-based protection for individuals remained unmentioned.[24] While public approval may, therefore, have been widespread the basic principles of Beccaria's thesis appear generally to have been poorly understood, and perhaps even judiciously ignored, by those with real influence in England.

What cannot be disputed, however, is that the prime goal of Beccaria's theory, that of deterrence, was also the general goal of English penal theory, and this had

[21] See Beccaria, *Crimes* (Chapters 1, 2 and 28).

[22] The range of interest for the 'new' ideas is well illustrated by the Parliamentary support readily offered for Sir William Meredith's 1770 motion for 'an enquiry into the State of the Criminal Laws of the kingdom', *Parliamentary History*, 16 (1765–1771) pp. 1124–1127. Condemning English criminal laws for exemplifying 'the spirit of Draco, whose laws were all written in blood', Meredith went on to show the influence of continental ideas on English reformers: 'Other European states have the policy to punish crimes, and yet render the criminals useful to the community. Ought we not to imitate their prudence?' *Parliamentary History*, pp. 1125–1126. Meredith's motion was passed, a Committee appointed, and on 6 May 1771 the Committee's resolutions to the House suggested the repeal of 4 Statutes carrying the death penalty.

[23] See, especially, Blackstone, *Commentaries*, iv, pp. 14–19

[24] See D. Young, 'Let us content ourselves with praising the work …', pp. 155–169.

been the case since the end of the seventeenth century at least [47,48].[25] The penal code may well have been growing progressively more threatening, with the capital sanction being prescribed far more widely, but the principal reason for such developments was to deter more effectively; by the 1760s deterrence was the primary theoretical justification for the application of punishment in England. On this point a sharp distinction can be noted between conventional justifications in England and those found throughout continental states during the first half of the eighteenth century [49].[26] Few concepts comparable with the 'vengeance of state' remained within the mainstream of English penal thinking, and those changes that were made constantly sought to improve the deterrent effect of the law.[27] Indeed, with the perception commonly remaining that the crime rate was continuing its rise, any calls made for more aggravated capital sanctions, such as continental-style breaking on the wheel, were always suggested as a means of establishing a more effective means of deterrence [50].[28] No such punishments were introduced, and they appear to have had little chance of ever being so. Usage of the most severe forms of punishment associated with continental, retributive penal theory did not, therefore, extend into England, and the horrors of judicial torture and the violent extremes of inquisitorial justice, which Beccaria attacked so effectively, were unknown—at least officially unknown—to the eighteenth-century English criminal justice system.

It has been suggested that the English reception of Beccaria was so warm simply because he was, in some manner, preaching to the converted.[29] This is a point of real contention; for whilst Beccaria's ideas were received with open arms, few appear to have been so welcoming because of a belief that *On Crimes and Punishments* reflected the *status quo* within the English system, but rather that the demands for change were as appropriate to the English legal environment as to the Italian. In the preface to the first English edition of *On Crimes and Punishments*, published in 1767 with an introduction attributed to Voltaire, the translator felt obliged to argue that England was not operating its penal system along Beccarian lines and that there was indeed a

[25] On the prominence of deterrence as an end of punishment in eighteenth-century England see L. Radzinowicz and R. Hood, *A History of English Criminal Law and its Administration from 1750*, 5 Vols. (1948–1986) i, p. 268. See also J.M. Beattie, *Crime and the Courts in England, 1660–1800*, Oxford, 1986, p. 455, for the received establishment view, ably expressed by Blackstone, that punishment had a predominantly secular, non-retributive end: '…the purpose of all punishment, was…to prevent crime in the future'.

[26] Even as late as 1751 in Bavaria, and 1768 in Austria, new law codes still retained 'the full range of death penalties and tortures', R. Evans, *Rituals of Retribution: Capital Punishment in Germany, 1600–1987*, London 1997, p. 118.

[27] Thus, the statute commonly known as the Murder Act of 1752 (25 Geo. II, c. 37) attempted to add further deterring terror to the threat of death by ordering that convicted murderers be dissected and anatomized after their execution. Of course the tortuous death of hanging, drawing and quartering for high treason remained in use until at least 1781, when Francis Henry de la Motte suffered the punishment at Tyburn. The penalty was abolished in 1870.

[28] There were many such calls throughout the century. See for instance, [50] Anon, *Hanging not punishment enough…* London, 1701. See also Beattie, *Crime and the Courts*, pp. 489–490.

[29] See Lieberman, *The Province of Legislation Determined*, p. 207, where, when considering Beccaria's exceptional popularity, he suggests that the factor of most importance was '…the extent to which in England, as elsewhere, Beccaria often preached to the converted'.

great need for the work [51].[30] Of course, this must be regarded to some degree as an attempt to persuade the book-buying public of the value of the work, but the claim is supported by the earliest receptions of Beccaria's essay in the influential London journals of the day. One finds a discussion of Beccaria's, or Beccarian inspired, ideas concerning punishment beginning around 1766–1767 and continuing in much the same vein until 1770.[31] The principal point made in these public discussions indicates that, whilst deterrence was certainly the end sought for, there were many aspects of the English process of punishment which were generally thought to be flawed and in need of urgent reform. In particular, on issues such as leniency, equality before the law, certainty and celerity there was little that could be presented in support of the argument that Beccaria's theory was reflected in general English practice. Whilst there can be no doubt, therefore, that the English penal system sought predominantly to deter, it attempted to do so in a way quite alien to that suggested by Beccaria, and the eager support his small book received graphically illustrates the extent of the dissatisfaction with the English practice of punishment.

2. The adoption of Beccaria's ideas in the thought of William Blackstone

How thoroughly such dissatisfaction had spread is apparent when one examines the way in which Blackstone rapidly took up many of the issues raised by Beccaria, and attempted to reconcile such arguments with his own understanding of the workings of the English penal system. Blackstone saw the validity of many points immediately: concerning the case made for certainty and celerity in punishing, for instance, Blackstone enthusiastically agreed with Beccaria, saying:

> It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment.[32]

And, similarly, with the arguments for the better proportioning of punishments to the adjudged seriousness of the offence Blackstone was in full agreement. He believed it to be one of the major flaws of the English system that, increasingly, capital punishment was being 'inflicted … upon crimes very different in their natures'.[33]

[30] See Beccaria Bonesana, *An Essay on Crimes and Punishments, translated from the Italian; with a commentary, attributed to Mons. de Voltaire, translated from the French*, London, 1767. See *An Essay on Crimes and Punishments, translated from the Italian; with a commentary, attributed to Mons. de Voltaire*, p. v, for the translator's statement that he followed the original Italian edition in the arrangement of the chapters. The attribution of the commentary to Voltaire appears only to have been based on 'the voice of the public'. See, *An Essay on Crimes and Punishments, translated from the Italian; with a commentary, attributed to Mons. de Voltaire*, p. vi. Between 1769 and 1807 there were seven further English editions of Beccaria's treatise.

