

Criminal Entryways in the Writing of Cesare Beccaria

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Introduction

As the subject for the opening chapter of this collection, Cesare Beccaria is a fitting choice. Not only is Beccaria's *Dei delitti e delle pene* [*On Crimes and Punishments*] a foundational text in classical criminology, which has received and continues to receive much attention, but significantly, he also calls us to focus on the need for changing entryways to criminal justice. This chapter will briefly allude to well-trodden discussions of Beccaria's work on rationalizing criminal justice terrains and calling for enlightened reforms of the contemporary penal institutions he examined. However, our aim is to highlight an overlooked, yet equally influential, contribution. Specifically, we argue that not only did Beccaria's work offer an influential appeal for reason-based public codes, criminal trials, and penal practices, but that it also called for political transformations at gateways to criminal justice arenas. That is, his work may also be read as advocating for publicly accessible, rationalized ways to accuse subjects of crime and so provide just gateways that decide which subjects at entryways ought to be admitted to criminalizing fora. In turn, his reforms imply that opening moments that lead to the creation of criminal subjects indicate a sovereignty politics with important consequences for modern state formations (Pavlich, 2000).

The focus of much scholarship surrounding Beccaria has centered on a variety of implications that attended to his attempts to rationalize criminal law, and his utilitarian justifications for the punishment of crimes (Ferrajoli, 2014). As is well known, he criticized and called for fundamental alterations to the arbitrary, cruel, secret, and discretionary processes of medieval criminalization. He strongly advocated for a system of penal laws that were public, reason-based, consistent, universal, non-discretionary, clear, and based neither on vengeance nor reprisal. These laws were to be codified and founded on principles of the public good and reason. As is well known, he developed these ideas at various levels. For example, he offered a philosophical and socio-political analysis of the ways that a rational and minimalist image of criminal law and punishment should only be used to bring about a humane, just, and free social compact.

On this view, as Foucault has shown, Beccaria's and Bentham's writings took different trajectories and had different implications. Most important for our discussion, is that Beccaria sought to reframe, lessen, and rationalize the criminal justice system whereas Bentham sought to mine insights derived from the panopticon to help develop a disciplinary society (Foucault, 1977). He also developed a different conception of positive law from the one expressed by Bentham as

[an] assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power. (Bentham, 1970, p. 1)

Where Bentham might be seen to understand that the law is given and enforced by the sovereign, several passages from *On Crimes and Punishments* suggest that, for Beccaria, the sovereign should be assumed as metonymic of law and state. At the same time, he felt that the foundation of law cannot derive from tradition, superstition, religion, or the discretion of judges or the vagaries of the sovereign. By contrast, Beccaria promoted a form of law based on a kind of metaphysics of rationality that provides images and statements about human nature and the ideal society. Therefore, it is perhaps useful to heed Garland's (1985) assessment of Beccaria, Voltaire, Bentham, and Blackstone less as classical "criminologists" but more as legal scholars who applied the foundations of "legal jurisprudence to the realm of crime and punishment" (p. 14). In this light, Beccaria emerges not only as a legal philosopher, but also as a kind of activist concerned with recalibrating procedures, techniques, and apparatuses that bring people into the criminal justice system that necessarily frames the relationships between citizen and state.

On the latter, he provided hard-hitting critiques of specific penal and criminalizing practices of his time. He also offered many specific ideas of how criminal justice might be recalibrated, from the already noted calls for clear public criminal codes and the removal of judicial discretion, to education, crime prevention, swift and certain punishment that was rationally calibrated as proportionate to the atrocity of specific crimes, and so on. Throughout, it is worth noting, he championed compassion and argued that to ensure that

[punishment] may not be an act of violence, of one or of many, against a private member of society, it should be public, immediate and necessary; the least possible in the case given; proportioned to the crime, and determined by the laws. (Beccaria, 1819, p. 160)

Regardless, at all these levels, Beccaria's relatively small text provided a trenchant call for reformist action that resonated throughout Europe, Russia, the USA and across many intellectual traditions and times (Bessler, 2009; Draper, 2000; Harcourt, 2013; Massaro, 1991). Indeed, Harcourt (2013) describes how Beccaria's influence extended outwards in many directions and served as

an object of praise among utilitarians, a source of inspiration for classical English jurists, a target of pointed critiques by retributivists, the subject of histories and genealogies, the object of derision by the first *économistes*, rehabilitated and appropriated by the Chicago School. (p. 2)

As influential as his *Of Crimes and Punishment* most certainly has been, we would argue that not all of its achievements have been recounted. In this chapter we will reinterpret relatively overlooked aspects of this work to highlight one element of Beccaria's thinking: his call

for rational and just reforms to entryways that determine admission to criminal justice. Stated more pointedly, we interpret Beccaria, in responding critically to the context that he faced, as seeking to restructure the discretionary, secret, spurious, irrational, tyrannical, arbitrary, and sovereignly ordered gateways wherein people were then accused of crimes and potentially entered into criminal justice arenas. Our aims here are first to situate his thinking as it pertains to such entryways before pointing to the kinds of reforms that his text seems implicitly to call for. Thereafter, we look at various political rationales that he provided for such reforms, before alluding briefly, by way of conclusion, to the political implications of our interpretative recovery.

