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Foundational Works on Law and Society

This chapter looks at four classical theorists who have had an indelible influence on contemporary views of law and society: Cesare Beccaria, Sir Henry Maine, Herbert Spencer, and William Graham Sumner. Although only Spencer and Sumner were sociologists per se, the concepts advanced by all four of these early writers provide a foundational knowledge-base on which to build and advance a modern sociology of law. As a consequence, we will see these theorists' notions concerning law and society reappear periodically throughout this book. Indeed, it is precisely because their works are pivotal to understanding the sociology of law that they are featured at the beginning of this text.

The purpose of this chapter is to show how Beccaria, Maine, Spencer, and Sumner were concerned with *social and legal change*. As such, they held two major ideas in common. First, they all believed that as the conditions of history change so will society's ideology, institutions, and values inevitably and concomitantly be altered (usually for the better). Near-contemporaries, Maine, Spencer, and Sumner expressed this idea of changing social conditions through the popular Victorian concept of evolution. Second, and related, all four classical thinkers believed that legal conceptions develop in a progressive fashion and, in so doing, they induce positive social reforms. These reforms produce, among other things, a fairer justice system, greater privatization of property, increased legal equality, and more effective regulation of immoral behavior. We begin by closely examining the writings of eighteenth-century Italian legal reformer, Cesare Beccaria.

Cesare Beccaria: Legal Reformer

Almost two and a half centuries after proposing his ideas for improving the legal and penal systems of Europe, Beccaria's philosophy remains an important topic of discussion in criminology and legal sociology. To be sure, he has long been considered a founder of the classical school of criminology and, as we shall presently

see, his proposals have shaped the legal systems of several countries, including that of the United States.

Life and Influences

Cesare Bonesana, Marchese di Beccaria (1738–1794) studied law at the University of Pavia (Italy) and received his doctoral degree in 1758. Ten years later he was given the position of Professor of Political Economy in the Palatine School of Milan. Beccaria was not just an ivory tower intellectual, however; he also acquired practical experience in jurisprudence with his appointment, in 1771, to be “a councillor of state and a magistrate” (Phillipson, 1923:22).

Despite his various accomplishments, Beccaria is today best remembered for one singular achievement: in 1764, at the age of twenty-six, he produced the highly renowned essay, *On Crimes and Punishments*. This slim volume, first published anonymously, was a scathing indictment against the brutal abuses of the legal and penal systems of eighteenth-century continental Europe. In short, the treatise was a clarion call to radically transform the penal system and criminal procedure of the time.

Beccaria’s ideas on penology were profoundly influenced by the social and philosophical thinking predominant during the eighteenth century’s Age of Enlightenment. The main currents of the Age of Enlightenment as a philosophical movement were: (1) the celebration of reason; (2) the importance of humanitarian ideals; (3) the search for knowledge, freedom, and happiness; (4) the emphasis on truth; and (5) the critiquing of the existing social order. More specifically, Beccaria’s notions about crimes and punishments were largely shaped by the Enlightenment philosophers—Thomas Hobbes (1588–1679), John Locke (1632–1704), Charles de Secondat Montesquieu (1689–1755), Francois-Marie Arouet de Voltaire (1694–1778), and Jean-Jacques Rousseau (1712–1778)—and their views of society as a social contract, and of human nature.

These philosophers regarded the basic feature of society as *contractual*. Society becomes contractual, they contended, when people surrender their innate pleasure-seeking proclivities to the political state and its laws. In other words, the individual citizen makes a bargain with the state in which he or she is concomitantly: (a) obligated to refrain from engaging in certain actions that are detrimental to society, and (b) entitled to receive certain protections that are beneficial to everyone. Thus, individuals surrender to the state some self-interests such as the freedom to do as they please, but in return they acquire from the state some needs such as peace and security. This consensual agreement preserves the social order by preventing what Thomas Hobbes called “a war of all against all.”

The social contract is based on the doctrine of **utilitarianism**, or the ethical philosophy that argues that all social, political, and legal action should be directed toward achieving the greatest good for the greatest number of people. The terms of the social contract are specified in the laws. Inevitably, however, there are those individuals who will breach those terms (that is, break the laws) and punishments must be introduced to instill fear in these persons and prevent them, and others with similar intentions, from violating the contract in the future. Thus, the state,

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operating from a utilitarian perspective, relies on punishment as a way of protecting the law-abiding citizens (the majority) from the criminals (the minority).