[31] See *London Magazine*, 35 (May 1766) 222, (June 1767) 575–7, (November 1767) 306–308, (May 1768) 235, (December 1768) 639–40, (January 1769) 325, (May 1769) 237–238; *Annual Register* (1767) 316–320; *Scots Magazine* (1767) 210.

[32] Blackstone, *Commentaries,* iv, p. 17.

[33] *Commentaries*, p. 18. The similarity with Montesquieu here is obvious.

Whilst earlier continental theorists such as Montesquieu may have praised English criminal law for the distinctions it *had* established, between the penalties for robbery and murder for example,[34] Blackstone felt compelled to admit that:

> It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death.[35]

Blackstone recognised that this number of capital offences presented great problems for conventional justifications of the system, and agreed with Beccaria that such severe penalties were potentially indicative of the 'distemper of any state, or at least of its weak constitution'.[36] Blackstone also agreed that a natural compassion inherent to human nature, and which Beccaria emphasised so strongly, could only make such a system unworkable and ineffective:

> So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy.[37]

The consequence of this position was plain. With an increasing number of opportunities provided for the avoidance of punishment, there could be no effective deterrence, despite legislative threats of the most severe kind. Clearly, the call for proportion presented by Beccaria supported Blackstone's belief that the number of capital sentences needed to be substantially reduced.

Similarly, the lack of certainty of punishment produced by the threatened application of the same severe penalty to a burgeoning mass of offences widely differing in their nature, was a defect for which Blackstone believed Beccaria indicated a valuable response. Here Beccaria suggested that all states ought to produce 'an exact and universal scale' of punishments to offences and, should further ensure the publication of such a statement.[38] Blackstone was clearly intrigued by this notion, although he believed the exactness required by Beccaria to be both unattainable and inapplicable in practice, and called this, 'too romantic an idea'.[39] The concept of a fixed scale of crimes and punishments was therefore rejected by Blackstone, but there is no doubt that he sought to incorporate the suggestion of a better proportioning in punishments into his own theory as an aid to certainty of application, and hence to improve the deterrent threat provided.

[34] *Commentaries*, p. 18. Blackstone notes Montesquieu's acknowledgment of this point.

[35] *Commentaries*, p. 18.

[36] *Commentaries*, p. 17.

[37] *Commentaries*, pp. 18–19. Note the value placed on compassion; reflective, perhaps, of the Humean notion of a natural virtue of sympathy or benevolence.

[38] Beccaria, *Crimes*, p. 20. On the need for simplicity and clarity in the promulgation of the law and the prevention of crimes see *Crimes*, p. 103.

[39] Blackstone, *Commentaries*, p. 18.

Yet despite these clear adoptions and adaptations a larger problem arises in Blackstone's use of Beccaria when one examines the principles underlying the suggestions Blackstone makes for improvement. It soon becomes obvious that the ideas of Beccaria are selectively incorporated into Blackstone's *Commentaries*, and this had to be so for fundamental theoretical reasons.

The most pertinent question that can be asked of Blackstone, with regard to the practice of punishment, is whether he was seeking substantial reform in the manner of Beccaria or whether he sought only minor adjustments to the existing process? It has been claimed that Blackstone can indeed be viewed as an important reformer and that, primarily in his calls for a reduction in the use of the death penalty, he was working along lines similar to Beccaria and later English reformers.[40] And certainly there is an element of truth in this claim since Blackstone did want to see considerable changes made in the variety of punishments threatened. Yet, the foundation of his demands rested on conventional arguments which differed, in several important respects, from the dramatically new criticism of contemporary penal practices as expressed by Beccaria.

Distinctions are evident on two main fronts. First, Blackstone did not allow the principle of protection or care for human sentiment to intrude too far into his thinking; and second, there is no element of the utilitarian emphasis on the spread of happiness within society as an end of punishment. The result of such distinctions are displayed in Blackstone's obvious inability to follow Beccaria in calling for a positive pursuit of leniency in punishment. Even where Blackstone echoes the words of Beccaria, saying for instance that amongst offences 'those should be most severely punished, which are the most destructive of the public safety and happiness',[41] he does so with an entirely different understanding of what actually constitutes destructive action. It is the Lockean notion of public safety which overwhelmingly determines the gravity of offences for Blackstone. In Beccaria 'harm done' is identified in terms of public good, which is interpreted in a fundamentally consequentialist manner, emphasising a variety of damaging pains which amount to a combined social harm transcending the idea of public safety. It may well be that the exact meaning of this phrase in Beccaria cannot be incontrovertibly established, but it is instructive to note the very different outcomes suggested by the two men. Blackstone could not support the abolition of the death penalty, and neither could he support the more lenient treatment of those who were guilty of more frequent, tempting, offences. For Blackstone, frequently occurring property offences, especially where property was taken from the person, were a more substantial threat to society than they were for Beccaria, and the idea of assessing the specific harm spread by such minor offences carried little weight for Blackstone when set beside the Lockean justifications for the protection of private property.

[40] See Lieberman, *The Province of Legislation Determined*, pp. 200. Later reformers including men such as Samuel Romilly (1757–1818) for example.

[41] Blackstone, *Commentaries*, p. 16. Compare with Beccaria's: 'the obstacles which repel men from committing crimes ought to be made stronger the more those crimes are against the public good', *Crimes*, p. 19.

In a similar manner, there is little evidence of Blackstone being convinced by those early utilitarian elements in Beccaria's work which emphasised that government ought to concern itself with the spread of the greatest happiness shared amongst the greatest number.[42] Blackstone does not attempt any reconciliation of utility with contract theory as does Beccaria. The pursuit of happiness was inconsistent with the Blackstonian view of the contract on which society was based, a contract which premised the defence of individual security by founding the criminal law upon principles that are 'always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind'.[43] In this sense, the overwhelming dominance of rights theory produces a sharp divergence between Blackstone and Beccaria's vision of punishment as a tool for government [52];[44] and whilst Blackstone certainly sought a revision in the application of punishments, his theory did little to alter the basic justifications on which such punishment was based.