Historical Context and Reception: *Of Crimes and Punishment*

A few years prior to writing his text, Beccaria had met Pietro and Alessandro Verri, Milanese brothers, and together they later formed *Accademia dei Pugni* or the Academy of Fists—a collection of Milanese intellectual elites who had tried to bring Enlightenment ideas to Italy, emphasizing how crime and punishment might be reconceptualized. More broadly, these elites—the “Milanese *illuministi*”—sought to create

[a] bourgeois society that combined spiritual and moral regeneration with and through the materialist advantages of economic growth ... envision[ing] a well ordered, hierarchical society whose reconstruction would emanate from an enlightened state administration that, though working in alliance with other powers such as the papal administration, could dominate all power blocs and would include all men of property and education. (Beirne, 1993, p. 18)

The Academy of Fists was vital for Beccaria’s formation as a “legal scholar” through its at times heated philosophical debates inspired by the likes of Bacon, Diderot, Helvétius, Hume, Locke, and especially Montesquieu (Beirne, 1993). Reading these philosophers, members of the Academy of Fists wrote on a variety of subjects ranging from economic, political, social, aesthetic, to scientific concerns—all published in their journal, *Il Caffè*. The latter was designed to imitate the flamboyancy of French philosophical writings at the time and to embrace the critical edge that Enlightenment thinkers had forged across Europe, especially in France and Scotland (Beirne, 1993; Calisse, 2001). One of the members had access to the prisons which enabled some insight into prison conditions and the plight of contemporary prisoners (Maestro, 1973, p. 12). From their publications and many debates, Beccaria would learn about inquisitorial legal procedures and the inhumane conditions of confinement in Italy. This, no doubt, prompted his broad reformist agenda, but let us turn to specific examples.

Widely acclaimed by legal historians and philosophers, Beccaria reacted to outside forces: “two institutions, or rather two forces, had been the particular objects of his attacks ...; the authority of the Roman law and reasons of State” (Calisse, 2001, p. 461). Beccaria championed humanism, reason, and rationality as the basis for reforming contemporary ecclesiastical entryways that centered on inquisitorial judgment. Beccaria viewed inquisitorial entryways to criminal justice as inhuman, irrational, baseless, and tyrannical. As he put it:

Those who are acquainted with the history of the two or three last centuries, may observe, how from the lap of luxury and effeminacy have sprung the most tender virtues, humanity, benevolence, and toleration of human errors. They may contemplate the effects of, what was so improperly called, ancient simplicity and good faith; humanity groaning under implacable

superstition; the avarice and ambition of a few, staining with human blood the thrones and palaces of kings; secret treasons and public massacres; every noble a tyrant over the people; and the ministers of the gospel of Christ bathing their hands in blood, in the name of the God of all mercy. (Beccaria, 1819, p. 27)

From this statement, one gleans his political commitment to humanism and tolerance and a wide rejection of superstition, ambitious sovereign agents, corruption, pre-trial secrecy and post-trial public violence, as well as cruel and tyrannical monarchical or ecclesial rulers. His calls for rational and secular interventions in criminal matters echoed the widespread Enlightenment transformations of medieval societies (see Beirne, 1993; Calisse, 2001; Maestro, 1973).

He addressed his critiques to a late medieval and pre-Enlightenment Italy, where magistrates and religious inquisitors ruled courtrooms with significant powers of discretion (Hostettler, 2011). Based on a belief in the inviolability of stratified social classes, for instance, magistrates might condemn one person to death and another given a pecuniary penalty for the same crime. Typically, this meant that the penalty “weighed heaviest upon those who, through poverty and ignorance, might have some excuse” (Calisse, 2001, p. 266). Beccaria challenged such unequal applications of magisterial justice and noted that,

[Magistrates] are the sovereign arbiters of the lives and fortunes of men, terrified by the condemnation of some innocent person, have burdened the law with pompous and useless formalities, the scrupulous observance of which will place anarchical impunity on the throne of justice. (Beccaria, 1819, p. 50)

In this quote we detect a telling critique of entryways to contemporary crime control practices. If magistrates had enormous powers over the inquisitions through which subjects were often secretly accused of crimes, they were also able to use complex, formal, and non-rational procedural rules to decide who would be accused and so admitted to face criminal trials. Here, little emphasis was placed on determining the credibility of witnesses who leveled accusations of crimes.