The Enlightenment philosophers' view of human nature was predicated on three characteristics: *hedonism*, *free will*, and *rationality*. First, the philosophers believed that people are basically hedonistic. **Hedonism** refers to a way of life based on the belief that pleasure is the chief goal and pain the main factor to avoid in human existence. From this perspective, individuals are seen as motivated by self-seeking desires. Second, the philosophers believed that people have **free will** to choose their own course of action. Thus, in their view, there are no external influences, spiritual or otherwise, determining an individual's behavior. Finally, the Enlightenment thinkers believed that since people are **rational** they logically and systematically contemplate the consequences of their behavior; that people weigh the pros and cons of their actions. Taking these three characteristics of human nature into account—hedonism, free will, and rationality—Beccaria concludes that individuals violate the social contract because of a volitional, rational choice they make to achieve maximum pleasure at the cost of minimum pain. But, even though lawbreaking may be personally gratifying to individuals, it is, nevertheless, a threat to the happiness and welfare of society. With these ideas in mind, Beccaria was intent on establishing a fair and rational legal system based on the doctrine of utilitarianism. He was fully convinced that the judicial and penal practices of his day had to be altered because they were grossly unfair and highly irrational. We now consider some of Beccaria's recommendations for legal reform.

Legal Reform

Generally, the legal and penal systems of eighteenth-century Europe were extremely abusive and brutal. Owing to the fact that much of it was unwritten, the law was frequently applied in an uncertain, haphazard, and biased manner. Put another way, legal obscurity gave court magistrates enormous latitude in interpreting and administering the law. Moreover, the fact that judicial cases were arbitrarily decided by the magistrates created a high degree of legal unpredictability.

Beccaria was writing at a time when it was common for people to be accused of crimes without their knowledge. The corruption of prosecutors and judges was also a widespread problem during the eighteenth century. Judges were easily bribed and offenders of wealth and high status usually influenced the court's decision in their favor. In addition, because there was little or no due process of law, the accused lacked legal protections such as the right to a speedy and public trial by an impartial jury. Finally, many punishments involved a variety of agonizing torments and the majority of offenses carried the death penalty.

Much of the repressive and desultory nature of the laws and penalties of continental Europe stemmed from its **inquisitorial system of justice**. Inquisitorial procedure began with the presumption that defendants were guilty of having committed the offenses with which they were charged. Under this system magistrates were given the power not only to judge, but also to charge and prosecute the accused. Furthermore, extracting confessions through the use of torture was done so frequently and effectively that confession was called the "queen of the proofs."

The inquisitorial system's harshness derived chiefly from the fact that it was influenced by canon (church) law and Roman law. Concerning the influence of canon law on the inquisitorial system, criminologist Paul W. Tappan (1961) explains that during the fifteenth and sixteenth centuries the Catholic Church established a tribunal of Inquisitions called the Holy Office. The Holy Office, which dealt specifically with offenses against the faith, not only deprived alleged heretics of the benefits of legal procedure, it regularly used torture in eliciting confessions. The punishments that the Holy Office commonly employed for the violation of canon law were extremely severe and consisted of burning alive, confiscation of property, excommunication, the pillory, and mutilation (Tappan, 1961:42).

The advent of Protestantism in the sixteenth century did little to improve inquisitorial brutality. For example, under Protestant theology the penalty for adultery in Electoral Saxony was death by the sword. And for the crime of sacrilege, the offender was broken on the wheel (Tappan, 1961:42).

The influence of Roman law also contributed to the cruelties and inequities of the administration of justice in continental Europe:

In France, where the law of the eighteenth century differed but little from that of the thirteenth, the Roman law was dominant, with its investment of broad discretion in the judges to determine both the definition of crime and the penalties to be imposed. The Criminal Ordinance of 1670 made quite detailed provisions for penalties, but they were similar to those of prior centuries: the death penalty in varied forms was applicable to numerous crimes; banishment was to Corsica, foreshadowing the later system of transportation; confiscation and civil death commonly accompanied these penalties; maiming, branding, flogging, the pillory, and the iron collar were employed as corporal penalties; consignment to the galleys and imprisonment for a term of years along with exile and servile public labor were designed as 'non-corporal afflictive punishment'; finally, a class of 'infamous punishments' was used, including public reproof, the deprivation of office or privileges, or other degrading penalties, these often combined with one of the other forms of penalty (Tappan, 1961:48-49).

In sharp contrast to the inquisitorial system of the Continent, England's **adversarial system of justice** provided several procedural safeguards. In English common law: (1) accusations were public; (2) the defendant was considered innocent until proven guilty; (3) the burden of proof was on the court; (4) the accused were allowed to confront their accusers; and (5) torture was not regularly practiced. To be sure, the English and the continental legal systems during the eighteenth century represented the two ends of a continuum (Currie, 1968:8).

In light of the abusive conditions on the Continent, Beccaria advances seven general recommendations for legal reform:

1. Beccaria declares that the legislature alone, and not the judiciary, should have the power to enact and interpret the law. Judges are not lawmakers and their responsibility must be limited to determining the guilt or innocence of the accused.