Nevertheless, recognition of Beccaria's work by an authority of Blackstone's stature provided a clear stimulus to the reception of Beccaria's work in England. It has been found that after 1770, that is after the publication of volume four of Blackstone's *Commentaries*, Beccaria's ideas came under sustained discussion in the London journals.[45] Generally, the impression is one of agreement with the establishment view that Beccaria's work required and deserved selective treatment. There were some, however, who pursued a more encompassing adoption of the Beccarian line; one such writer, whose approach at first appears close to Blackstone's but which ultimately is revealed to be quite distinct, was the young lawyer, William Eden.

3. The first authentic use of Beccaria's thought in England: William Eden and the advocation of penal leniency

Eden was generally a sure supporter of William Blackstone, but in regard to their differing approaches to punishment there are uses of Beccaria's ideas in Eden's work which establish him as a more significant penal reformer. The distinctive element in Eden's *Principles of Penal law* is the idea of introducing a positive leniency into the practice of punishment.[46] To make the criminal laws more effective in guiding

[42] Although he occasionally identified happiness as a political goal. See, *Commentaries*, p. 16.

[43] Blackstone, *Commentaries*, iv, p. 3.

[44] Indeed, in this respect there is some incoherence in Blackstone's insistence that the end of punishment is deterrence whilst relying for its justification on Locke's theory of natural rights—which develops an essentially *retributive* principle of punishment. Compare, J. Locke, in: P. Laslett (Ed.), *Two Treatises of Government*, Cambridge, 1988, p. 272.

[45] For examples see *London Magazine*, 39 (August 1770) 407ff, and *Annual Register*, 12 (1770) 151.

[46] Eden, like Beccaria, believed 'the increase of human corruptions proceeds, not from the moderation of punishments, but from the impunity of criminals', *Principles*, p. 13.

conduct he believed the laws needed to be loved, and this could only happen if penalties were mild: '…the love of the laws is followed by the love of our country, and is consequently productive both of rectitude of conduct, and purity of morals'.[47] Whilst this is based on natural law principles which resemble a number of versions of reformist thought,[48] Eden drew more especially on the humanitarianism and the respect for natural human compassion present in Beccaria.[49] This emphasis identified Eden's prime aim of attempting to illustrate the failings of the penal process from the perspective of the individual, and to suggest a way of restoring confidence in the system. More especially, Eden thought the penal laws should encourage a form of public virtue in the citizen body [53].[50] The entire emphasis of Eden's work is markedly different from either Blackstone before him or from those who followed (and from Bentham in particular). He stressed many of the commonly supported English reformist positions, in that he recognised the value of proportioned punishments, he identified the need for certainty and celerity in the execution of punishment, he accepted the value of judicial discretion,[51] and he even presented an almost identical argument to Blackstone's for the inapplicability of Beccaria's fixed scale of punishments.[52] But despite these similarities the foundations for Eden's theory are inherently different from his contemporaries.

Eden believed that particular prevention was only possible if offending individuals could be encouraged to rediscover an appreciation for the criminal law, and to see it as their protector rather than their relentless oppressor. The Lawgiver was required by Eden to have a 'severe eye upon the offence', but more especially, to present a 'merciful inclination towards the offender'.[53] This was entirely in line with the basic focus of Beccaria, that the law was worthless if it did not provide equal security for all.[54] Eden enthusiastically centred his theory on the view of man as a compassionate and sentimental being whose anti-social actions would not be curbed for long by the excessive use of violence by the state [54].[55] The individual had to be recognised as worthy of the protection of the state and this could never be possible whilst extreme, violent punishments were applied for a large number of offences.

[47] *Principles*, p. 284.

[48] Natural law principles such as those found in both Locke and Montesquieu.

[49] Once again, the emphasis on natural justice as an encouragement of compassion or natural sympathy bears a strong resemblance to the Humean notion of natural justice.

[50] For a discussion of Eden's role as a promoter of public virtue, see [53] A.J. Draper, William Eden and Leniency in Punishment, *History of Political Thought* 22(1) (2001) 106–130.

[51] This continued support for judicial discretion went entirely against Beccaria's theory. Bentham was also in favour of the retention of judicial discretion but was keen to see this reduced to a minimum.

[52] 'It is impossible', said Eden, 'to delineate any systematic or graduated scale of crimes, applicable to every legislation', *Principles*, p. 79.

[53] Eden, *Principles*, p. 6.

[54] On the concept of equality before the law that runs throughout Beccaria's work see in particular his proposition that 'punishments ought to be the same for the highest as they are for the lowest of citizens. To be legitimate, every distinction whether of honour or wealth presupposes an antecedent equality based on the laws, which treat every subject as equally subordinate to them.' See *Crimes*, p. 51.

[55] Here Eden wrote very much in the vein of what Norman Hampson has described as the 'cult of sensibility' that developed across Europe during the last quarter of the eighteenth century. See [54] N. Hampson, *The Enlightenment*, London, 1968, reprinted 1982, p. 157.

For Eden, as with Beccaria, the compassion at the centre of his thinking derived, ultimately, from God, and this provided a natural and essential restraint on the measures applied by states as punishment.[56] In the same degree, the purpose of legal punishment had little to do with retribution or vengeance, since this could be exacted by God alone: it was not man's place to attempt to do what ought to be, and could safely be, left to the divine power.[57] The role of legal punishment is therefore viewed as entirely secular—it is to prevent actions that work against the social contract. For the social contract reflected the security available to the individual citizen, and this concern is brought to centre stage in Eden's, as in Beccaria's, work, where one finds a critical feature presented in the notion that a true end of government is the protection of the innocent.[58]

Yet the penal laws are required to do more than deter in pursuit of this end of government. In fact, Eden's desire for citizens to love the laws identifies a more subtle goal for the process of punishment. Eden's theory requires that 'public virtue' be produced by the correct application of the legal sanction: a principle is offered such that moderation in the penal threat will produce a 'love of laws', and from this will flow the desire to adhere not just to the letter but also to the spirit of the law. In many ways this takes up Beccaria's suggestion that education is the only sure, though difficult and long, route to the substantial prevention of crimes.[59] In Eden's vision the leniency of the punishment itself is turned into a tool of the educator and is not simply a reflection of an already 'improved' society as it appears in Montesquieu. For Eden, the punishments provided by a state may be arranged so as to provide an education in civility, with their intentional leniency generating merciful and gentle conduct in much the same way as savagery was said to be encouraged if punishments were raised to unnecessary levels of violence. The idea developed here emphasises this merciful inclination towards offenders, in that they are required to receive only small quantities of pain, but such pain can be said to be severe against the crime in that it is always applied—hence certainty in punishment might be achieved.[60]

Eden can accordingly be seen as a more faithful representative of Beccaria's argument since this concept of moderate or lenient punishments was given such a profound and prominent role. Yet how did Eden arrive at such an interpretation? A comparison of the two works suggests the answer lies in the fact that Eden's position, though not publicly presented until 1771, was firmly developed before Blackstone had made his contribution to the debate. In other words, Eden relied directly on

[56] Eden, *Principles*, p. 5.