Consequently, Beccaria opines that, “in the most atrocious crimes, the slightest conjectures are sufficient, and the judge is allowed to exceed the limits of the law” (p. 49). The coupling of magisterial discretion, secrecy, and unchecked witness testimony troubled Beccaria, who considered such channels to criminal justice as cruel, variable, and unpredictable. To make matters worse, torture was sometimes used to extract the truth from those accused of crime who refused to confess their guilt (Beccaria, 1819, see also, Calisse, 2001). Even if this practice was on the decline by the mid-18th century, inquisitorial juridical forms continued to frame some contexts. For example, under the Inquisitorial Council of Ten in Lombardy, depending on the nature of the accusation, those whom the judges thought were guilty but who protested their innocence could be subjected to the *strappado*, a brutal torture device designed to extract truths by painful and cruel tortures:

The defendant’s hands were tied behind his back up above his head and then to a rope hoist, by which he was lifted into the air. To intensify the pain and dislocate the joints, the rope was jerked a specified number of times. (Stern, 2004, p. 271)

Denouncing such uses of torture as a “shameful” reality and “enduring monument to the law of ancient and savage times,” Beccaria dedicated several paragraphs to dismantling contemporary rationales for the use of torture (1819, pp. 59–68). He argued that the extraction

of truthful confession under duress could never yield a true confession: “A man on the rack, in the convulsions of torture, has it as little in his power to declare the truth, as, in former times, to prevent, without fraud, the effect of fire or of boiling water” (p. 63). In a nod to the Roman law principle of *ei incumbit probatio qui dicit, non qui negat* (innocent until proven guilty), Beccaria questioned the right of any magistrate to inflict pain on the body of an accused in order to prove innocence. He asks:

What right, then, but that of power, can authorise the punishment of a citizen, so long as there remains any doubt of his guilt? ... If guilty, he should only suffer the punishment ordained by the laws, and torture becomes useless, as his confession is unnecessary. If he be not guilty, you torture the innocent; for, in the eye of the law, every man is innocent, whose crime has not been proved ... to expect that a man should be both the accuser and accused; and that pain should be the test of truth, as if truth resided in the muscles and fibres of a wretch in torture. ... These are the inconveniencies of this pretended test of truth. (p. 60)

If this statement suggests the depth of Beccaria’s challenge to existing practices, and his call for basic criminal justice reforms of entryways, it is perhaps unsurprising that the successes of his work would destabilize the hegemony among Italy’s aristocratic and religious ruling order. Moreover, his call to distinguish crime from sin and to imagine punishment from religious to rational calibrations would cause Italy’s ecclesiastics to respond quickly and forcefully. They placed *Of Crimes and Punishments* on the Index of condemned books soon after its publication in 1766¹ and slandered Beccaria by charging him of impiety and sedition (Maestro, 1973). One of Beccaria’s most vocal critics was a Vallombrosian monk in the Venetian territory by the name of Ferdinando Facchinei. Under the banner of the Inquisitorial Council of Ten in Venice, he published a public rebuke, *Notes and Observations on the Book Entitled, On Crimes and Punishments*. In this text, he recounted six accusations of sedition and 23 of impiety against Beccaria’s writings. In framing these accusations, Facchinei defended the use of torture as a way of arriving at truth, justified secret accusations, and heralded the value of the death penalty. Interestingly, the Academy of Fists² responded to this text with their own “apology” entitled *Response to a Writing Entitled ‘Notes and Observations on the Book “On Crimes and Punishments”*” (see Beccaria, 2008). This apology refuted Facchinei’s accusations and reiterated support for rational versions of penal policy derived from social contract thinking, a tendency that was to inspire approaches to crime far and wide, from Europe, Catherine the Great’s Russia, to the US Constitution. Signaling a growing acceptance of Beccaria’s thought, one might note that in 1791 Beccaria was invited by Leopold II to sit on the Commission for the Lombardy Code; the latter set the stage for state-centralized entryways of accusatorial procedures and techniques in Italy.

Techniques and Procedures: How to Rationalize Entryways to Criminal Justice

Even though brief, this schematic outline of the context and reception of his text gives a sense of Beccaria’s sheer influence on changing social times. But what precise techniques and procedures did he see as vital to recalibrating entryways to criminal justice systems? At the most general level, he promoted rational procedures that would admit people into the system exclusively through transparent public (rather than secret) processes. In addition,

he called for social reforms that would: (1) limit criminal justice responses to “real” crime; (2) require law to define the role of agents authorized to determine which subjects might legitimately be accused; (3) erect a clear distinction between the accused and the guilty criminal; (4) regulate information used to found an accusation; and (5) reduce time periods between accusation, prosecution, and punishment.

To begin with, in seeking to rationalize the legal system, Beccaria called for the decriminalization of smaller acts and the promotion of education to reduce the caprices and the violence of the justice system that he deplored. In effect, he called for a reduction in the kind of acts that were to count as criminal. For the most part, only those acts that jeopardized the social contract were to count as “real” crimes. In this endeavor, as one commentator puts it, he was strongly influenced by

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. (Harcourt, 2013, p. 17)

From that heterogeneous conceptual lineage, Beccaria defined criminal law as a means to safeguard the public good; it was to be considered as a stockpile of people’s natural liberties that had to be sacrificed to establish society and create a harmonious public (Beccaria, 1819, pp. 146–147). Its basic role was to help with the regulation of a “proper” citizen within an integrated and ordered society; even if in certain unnecessarily punitive conditions, the law could itself promote crime. Indeed, he felt that the criminal law of his day was doing precisely that by punitively sanctioning countless minor, moral-based infractions. This law had lost sight of its political, social-ordering role, and created conditions wherein crime could flourish. His version of natural law saw principles of criminal law as necessarily premised on natural human sentiments and proclivities.