[57] 'Vengeance belongeth not to man', *Principles*, p. 6; see also *Principles*, p. 79 for Eden's unambiguous conception of crimes as temporal offences only. Confer Beccaria, *Crimes*, p. 100: 'My topic is solely those crimes which arise from human nature and the social compact, and not those sins whose punishments, even in this life, ought to be regulated by principles other than those of a limited philosophy'.

[58] Eden emphasised that no-one knew when they might find themselves accused of a crime, and he was constantly concerned to protect the individual against unjust accusations from the state. *Principles*, p. 281.

[59] See Beccaria, *Crimes*, p. 110. This is entirely in line with the emphasis on prevention prevalent amongst eighteenth-century consequentialist thinkers.

[60] '…the prevention of all crimes should be the great object of the Lawgiver; whose duty it is, to have a severe eye upon the offence, but a merciful inclination towards the offender', Eden, *Principles*, p. 6.

Beccaria's work, and was unaware of the manner in which *On Crimes and Punishments* was used, or was about to be used, by Blackstone.[61]

One explanation for this feature is that Eden perhaps gained an acquaintance with Beccaria's ideas at a very early date. It has been found that during the period 1764–1765 Eden was in correspondence with Sir James Macdonald of Sleat, a close friend from his time at Oxford [55].[62] Macdonald is believed not only to have reawoken Voltaire's interest in penal reform, by showing him a copy of Beccaria's book,[63] but is also known to have corresponded with Eden just a few weeks before his contact with Voltaire.[64] It is perfectly possible, therefore, that Eden received his first insights into Beccaria's work as early as 1765, and that this provided him with the opportunity of examining *On Crimes and Punishments* from a standpoint entirely independent of Blackstone's later interpretation.

Some substantial, practical consequences can be explained by such a sequence of events. Eden went much further than Blackstone in seeking the removal of the great majority of death penalties, and although Eden did not feel able to join Beccaria in calling for the complete abolition of capital punishment he presented an understanding which sharply distinguished death from all other forms of punishment. For Eden the death penalty was not a punishment in the same sense as were other modes—death was different [56].[65] Capital execution was an act which illustrated, to no small degree, the failure of the system, and could only ever have for its justification the desperate protection and preservation of the state. In this sense, the notion of capital execution went beyond the normal understanding of what was meant by punishment.[66] It was unacceptable, for Eden, to regard this form of punishment as appropriate in the number of instances Blackstone would have still allowed, and especially in the use of death for the most tempting crimes: this was, for Eden, a gross misapplication of the most extreme of state responses.[67] Here he was at his most critical of Blackstone, since Blackstone continued to argue that if the most tempting crimes were to be deterred then severe penalties must continue to be attached as sanctions.[68] Eden, on the other hand, argued, as did Beccaria, that these crimes were generally caused not by maliciousness on the part of the offender, but

[61] In terms of support for the death penalty, for instance, Eden no longer regarded it as one amongst a range of equally acceptable punishments. On his reading of Beccaria it became the 'last melancholy resource in the extermination of those from society, whose continuance among their fellow-citizens is become inconsistent with safety', Eden, *Principles*, p. 25.

[62] See the discussion in [55] G.C. Bolton, 'William Eden and the Convicts, 1771–1787', *The Australian Journal of Politics and History* 26(1) (1980) 31.

[63] Maestro describes how Macdonald took a copy of *On Crimes and Punishments* to Voltaire at Ferney, on Lake Geneva, in October 1765. On reading the essay Voltaire is said to have exclaimed 'the author is a brother'. See M. Maestro, *Cesare Beccaria and the Origins of Penal Reform*, p. 44.

[64] Macdonald to Eden (16 August 1765), BL Add. MSS 34412, fo. 96. See also Bolton, 'William Eden and the Convicts', 31.

[65] An argument used today by abolitionists in the USA. See [56] H. Bedau, *Death is Different: Studies in the Morality, Law and Politics of Capital Punishment*, Boston 1987.

[66] See note 63 above.

[67] He went so far as to call it a 'perversion of distributive justice', *Principles*, p. 8.

[68] Blackstone, *Commentaries*, iv, p. 16.

often only by need, and that in such instances no amount of punishment would prevent petty, tempting offences from being committed. And certainly such crimes were of little threat to the security of the nation. The issue of deterrence was, therefore, irrelevant in these cases. Individuals at this level of society had to be shown that the law understood their predicament and would eschew the excessive application of punishment, whilst continuing, through mild but certain penalties, to punish as each offence deserved.

Eden called, therefore, for a dramatic and substantial re-scaling of the seriousness of crimes, on the same basis as Beccaria: that if punishments were lenient, they could be unfailingly applied and hence remove the chance of guilty offenders going unpunished through the unpredictable distribution of 'merciful' judicial pardons. Where Beccaria, however, looked for 'damage done to the nation'[69] as an assessment of the severity of the offence, Eden sought to determine the 'flagitiousness'[70] of the crime—that is, he stressed the intention of the agent quite unlike Beccaria. In this sense, Eden was perhaps more interested in the individual circumstances of the offender than Beccaria. Certainly, Eden showed no hesitation in calling for greatly reduced punishments as a response to the most tempting offences.[71]

Like Beccaria's, Eden's was a popular work, and much of this popularity seems to have rested on the use he made of natural human compassion in the pursuit of penal leniency in 'civilised' government. Four editions of *Principles of Penal Law* were brought out within as many years, and with this success Eden very quickly came to the attention of those in Government [57].[72] The publication of Eden's treatise in 1771 provoked yet another round of discussion in the London journals,[73] and there can be little doubt that such eager approval of his position reflected much of the enthusiasm that had greeted Beccaria's work four years earlier. The variety of sources used in the construction of Eden's *Principles of Penal Law* seems, as with Beccaria, to have contributed to its broad appeal. Yet, within the English sphere, the presentation of political society as resting upon some notional Lockean contract was both deeply valued and widely accepted. The extent of this acceptance allowed Eden to take a far more conservative, some may even say reactionary, line than Beccaria. Eden claimed that the increase in statute legislation, and the concordant increase in the number of capital sentences, was at odds with the traditional manner of English law. His argument was that a return to an earlier state of affairs should be sought, where local magistrates administered a more paternalist form of criminal law regulation and enforcement. Eden believed such a system respected and bonded the

[69] Beccaria, *Crimes*, p. 22.

[70] Eden, *Principles*, p. 8.

[71] *Principles*, p. 8.

[72] See note 8 above. As Eden's influence grew he was able to engage in the implementation of his ideas. For his prominent involvement in the development of a scheme of national penitentiary imprisonment in England, particularly with regard to the Penitentiary Act of 1779, see [57] S. Devereaux, The making of the Penitentiary Act 1775–1779, *Historical Journal* 42 (1999) 405–433, and Draper, 'William Eden and Leniency in Punishment', 123–129.

[73] See *London Magazine* 40 (May 1771). Further articles appeared in the same journal in June and July 1771.

disparate strata of society, and that such benefits had been lost following the increase in severities threatened and inflicted in the name of necessary deterrence. Beccaria clearly did not indulge in such visions of past judicial arrangements, and indeed, he, along with fellow members of the *Accadèmia dei pugni*, did much to undermine such concerns for tradition and local variation.

This is not the only issue on which Eden differed from Beccaria. Amongst their differences not the least important is the complete absence of an emphasis on utilitarianism in the work of Eden; for unlike Beccaria, Eden did not seek to establish pain and pleasure as any sort of measure or standard. Eden simply ignored Beccaria's definition of the purpose of government as providing for the greatest happiness spread amongst the greatest number, and talked instead of encouraging public virtue. And public virtue meant obedience to the laws on grounds of appreciation of their value as protectors of the social contract, and a desire to accord with the 'good' represented *by* the law.[74]

Nevertheless, despite such differences Eden's work contains the first significantly reformatory direction for English punishment theory, in which Beccaria was extensively used to pursue ideas of a humane and compassionate system of punishment. But although Eden ignored Beccaria's suggestions that the greatest happiness might best be sought by calculation, this was precisely the element seized upon by English utilitarians of the period, and, of course, it was taken up with the most unwavering vigour by the most singular of them all, Jeremy Bentham.

4. Jeremy Bentham: the spread of pain, calculation and proportion

Bentham, as with Blackstone, accepted Beccaria's goal of deterrence as the prime justification for the exercise of the penal sanction; but the manner in which he did so provided an alternative route by which penal reform was pursued in England. This line of development stems from Beccaria's thought and has already been generally identified elsewhere,[75] though some aspects of the adoption require further examination.

Bentham agreed that a reduction in the general level of penal severity was required; he also emphasised the need to account for the individual circumstances of the offender when punishing; and he sought consistency and certainty in punishment—in all these ways he followed Beccaria's seminal discussion directly. But the key area in which Bentham's thinking was most effectively stimulated by Beccaria was in the argument that a deterrent theory required a sophisticated method of proportioning punishment to offence. It is on this issue that Bentham consolidated the nascent utilitarian theory of Beccaria by developing, first, a method for assessing

[74] See Draper, 'William Eden and Leniency in Punishment', Section II: 'Punishment as the Encouragement of Public Virtue', pp. 111–116.

[75] See for example Venturi, *Cesare Beccaria and Legal Reform*, p. 160, where he clearly describes the debts owed to Beccaria by radical utilitarians. He has overlooked, as have most, the dramatic influence of Beccaria in England before the use by Bentham. See also, Hart, *Essays on Bentham*.

the spread or distribution of pain and, second, by drawing up thirteen rules for the equating of punishment to offence.

For Bentham legal punishment was, he said,

> … annexed by political authority to an offensive act, in one instance; in the view of putting a stop to the production of events similar to the obnoxious part of its natural consequences, in other instances [58].[76]

This was a more technical expression of what Beccaria had already stated:

> … the purpose [of punishment], therefore, is nothing other than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise.[77]

Bentham believed it ought to be possible for the operation of the law to be arranged in such a way as to accord always with the all-directing principle—essentially provided by Beccaria—that the greatest happiness of the greatest number (eventually being stated simply as the Greatest Happiness Principle [59]) is the true aim of government. The purpose of statute law was to increase general social happiness. But punishment itself was a clear social negative: 'Punishment', Bentham said, 'is an evil inflicted by lawful authority upon an offender on account of some offence' in order either to reform, deter or disable.[78] The main ends of punishment remain precisely as defined by Beccaria, and for Bentham to justify any punishment it was necessary, therefore, to establish the quantity of pain, or evil, produced by an offence, and to devise a painful punishment which would ultimately lead to a surfeit of social happiness.

Bentham's theory began by seeking to separate the assessment of offending acts from the historic foundations which upheld traditional conventions of morality and law. On this point Bentham's conflict with the theory of Eden is particularly clear, since Eden required a restatement and reassertion of traditional social values. Bentham suggested that their place be taken by an empirical test as represented by the experience of pain suffered by some assignable or unassignable individual or individuals.[79] Such a test would provide a single standard sufficient to determine whether an act was 'wrong', and whether it ought consequently to be classified as an 'offence' and made preventable by law.

The concentration on, and presentation of, criminal behaviour as depending upon harm experienced by an individual, and forming an assault upon the wider community, is certainly prominent in *On Crimes and Punishments*, but Beccaria's use

[76] J.H Burns, H.L.A. Hart (Eds.), *An Introduction to the Principles of Morals and Legislation*, *The Collected Works of Jeremy Bentham*, with a New Introduction by F. Rosen, Oxford, 1996, p. 157, Henceforth *IPML* (CW).

[77] Beccaria, *Crimes*, p. 31. And see p. 5 above.