As such, he insisted on distinguishing between “real” crimes that went against a natural order, and smaller, status-based infractions that violated transitory norms (Beccaria, 1819). The basis of this distinction rested, for Beccaria, on a universal, reasonable, human nature. Real crime, as he understood it, obfuscated and perverted what it was to be a human being, and expressed itself in deviance from nature (pp. 95–106). The latter was reflected by a social contract, and it was only those who spurned this contract that could be regarded as committing “real” crimes; such individuals existed in a different relationship to the state and human nature (pp. 95–106, 144). In essence, from his viewpoint, crime excluded those acts that could be seen as emanating from necessity or other reasons; rather, it was always premised on selfish acts that had wilfully forsaken humanity, empathy, and compassion that served as bases for the social contract. Beccaria appears here to have articulated a metaphysical principle behind criminal law, viewing crime as happening only in situations where people had acted counter to human nature and an ensuing social contract. To help bring about rational entryways to criminal justice, Beccaria thus called for the decriminalization of previously framed crimes that did not violate the contract. He also advocated for public education of criminal codes to broadcast widely which acts were regarded by states as criminal. The aim would be to allow people to know in advance which precise acts might attract penal sanctions. By so limiting criminalizing gateways (i.e., reserving entry for “real criminals”), and championing a somewhat compacted vision of criminal law, he thought criminal justice might help to secure an advanced, compassionate, and more humane society that treated its citizens and criminals in kinder, gentler ways (pp. 17–18).

Hence, from his point of view, only those subjects who could legitimately be accused of violating or denying the social contract ought to face criminal justice; the sovereign's role was to execute laws in ways that "bind the members" to that contract (p. 21). But how was the sovereign to filter out the innocent from those who had offended fundamentally? In tackling this sort of question, Beccaria framed a new kind of relationship between the citizen and the sovereign via rational versions of criminal law. He advocated for a separation of powers between the executive and the legislative branches, with the sovereign situated at an order removed from direct involvement with the accusatorial, trial, and punishment processes. At the same time, he noted that the sovereign lawgiver was to safeguard how judges actually executed the laws. To achieve the latter would require removing certain discretionary powers that judges and magistrates previously wielded over accusatorial processes; in turn, having clear roles for authorized mediating bodies would enable the rational sovereign to remain the sole interpreter of the laws. He thus called for the legal codification of entryway procedures that would be "fixed by laws, and not by the judge, who, in that case, would become legislator" (p. 112). So while judges might be authorized to determine whether specific accused persons deserved admission to criminal justice, all judgments had to emanate from the letter of a public law, not its spirit.

Beccaria also made much of the distinction between the legal status of those merely accused, and those who had been judicially convicted. He recounted that at the time of his writing, this distinction was not always apparent. He argued that contemporary criminal justice was defective,

because the present system of penal laws presents to our minds an idea of power rather than of justice. It is, because the accused and convicted are thrown indiscriminately into the same prison; because imprisonment is rather a punishment, than a means of securing the person of the accused. (p. 110)

If this passage signals an argument against imprisoning and so punishing (rather than merely holding) the accused, it also highlights that citizens whose guilt had not been established could not reasonably be punished. To do so would be to work against a rationally ordered society that was parsimonious with penalties, and that required a distinction between potentially innocent accused persons and guilty criminals. Extrapolating from this position, one might say that he advocated for a clear distinction to be drawn between the accused who were poised on the thresholds of criminal justice and those criminals who had been legitimately convicted and admitted to penal systems. The implication is that the criminal justice system should treat these two parties differently, with the accused confined to regulatory gateways rather than to punitive establishments. Following his logic, at such gateways the accused might expect to be questioned via publicly accessible procedures and practices, by authorized agents who were legally regulated in compliance with clearly formulated codes. In addition, Beccaria insisted that any witness's claims relevant to an accusation of crime ought to be lawfully vetted. He pointed to various social prejudices of the time that sometimes allowed witnesses to accuse others of crime based on entirely spurious and irrational grounds. His reforms were meant to include developing a rational way to determine the credibility and truth of witness claims. For example, Beccaria understood the credibility (and therefore the truth) of a witness's testimony to be directly proportionate to: that person's investment in or profit from the accused being convicted; the severity of the crime; and, whether or not the witness was a member of a secret society whose logic of veracity was founded on grounds different from those of mainstream society (p. 53).

Finally, Beccaria worried that it is “infinitely easier ... to found an accusation on the words, than on the actions of a man; for in these, the number of circumstances, urged against the accused, afford him variety of means of justification” (p. 51).

Consequently, he pursued ways to eliminate as much as possible not only the whims of magistrates in accusing subjects of a crime, but also the public’s potentially irrational and ulterior motives of vengeance or reprisal. He argued therefore that justice institutions should assign far less weight to a criminal’s or a witness’s recounting of events than to impartial material evidence collected from a crime. Indeed, for him, criminal accusation should depend less on caprices and opinions than on the irrefutability of the physical evidence garnered from a crime scene (Beccaria, 1819). In addition, where testimony was to be used to accuse someone, Beccaria thought that legislators ought to establish a metric by which legal proofs could be hierarchically arranged and tallied to determine logically whether an accused might justifiably be admitted to the criminal justice system. He insisted that such a metric of proofs should encompass all attestations, including imperfect proofs that might be used to vindicate the accused. At the same time, Beccaria argued that if exonerated because of the lack of evidence, the accused could be tried again in the future if sufficient evidence to form a proof became available (p. 115). Beccaria’s concern here suggests that to further justice at entryways to criminal justice required greater reliance on material evidence than witness testimony. When justice turned to the latter, it was to devise ways to measure the credibility of witnesses and tally proofs to test the truth of an accusation. As a further technique to avoid false accusations, he considered it entirely appropriate to inflict commensurate punishments on calumniators; that is, “the punishment, due to the crime of which one accuses another, ought to be inflicted on the informer” (p. 58).

However careful Beccaria wanted accusatory processes at entryways to be, he was mindful too that criminal justice required swift and certain judgments for the overall system to secure social order, and to reduce the torment of mind and body of those accused but not proven guilty. In this regard, Beccaria saw the importance of ensuring a rapid, though rationally thorough, procedural process from accusation to conviction:

The proofs of the crime being obtained, and the certainty of it determined, it is necessary to allow the criminal the time and means for his justification; but a time so short, as not to diminish that promptitude of punishment, which, as we have shown, is one of the most powerful means of preventing crimes. (p. 112)

That is, if punishment were to serve as an effective deterrent for crime, a well-defined association between the criminal act and its punishment had to be established specifically in the minds of offenders and generally for the wider public. But criminal law should rationally determine by measurement the appropriate time between accusation and punishment; that time might be expected to decrease with the “atrociousness” of a given crime. The more atrocious crimes should be expedited through the system to imprint in the public’s mind the connection between that crime and its punishment (pp. 48–51).

In all, by calling for such changes at entryways to criminal justice, Beccaria appears to have considered rational modifications to accusatorial procedures as a basic element of his stated normative end for criminal law—to secure social peace by reducing and preventing real crime (p. 48). Furthermore, following Montesquieu, he felt that how the system can accuse someone of a crime was intimately entangled with state governance as a whole (pp. 56–58). By suggesting, for instance, that all trials and accusations need to be made public, he posited that transparency is the “the only cement of society” that works to “curb the

authority of the powerful, and the passions of the judge” (p. 55). In addition, when criminal justice operates under the light of public observation, one can easily detect the lucidity of governance that situates its citizen confidently within a state’s borders.

The previously discussed techniques and procedures called for reforms to the way subjects were to be criminalized, and Beccaria justified them in various ways. We think it useful to give more details on his key justifications for they help us to glimpse further his sense of changed entryways to criminal justice. In particular, two matters were central to the reasons he offered for reorganizing these regulatory spaces: (1) the already-mentioned removal of discretionary powers from sovereignly sanctioned gatekeepers; and (2) the reasons for securing just prosecutions through publicly available (cf. secret) accusations that do not rely on torture or rewards, and that, by contrast, are prosecuted in a timely way, relying only on credible witness testimony.

Removing Magisterial Discretion from Entryways

As seen above, Beccaria responded to the 18th-century climate where entry to spaces that criminalized subjects were arbitrary and even tyrannical—steeped as they were in superstitions that accorded considerable discretion to authorized gatekeepers and enabled secret accusations, relied on torture as well as hearsay, rewards, deific signs, and dubious witness testimony. Beccaria’s attempts to rationally govern such entryways to criminal law were in large part an attempt to check significant abuses of power, signaling the transposition of Enlightenment ideas to the governance of the initial moments surrounding a criminal event. He might have seen the importance of extending rational governance to all facets of the system, from moments of apprehension to ensuring that the atrocity of a crime conformed to the measure of punishment inflicted. But his overarching reasons for so doing ran along two potentially conflicting lines of thought noted before. On the one hand, he argued that the recognition (identification) of criminal wrongdoers should be both “swift and certain.” On the other, he insisted on the importance of formally regulating and thereby limiting the arbitrary powers of accusation and prosecution.

To reconcile possible contradictions, he called for the latter to be achieved by pursuing efficient governance at entryways to criminalization via transparent and rational legal standards that would regulate authorized gatekeepers. These gatekeepers, for him, could do great harm when accorded vast discretionary powers. He consistently regarded arbitrariness at the entryways as concentrating power, allowing representatives of sovereigns to detain and punish subjects more or less with impunity. Hence, Beccaria called for codified (and here one might assume procedural) criminal laws to regulate gatekeepers and accusers, and to remove their discretion as far as possible. He estimated that the time was exactly right for such changes, because criminal law had been moving away from its previous attachments to monarchic sovereigns, or more specifically where the “crimes of the subjects were the inheritance of the prince” (1819, p. 69). Previously, punishments typically had turned on the imposition of fines, and crimes were tried not in courts of criminal law but in courts regulated by the exchequer. As he put it, in criminal matters, “the cause became a civil suit between the person accused and the crown” (p. 69). In such arenas, magistrates were accorded enormous powers of discretion, beyond what Beccaria considered necessary to public safety and welfare. Fittingly, punishments were calibrated on the basis that the judge was more “a collector for the crown, an agent for the treasury, than protector and minister of the laws” (p. 69). With such pecuniary motivations, accused subjects were

required to admit their debts to the Crown—one of the negative effects being that there were strong motivations for subjects to confess either to receive punishments that were more lenient, lesser fines, or indeed to avoid being tortured to secure confessions. In this context, the judge “becomes an enemy to the accused” and “inquires not into the truth of the fact, but the nature of the crime” with extreme powers to decide on what evidence would be sufficient to admit subjects into criminal justice controls (p. 70). Instead of this “offensive” kind of prosecution, Beccaria called for an “impartial inquiry into the fact, that which reason prescribes” (p. 71). Interestingly, he speculated that the older approach to prosecution would eventually appear as absurd to “happier posterity” (p. 71)!