[78] University College London, Bentham Manuscripts (henceforth UC), cxliii. 31, marginal note: 'Punishment in general defined'.

[79] 'Is an offence committed? it is the tendency which it has to destroy, in such or such persons, some of these pleasures, or to produce some of these pains, that constitutes the mischief of it, and the ground for punishing it', *IPML* (CW), p. 49.

was markedly different from Bentham's. Of crucial importance was Bentham's insistence that the extent of the harm inflicted was dependent upon the motive, circumstances and intention under the influence of which an act was carried out. In contrast to this Beccaria seemed to be at a loss when considering the variety of circumstances that his argument suggested may need to be accounted for, and he despondently stated that 'it would, therefore, be necessary to frame not only a special code of laws for each citizen, but also a new law for each particular crime'.[80] The desire for a fixed code is overwhelmingly felt in Beccaria as a means of circumventing the innumerable difficulties connected with the establishment of the variety of circumstances in each case.[81] And it can be noted, as Élie Halévy suggested many years ago, that Bentham's 'attempt at a scientific and systematic theory of penal law' was substantially superior to Beccaria's since it took account of the variety of circumstances that seemed to daunt Beccaria [60].

Despite Beccaria's appeals to sentiment and compassion, he appeared therefore to have left the door open to careless punishments (these being, in Bentham's view, those which inflict too much or too little pain) in that he failed to allow sufficiently for the assessment of individual circumstances and intention. In contrast, Bentham's theory examined circumstances, sensibilities and intention, and placed emphasis on the 'primary' and 'secondary' pains found to be inflicted on individuals [61].[82] From this more precise foundation progress could be made to a consideration of how inflictions of pain might be gauged, and an attempt made to distinguish the nature of the dispersal of the 'shapes' of pain throughout society.[83]

With his thirteen 'rules or canons' for calculating the required quantity of punishment to be applied, Bentham made the most obvious contribution to utilitarian proportion theory. With nine of his rules he established the foundations for increases in amounts of pain provided as punishment.[84] Three others protect against excesses, and finally, a thirteenth rule is given which stresses that precise calculation is not required and small disproportions might be ignored. With this plan Bentham sought the formation of a mechanism for the controlled assessment and application of pain and, in the process, substantially extended Beccaria's emphasis on utility. The crux of the theory is an overwhelming concern for quantities of pain. Bentham's first 'rule' is all that needs to be mentioned here since, with this, Bentham

[80] Beccaria, *Crimes*, p. 22.

[81] Though he believed that any effective classification of crimes 'would demand immense and tedious detail because of the variations caused by the differing circumstances of differing times and places'. *Crimes*, p. 24. Yet Beccaria did think such a categorisation 'proper' for his analysis—clearly Bentham extends his method in later attempting to provide one.

[82] On Bentham's subjective approach to offences and punishments see Radzinowicz, *A History of English Criminal Law*, pp. 370–373. Bentham said of offences, '…the same offence at different times and places will stand, and to different persons will appear to stand, in a different light in point of criminality', H.L.A. Hart (Ed.), *Of Laws in General*, *Collected Works of Jeremy Bentham*, London, 1970, p. 217.

[83] See, Chapter XII, Section 1, 'Shapes in which the mischief of an act may show itself'. *IPML* (CW) pp. 143–152.

[84] See *IPML* (CW) Ch. 14, rules 1–4 and rules 7–11, pp. 166–171.

succinctly incorporated Beccaria's notion of proportioned deterrence into his own by stating that,

> … the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence.[85]

Bentham specifically referred to Morellet's 1766 French translation of *On Crimes and Punishments* at this point, and we find Beccaria's own views reflecting the same notion of quantity of punishment outweighing quantity of profit from the offence:

> If a punishment is to serve its purpose, it is enough that the harm of punishment should outweigh the good which the criminal can derive from the crime, and into the calculation of this balance, we must add the unerringness of the punishment and the loss of the good produced by the crime.[86]

Clearly, we are presented here with a justification of proportionality expressed in terms of calculation which provided a fundamental impetus to the utilitarian approach pursued so directly by Bentham, and which Bentham developed in order to establish the correct distribution of punishment according primarily to the quantity of profit received by the offender.

Yet in Beccaria's expression the pursuit of happiness, is combined with, and affected by, his understanding of natural law expressed as human compassion and protected by the social contract. Any calculation had to incorporate the implications of contractarian justice, that is, protection of individual rights, in order to determine what harms and goods were involved.[87] 'Right' and 'wrong', for Beccaria, were not based solely on pleasure and pain as they were for Bentham. Beccaria accordingly constructed his theory in such a way as to promote positively lenient punishments which, in some sense, reflected and protected compassionate human nature, and he cannot, therefore, be said to present a wholly consquentialist account when defining correct applications of punishment. For Bentham, this approach provided yet another example of the erroneous establishment of political argument on principles of sympathy and antipathy.[88] Bentham's theory is presented as a response to the inadequacy of such penal concepts provided by advocates of proportioned leniency, and once again the disparity between the utilitarian approach and the contractarian approach to reform in England is evident.

The consequences of contemporary punishments were searched for their proven deterrent value, and Bentham roundly condemned the widespread threat of the capital sanction as established in England. Bentham used Beccaria's emphasis on certainty of punishment to attack other utilitarian thinkers who advocated, like

[85] *IPML* (CW) p. 166.

[86] Beccaria, *Crimes*, p. 64.

[87] See *Crimes*, p. 13, where Beccaria acknowledged that severe punishments might deter but would nevertheless remain unacceptable since they were 'contrary to justice and to the very nature of the social contract'.

[88] See UC xvii. 48, 'Antipathy on the side of lenity'. See also the first paragraph of UC xxvii. 60. Though, of course, Beccaria's utilitarian arguments unquestionably redeemed his analysis in Bentham's opinion.

William Paley, the retention of numerous capital offences but with a selective application [62].[89] Bentham argued that the uncertainty of the sentence being carried out was precisely what undermined the deterrent effectiveness of the capital sanction. [63].[90]

By 1831 Bentham came to reject capital punishment outright, when, in an important pamphlet titled *Jeremy Bentham to his Fellow Citizens of France, On Death-Punishment* [64],[91] he explained:

> On this subject, the following is the information, for which I find the question indebted, to our fellow-citizen—*M. Lucas*:- In *Tuscany*, in the whole interval between the abolition of death-punishment, in that Grand Duchy, by the Emperor Leopold, while Grand Duke—and the re-establishment of it—the average number of crimes was considerably less than those after that same re-establishment: length of the interval many years: and, in that same interval, *assassinations* no more than *six*: while, in the Roman States, not much larger than Tuscany, the number, in a quarter of a year, was no less than *sixty*.[92]

The collection of this 'evidence' appears to be proof in itself for the influence of Beccaria's work, in that it displays a clear administrative focus on the deterrent effectiveness of punishments.[93] For Bentham these statistics were decisive. With the number of serious crimes being found to increase after the reintroduction of the death penalty, factual support was provided to bolster the call for a suspension of this particular form of punishment. These statistics were seized upon to explain how capital sentences provided no deterrent, but instead, did exactly the opposite and encouraged serious, violent crime. This practical example gave Bentham the impetus he needed finally to follow Beccaria and to confidently declare his support for the abolition of the death penalty.

[89] Archdeacon William Paley (1743–1805), who argued in his *Principles of Moral and Political Philosophy*, London, 1785, that only the worst examples from each category of offence needed to be punished with maximum severity.

[90] Though Bentham was also vehemently opposed to the utilitarian extremism of the Calvinist minister Martin Madan (1726–1790), who sought the execution of all capital sentences without exception. It has been said that 'after the publication of Madan's book capital punishments became so frequent that one could often see the spectacle of nearly twenty criminals hanged at a time'. See [63] J.A. Farrer, *Crimes and Punishments*, London, 1880, pp. 53–54.

[91] 'Jeremy Bentham to his Fellow Citizens of France, On Death Punishment' (1831), J. Bowring (Ed.), *The Works of Jeremy Bentham*, Vol. i, Edinburgh, 1838–1843, pp. 525–532.

[92] *The Works of Jeremy Bentham*, vol. i, p. 531. In 1786 Grand Duke Leopold of Tuscany abolished the death penalty as a direct result of Beccaria's book. See Maestro, *Voltaire and Beccaria as Reformers of Criminal Law*, p. 141.

[93] Bentham said that the first item of information, regarding the comparison of murders within Tuscany, had already been provided by way of John Howard; presumably by this he is referring to Howard's, *An Account of the Principal Lazarettos of Europe* (Warrington, 1789). The second item, the comparison between Tuscany and the Papal States, Bentham suggests comes only from the Monsieur Lucas mentioned.

5. Conclusion

Beccaria's *On Crimes and Punishments* therefore provided a radical critique of contemporary European systems of severe punishment, and this was highly appropriate to the English environment which had experienced a remarkable rise in the number of capital offences reaching the statute books. In dramatically presenting his new justification for punishment, Beccaria's passionately presented mixture of proto-utilitarian thought and contractarian thinking inceptively stated the need for penal theory to pursue more directly the welfare of all individuals in society.

In England in particular, his ideas were received with enthusiasm (or, as Bentham described it in 1776, 'as an Angel from heaven would be by the faithful'[94]), but an enthusiasm which developed in two directions. Eden's highly purposeful use of Beccaria's advocacy of mildness in punishment provoked his demand that public virtue and a love of the laws be pursued on the basis of natural human rights and natural compassion. Bentham, on the other hand, followed the penal principles inherent in Beccaria's argument to connect his own justifications for legal punishment firmly to a utilitarian base. This dual application of Beccaria's ideas identifies a remarkable and distinctive reaction to a short but powerful work, and the division between the two camps substantially illustrates the difficulties presented in Beccaria's apparent reconciliation of contractarian with utilitarian justifications of punishment. In the 1770s English theorists clearly attempted to isolate the strands of thought in Beccaria's work in their search for the effective principle.

Yet Beccaria's appeal remains. The enduring legacy of *On Crimes and Punishments* rests, to a considerable degree, upon its reflection of the perennial desire to discover a convincing method of reconciliation, which allows for an application of punishment that satisfies a demand for just deserts at the same time as being conducive to the greatest happiness of all. Whilst it has been seen how the ideas presented by Beccaria were recognised and acted upon within a few years of the work's first appearance in England, the promise of coherent interaction between its primary concepts still requires further exploration.

References

[1] R. Bellamy (Ed.), On Crimes and Punishments and Other Writings, Cambridge, 1995 (translated R. Davies).
[2] M. Maestro, Voltaire and Beccaria as Reformers of Criminal Law, New York, 1942, pp. 155–157.
[3] M. Maestro, Cesare Beccaria and the Origins of Penal Reform, Philadelphia, 1973 (Chapter 3).
[4] F. Venturi, Utopia and Reform in the Enlightenment, Cambridge, 1971, p. 102.
[5] S. Woolf (Ed.), Italy and the Enlightenment: Studies in a Cosmopolitan Century, London, 1972 (Chapter 6).

[94] Bentham was so admiring because he judged Beccaria to be a 'Censor' rather than a mere 'Expositor'. See, *A Fragment on Government*, in: Burns, J.H., Hart, H.L.A. (Eds.), *A Comment on the Commentaries and A Fragment on Government*, *The Collected Works of Jeremy Bentham*, London, 1977, pp. 403n.