To justify such clear limits on accusatory and juridical discretion, he appealed to the, “peaceful disciples of reason and philosophy” (p. xiv) to favor the “cause of humanity” and to use “enlightened reason” in matters of sovereign governance, that is, to rule “through freedom and happiness.” By extension, Beccaria insisted that all judges of criminality (and we would say this included accusatory gatekeepers) should “reason syllogistically” (p. 23). That is, for him, there could be no deviation from the idea that codified and publicly accessible laws should form the major premise. The minor premise would then become any action that stands in opposition to criminal law. This syllogistic reasoning would conclude with judgments of either “liberty or punishment” (p. 23). It should be noted that Beccaria took a firm and literal stance on this approach to entryways—anything that transcended this simple syllogism for him amounted to a slippery slope leading to the “introduction of uncertainty.” When gatekeepers provide too complex an array of ideas in their reasoning, calling for people to follow the spirit rather than the letter of laws (cf. Montesquieu), they become adherents of dangerous discretionary possibilities. The resulting effects could be profound:

Hence we see the fate of a delinquent changed many times in passing through the different courts of judicature, and his life and liberty victims to the false ideas or ill humour of the judge; who mistakes the vague result of his own confused reasoning, for the just interpretation of the laws. (p. 24)

In response, Beccaria explicitly called for a “rigorous observance of the letter of penal laws,” that may require reforms and adjustments over time, but that do not reproduce the structural problems associated with “arbitrary and venal declamations” (p. 24). For him, once criminal codes of law are fixed, they must be “observed in a literal sense, and nothing more is left to the judge than to determine, whether an action be, or be not, conformable to the written law” (p. 25). In other words, subjects of given societies could only acquire liberty and independence when the effects of tyranny were curtailed. In matters concerning entryways to criminal law specifically, Beccaria felt that people had become slaves to the capricious and flexible whims of magistrates. Interestingly, he conceptualized the “despotism of this multitude of tyrants” as something that could only be curtailed when the social “distance” between oppressor and oppressed was reduced, and when the discretion of the former to tamper with the lives of the latter removed. There is an interestingly ironic tone to his recognition that he would have “everything to fear if tyrants were to read my book,” but he added, rather sardonically, “tyrants never read” (p. 26).

So, at this stage of his work, Beccaria justified the use of rational entryways by arguing that any criminal justice system becomes fairer and more just in direct proportion to the extent that it conforms to the letter of the law as prescribed by public codes based on reason, and which prescribe syllogistic reasoning to deduce whether or not someone should be entered into the criminal justice system. As far as Beccaria was concerned, interpretations of the law lead only to unpredictable abuses of power, and therefore gatekeepers should be

required to follow the literal letter of the law, adhering to a simple syllogism that draws conclusions of entry (rationally calibrated punishment) or exit to criminal justice controls, based on impartial measures of action against a formal criminal code. Anything that interferes with such literal and basic calibrations of entry, including attempts to render law more complex, were to be regarded as steps leading to the tyranny of gatekeeping agents who threaten the effective and free governance of enlightened subjects of humanity.

One might thus read Beccaria's attack on magisterial discretion as an important, if often overlooked, element of his call for enlightened criminalizing and punishing practices. In many ways, he referenced a form of governance by which to engage a politics of recognition that would rationally select subjects for admission to criminal justice controls. Also, we have previously noted that he called for a separation of powers between the sovereign and authorized powers delegated to determine who should enter the criminal justice system. In his words,

The sovereign, who represents the society itself, can only make general laws to bind the members; but it belongs not to him to judge whether any individual has violated the social compact, or incurred the punishment in consequence. For in this case there are two parties, one represented by the sovereign, who insists upon the violation of the contract, and the other is the person accused, who denies it. It is necessary then that there should be a third person to decide this contest; that is to say, a judge, or magistrate, from whose determination there should be no appeal; and this determination should consist of a simple affirmation, or negation of fact. (p. 21)

Here Beccaria reinforced his sense that "fixed principles" should regulate judges as final gatekeepers when admitting subjects to criminal justice. Moreover, in their determinations of entry, judges must be bound to "facts," and their transposition within rational syllogisms. If this implies a political dimension to Beccaria's positive justification for rational, non-discretionary, criminalization, it also offers a negative set of reasons for strictly regulated, clear and certain processes of criminalization. More specifically, he claimed that if discretion were allowed to cloud the judgment of gatekeepers to criminal justice, then those subject to criminal laws could not have a clear or certain idea of whether specific actions would be counted as criminal or not. Further, this would negatively affect his classical deterrence argument regarding rational punishment made elsewhere in the text. More than this, though, those subject to the brute discretion of gatekeepers to criminal justice would be required to live uncertain lives, never knowing whether specific acts would be framed as criminal. This could produce great tension in their lives, and interfere with an ability to live peaceful, free, secure, and happy lives:

Without any certain and fixed principles to guide them, they fluctuate in the vast sea of opinion, and are busied only in escaping the monsters which surround them; to those, the present is always embittered by the uncertainty of the future; deprived of the pleasures of tranquility and security, some fleeting moments of happiness, scattered thinly through their wretched lives, console them for the misery of existing. (p. 56)

Rationalized Criminal Accusation

Referencing again the legacy of medieval entryways to criminal justice, as discussed above, Beccaria challenged as "weak government" the common tendency for entry to criminal law to be initiated by "secret accusations," a reliance on dubious witness testimony, enforced confession, and rewards for the apprehension of criminals. His challenge to each of these

was framed through specific critiques, the composite of which implied the importance of adopting his approach. It is worth then examining each of his critiques, recognizing that each serves as the basis for accepting the entryway procedures that he envisages as critical.

In devoting a chapter to the matter of “secret accusation,” Beccaria signaled the importance of his critique of the then common practice of allowing accusers to make secret criminal accusations of which the accused remained totally ignorant. Beccaria framed his opposition to secret accusation in no uncertain terms:

This custom makes men false and treacherous. Whoever suspects another to be an informer, beholds in him an enemy; and, from thence, mankind are accustomed to disguise their real sentiments; and from the habit of concealing them from others, they at last even hide them from themselves. Unhappy are those, who have arrived at this point! (1819, p. 56)

Indeed, when processes of accusation operate in the shadows of darkness and secrecy, they encourage inept forms of governance with disastrous social effects. Beccaria even noted a tendency for people to develop the habit of concealing their real motives and sentiments when accusing others, to such an extent that many even become unaware of the self-deception at hand. For him, this was a serious problem because it fosters situations where people use the pretext of accusing someone of committing a crime to mask personal grudges, discrimination, or other extraneous matters. This presented a formidable danger in which calumny could abound, and where no space is offered for accused persons to defend themselves. After all, the accusations against them would be secret and they might not even be aware of the specific allegations, or how these were mobilized into criminal accusations. He worried further that such secrecy would be antithetical to strong government and derided sovereigns who resorted to such secretive practices placing their subjects in perpetual fear and sacrificing the “repose” of subjects. In such contexts, he asked:

Who can defend himself from calumny, armed with that impenetrable shield of tyranny, secrecy? What a miserable government must that be, where the sovereign suspects an enemy in every subject, and, to secure the tranquility of the public, is obliged to sacrifice the repose of every individual. (p. 58)

This is why Beccaria so strongly advocated for criminal accusation to involve open, publicly accessible, non-secret accusations in which accusers and accused could challenge the versions of the events offered. Indeed, for him, false accusations should attract the same punishments as might have been meted out on the accused. Thus, all accusations that initiate processes of criminalization should be open to scrutiny and hold the accusers accountable for the truth of the avowals about the crime they make against others. That is, he called for publicly accessible forms of confession at the opening moments that arrest everyday life, and open up to criminal justice processes.

On a related note, Beccaria voiced his concern over the ways contemporary systems of governing entryways rely only on credible, truthful, and well-founded witness testimony. He coupled the “force of evidence” with the “credibility of witnesses,” and argued specifically that, “to determine exactly the credibility of a witness, and the force of evidence, is an important point in every good legislation” (p. 48). In other words, his use of measures to determine credible witnesses would lead criminal law to “determining exactly” the truth—and so credibility—of testimony. And how might it do so? First, it has to allow testimony only from those who possess, “common sense, that is, every one whose ideas have some connection

with each other, and whose sensations are conformable to those of other men” (p. 48). If this discounted the veridicality of those considered outside the bounds of “rational humanity,” it also demands that the law understand that the credibility of any witness’s testimony will “be in proportion as he is interested in declaring or concealing the truth” (p. 48). On this note, he also pointed out that many of the witnesses who were then discounted from giving legal evidence on spurious grounds should be allowed to testify when they have no reason to provide false evidence. This led him to an early statement that the law should hold to the simple letter of its precepts and not allow prejudices to interfere with its rational processes:

How frivolous is the reasoning of those, who reject the testimony of women on account of their weakness; how puerile it is, not to admit the evidence of those who are under sentence of death, because they are dead in law; and how irrational, to exclude persons branded with infamy: for in all these cases they ought to be credited, when they have no interest in giving false testimony. (p. 48)

So, if secret accusations were to be excluded when governing entryways to criminal justice, so too should evidence presented as truth but which can be shown to hail from motivations and reasons to provide false evidence. On this score, Beccaria turned his attention to the use of torture noted before. For Beccaria, the issue is this:

The torture of a criminal, during the course of his trial, is a cruelty, consecrated by custom in most nations. It is used with an intent either to make him confess his crime, or explain some contradictions, into which he had been led during his examination; or discover his accomplices; or for some kind of metaphysical and incomprehensible purgation of infamy; or, finally, in order to discover other crimes, of which he is not accused, but of which he may be guilty. (p. 59)