[6] M. Ignatieff, A Just Measure of Pain: the Penitentiary in the Industrial Revolution, 1750–1850, New York, 1978.
[7] D.B. Davis, 'The movement to abolish capital punishment in America, 1787–1861', American Historical Review 63 (1) (1957) 23–46.
[8] P.M. Spurlin, 'Beccaria's Essay on Crimes and Punishments in Eighteenth-Century America', in: Theodore Besterman (Ed.), Studies on Voltaire and the Eighteenth Century, vol. 27, 1963, pp. 1489–1504.
[9] H.L.A. Hart's, 'Bentham and Beccaria', Essays on Bentham, Oxford, 1982, pp. 40–52.
[10] D. Young, 'Cesare Beccaria: utilitarian or retributivist?' Journal of Criminal Justice, 11 (1983) 317–326.
[11] D. Young, ''Let us content ourselves with praising the work while drawing a veil over its principles'': eighteenth-century reactions to 'Beccaria's *On Crimes and Punishments*', Justice Quarterly, 1 (1984) 155–169.
[12] D. Young, 'Property and Punishment in the Eighteenth Century: Beccaria and his critics', The American Journal of Jurisprudence, 31 (1986) 121–135.
[13] H. Dunthorne, 'Beccaria and Britain', in: D.W. Howell, K.O. Morgan (Eds.), Crime, Protest and Police in Modern British Society, Cardiff, 1999, pp. 73–96.
[14] F. Venturi, Utopia and Reform in the Enlightenment, Cambridge, 1971, pp. 100–102.
[15] F. Venturi, The End of the Old Regime in Europe, 1768–1776, Princeton, 1989, p. xiii.
[16] Venturi, Utopia and Reform, p. 100, 1986.
[17] Venturi, Italy and the Enlightenment, London, 1972 (Chapters 6, 7).
[18] Mandeville, An Enquiry into the Causes of the Frequent Executions at Tyburn, London, 1725.
[19] Mandeville, An Enquiry into the Causes of the Frequent Executions at Tyburn, London, 1725, p. 20.
[20] Lord Kames, Historical Law Tracts, Edinburgh, 1758.
[21] W. Eden, Principles of Penal Law, London, 1771.
[22] L. Namier, J. Brooke (Eds.), History of Parliament: The House of Commons 1754–1790, Vol. ii, London, 1964.
[23] W. Blackstone, Commentaries on the Laws of England, 4 Vols., Oxford, 1765–1769.
[24] D. Lieberman, The Province of Legislation Determined, Cambridge, 1989 (Part I).
[25] A. Watson, 'The Structure of Blackstone's Commentaries', Yale Law Journal, 97 (1988) 795–821.
[26] M. Lobban, 'Blackstone and the Science of Law', Historical Journal, 28 (1987) 311–335.
[27] S.F.C. Milson, 'The nature of Blackstone's Achievement', Oxford Journal of Legal Studies, 1 (1981) 1–12.
[28] Jeremy Bentham, A Fragment on Government, London, 1776.
[29] Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, London, 1789.
[30] Jeremy Bentham, in: E. Dumont (Ed.), Théorie des peines et des récompenses, Paris, 1811.
[31] Jeremy Bentham, in: R. Smith (Ed.), The Rationale of Punishment, London, 1830.
[32] Voltaire, Histoire du Parlement de Paris, in: Moland (Ed.), Ouvres complètes, Paris, 1877–1885, pp. 98–99.
[33] Voltaire, Pièces originales et procédures du procès fait à Robert-Francois Damiens, Vol. iii, Paris, 1757.
[34] M. Foucault, Surveiller et punir: Naissance de la prison, Paris, 1975.
[35] D. Young, Introduction, On Crimes and Punishments, Indianapolis, 1986, p. xiv (translated by D. Young).
[36] Maestro, Cesare Beccaria and the Origins of Penal Reform, p. 35, 1973.
[37] Venturi, Utopia and Reform in the Enlightenment, p. 102, 1971.
[38] Charles Louis de Secondat, Baron de Montesquieu, De l'esprit des lois, 2 Vols, Geneva, 1748.
[39] Francis Hutcheson, An Inquiry into the Original of our Ideas of Beauty and Virtue, 4th Edition, London, 1738.
[40] Pierre Louis Moreau de Maupertuis, Oeuvres, Lyons, 1768.
[41] Claude Adrien Helvétius, De l'esprit, Paris, 1758.
[42] Étienne Bonnet de Mably de Condillac, Traité des systèmes, Paris, 1754.
[43] Hutcheson, An Inquiry into the Original of Our Ideas of Beauty and Virtue, p. 181.

[44] R. Shackleton, 'The Greatest happiness of the greatest number: the history of Bentham's phrase', Studies on Voltaire and the Eighteenth Century, Vol. 90, 1972, pp. 1466–1467.
[45] W. Meredith, 'An enquiry into the State of the Criminal Laws of the Kingdom', Parliamentary History, 16 (1765–1771) 1124–1127.
[46] W. Meredith, 'Other European states have the policy to punish crimes, and yet render the criminals useful to the community. Ought we not to imitate their prudence', Parliamentary History, 16 (1765–1771) 1125–1126.
[47] L. Radzinowicz, R. Hood (Eds.), A History of English Criminal Law and its Administration from 1750, 5 Vols. (1948–86) p. 268.
[48] J.M. Beattie, Crime and the Courts in England, 1660–1800, Oxford, 1986, p. 455.
[49] R. Evans, Rituals of Retribution: Capital Punishment in Germany, 1600–1987, London 1997, p. 118.
[50] Anon, Hanging not punishment enough… London, 1701. See also Beattie, Crime and the Courts, pp. 489–490.
[51] Beccaria Bonesana, An Essay on Crimes and Punishments, translated from the Italian; with a commentary, attributed to Mons. de Voltaire, translated from the French, London, 1767.
[52] J. Locke, in: P. Laslett (Ed.), Two Treatises of Government, Cambridge, 1988, p. 272.
[53] A.J. Draper, 'William Eden and Leniency in Punishment', History of Political Thought, 22 (1) (2001) 106–130.
[54] N. Hampson, The Enlightenment, London, 1968, reprinted 1982, p. 157.
[55] G.C. Bolton, 'William Eden and the Convicts 1771–1787', The Australian Journal of Politics and History, 26 (1) (1980) 31.
[56] H. Bedau, Death is Different: Studies in the Morality, Law and Politics of Capital Punishment, Boston 1987.
[57] S. Devereaux, 'The Making of the Penitentiary Act 1775–1779', Historical Journal, 42 (1999) 405–433.
[58] J.H Burns, H.L.A. Hart (Eds.), An Introduction to the Principles of Morals and Legislation, The Collected Works of Jeremy Bentham, Henceforth IPML (CW), Oxford, 1996, p. 157.
[59] F. Rosen, Jeremy Bentham and Representative Democracy: a Study of the Constitutional Code, Oxford, 1983, p. 200.
[60] É. Halévy, La formation du Radicalisme Philosophique, 3 Vols., Paris, 1901–1904. (translated by M. Morris as The Growth of Philosophic Radicalism, London, 1928; rept. 1972, pp. 57–59.
[61] H.L.A. Hart (Ed.), Of Laws in General, Collected Works of Jeremy Bentham, London, 1970, p. 217.
[62] W. Paley, Principles of Moral and Political Philosophy, London, 1785.
[63] J.A. Farrer, Crimes and Punishments, London, 1880, pp. 53–54
[64] J. Bowring (Ed.), The Works of Jeremy Bentham, Vol. i, Edinburgh, 1838–1843, pp. 525–532.