What he seems to be saying here is that it is impossible to take statements produced under, or even under the threat of, torture as true and credible legal evidence. His point is precisely that if entryways to criminal justice are to be just and fair, they cannot rely on statements produced through irrational, violent, and coercive measures. For example, torture may have been used to clarify disparities and contradictions in the accused’s examination, but he thought it entirely reasonable that such contradictions might surface given the accused’s “dread of punishment, the uncertainty of his fate, the solemnity of the court, the majesty of the judge, and the ignorance of the accused” (p. 62). It is in this sense reasonable for the accused to experience a “perturbation of the mind” when facing “imminent danger” (p. 62). As such, the veracity of statements produced through torture, whatever the claims for evoking such practices, were entirely counterproductive to justly selecting people for entry to criminal justice.

As well, Beccaria regarded as problematic the equally common practice of setting a “price on the head of a criminal, and so to make of every citizen an executioner” (p. 135). His critique here was addressed to the practice of offering rewards for apprehending criminals at large, arguing that this practice encouraged people to commit other crimes. He considered it as signaling a weak form of sovereignty unable to do its own work of bringing criminals to face rationally calibrated, but swift and certain, punishment. It was also a dividing and socially destructive practice with negative consequences for a sovereign because:

[H]e invites the suspecting minds of men to mutual [confidence], and now he plants distrust in every heart. To prevent one crime, he gives birth to a thousand. Such are the expedients of weak nations, whose laws are like temporary repairs to a tottering fabric. On the contrary, as a nation

becomes more enlightened, honesty and mutual confidence become more necessary, and are daily tending to unite with sound policy. Artifice, cabal, and obscure and indirect actions are more easily discovered, and the interest of the whole is better secured against the passions of the individual. (p. 137)

Here again one sees Beccaria trying to push for moderate and rational processes to select only “criminals” as viable targets for criminal law and its regulation.

Conclusion

During the time and space in which medieval and inquisitorial judicial practices were characterized by irrational, discretionary, secret, spurious, vengeful, tyrannical, and arbitrary procedures, Cesare Beccaria produced a text that was meant to illuminate what he saw to be a shadowy era. As an Enlightenment thinker who sought to offer a way of envisioning what a society might look like if governed according to principles of rationality and harmony, Beccaria helped inaugurate a form of reasoned criminal governance that, in effect, reverberates through society. This chapter has been concerned with a close re-evaluation of Beccaria’s small, but profoundly influential, *On Crimes and Punishment* with the underappreciated perspective that on top of rationalizing the relationship between crimes and their punishments, he also was concerned with rationally recalibrating criminal entryways.

Beccaria sought to ameliorate the tensions and contradictions in a system that reposed upon the vagaries of judges and magistrates where a crime personally offended the sovereign. Counter to existing forms of “offensive” prosecution whereby the sovereign and magistrate act as an “enemy” to the accused, Beccaria argued for the criminal justice system to establish a rational purpose beyond vengeance or reprisal. In consequence, he criticized many of the prevailing procedures that inaugurated individuals into the legal system. As we have shown, he especially condemned the use of secret accusation and trials, as well as torture in extracting a confession, as tyrannical methods that are contrary to not only the aims of the public good but also the purpose of reducing crime as such. In arguing for reason-based metrics in the procedures that permitted the entry of peoples into the criminal justice system, he challenged the value and nature of witness testimonies, promoted the decriminalization of smaller moral-based infractions, and advocated for the separation of powers that kept the sovereign one step removed from the legal system.

In this chapter, we have argued that by grounding criminal justice reform on utilitarian and contractarian principles, Beccaria reframed accusatory procedures, techniques, and rationalities in order to produce clear and just gateways that were public and minimalist. To do this, he had to understand what criminality meant in relation to state governance and so offered a socio-political analysis that implicitly resituated the proper citizen in the context of sovereignty politics. By framing a criminal as someone who violates the social compact, Beccaria effectively established a distinction between the accused and the convicted, between criminal and citizen that would be the hallmark of an enlightened, humane society. The focus on entryways suggests an important dimension of sovereignty politics and the rise of administrative state orders. Here laws, procedures, practices, and justifications through which people would be determined as criminal threats to order are decided. And where some might be inclined to say that this signals the rise of state sovereigns able to use the criminal justice system to command authorized agents on who to criminalize, Beccaria offered the beginnings of another story in which entryways, along with others, might be

taken as a key site in which the historical definitions of sovereignty are in part created. This might mean that far from entryways to criminal justice being defined by sovereigns, it is a recursive way by which sovereignty is itself generated (Pavlich, 2011). Could this mean that the persistence of many classical ideas found in Beccaria have survived precisely because of their ongoing political currency and utility?

Notes

- 1 Beccaria's *On Crimes and Punishments* remained on the Index until the Index was abolished in 1962 by then Pope John XXIII (see Maestro, 1973, p. 37).
- 2 Specifically Pietro and Alessandro Verri apparently wrote on behalf of Beccaria, which can be read at length in *On Crimes and Punishments and Other Writings* (Beccaria, 2008, pp. 102–150).

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