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This clear demarcation between the legislature and judiciary we now refer to as “the separation of powers.”

2. Beccaria argues that because society’s contractual nature does not discriminate between individuals on the basis of their social status, so too should the laws be applied equally regardless of a person’s station in life. In other words, *all* citizens, whether they be aristocrats or commoners, are to be guaranteed the equal protection of the laws. In order to ensure against legal bias and inequity, Beccaria calls for the accused to be judged publicly by an impartial jury.

3. Beccaria urges that the laws be written clearly and simply so that everyone is sure to understand them. In fact, he sees an inverse correlation between the comprehensibility of the laws and the crime rate: “When the number of those who can understand the sacred code of laws and hold it in their hand increases, the frequency of crimes will be found to decrease” (1988:17). Since not all laws were written down in the eighteenth century, individuals were often punished for actions they did not even know were crimes.

4. Following the Enlightenment philosophers, Beccaria reasons that since people are rational it is only logical that the laws also be rational. A rational legal code requires that the laws be stated generally and systematically so that they can be applied uniformly to similar types of conduct. In order to avoid ambiguity it is necessary that the law communicate clearly which types of actions are generally permitted or generally prohibited.

5. Beccaria recommends that the burden of proof be shifted from the accused to the court: “It pertains to the law, therefore, to indicate what evidences of crime justify detention of the accused, his subjection to investigation and punishment” (1988:19).

6. During Beccaria’s time there was no difference in treatment between the accused and the convicted. Attempting to rectify this injustice he writes that “a man accused of a crime, who has been imprisoned and acquitted, ought not to be branded with infamy” (1988:19). Thus, in Beccaria’s view, a defendant found innocent of a criminal charge must not be stigmatized with a negative label.

7. Beccaria vehemently denounces the secret accusations so prevalent in his day. Secret accusations not only encourage informers to lie, he says, they also create an atmosphere of suspicion where everyone is regarded as a potential enemy.

Beccaria’s objective in proposing the aforementioned reforms was to devise a system of laws that reflected and responded to society’s contractual character as well to people’s natural predisposition to seek gratification, decide freely their own course of action, and engage in rational thought. Accordingly, Beccaria envisioned a legal system that administered justice in a fair, equitable, and logical manner. Let us now consider Beccaria’s recommendations for reforming Europe’s system of punishments.

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Punishments

In eighteenth-century Europe, severe and cruel punishments were inflicted on offenders as a matter of course. The repressive punishments in vogue during that time included death by the gibbet, the mallet, the axe, by lashing, burning, breaking on the wheel, infamy, consignment to the galleys, branding, amputation of limbs, the pillory, and fastening to the horse's tail (Phillipson, 1923:32). Hundreds of offenses were punishable by death, usually in an aggravated fashion. French social historian Michel Foucault, for example, gives us a glimpse of the public torture and execution of Robert-Francois Damiens, the man accused of attempting to assassinate King Louis XV with a penknife. Damiens was executed in Paris in 1757, seven years prior to the publication of *On Crimes and Punishments*. The following account is taken from an eyewitness report:

. . . Then the executioner, his sleeves rolled up, took the steel pincers, which had been especially made for the occasion, and which were about a foot and a half long, and pulled first at the calf of the right leg, then at the thigh, and from there at two fleshy parts of the right arm; then at the breasts . . .

After these tearings with the pincers, Damiens, who cried out profusely, though without swearing, raised his head and looked at himself; the same executioner dipped an iron spoon in the pot containing the boiling potion, which he poured liberally over each wound. Then the ropes that were to be harnessed to the horses were attached with cords to the patient's body; the horses were then harnessed and placed alongside the arms and legs, one at each limb . . .

. . . at each torment, he cried out, as the damned in hell are supposed to cry out, 'Pardon, my God! Pardon, Lord.' Despite all this pain, he raised his head from time to time and looked at himself boldly. The cords had been tied so tightly by the men who pulled the ends that they caused him indescribable pain. . . .

The horses tugged hard, each pulling straight on a limb, each horse held by an executioner. After a quarter of an hour, the same ceremony was repeated. . . .

When the four limbs had been pulled away, the confessors came to speak to him; but his executioner told them that he was dead, though the truth was that I saw the man move, his lower jaw moving from side to side as if he were talking. One of the executioners even said shortly afterwards that when they had lifted the trunk to throw it on the stake, he was still alive . . . (Foucault, 1979:3-5).

Approaching penology from a perspective of Enlightenment humanitarianism compelled Beccaria to inveigh against the barbaric use of torture. Highly developed in his own country of Italy, the application of torture was measured by degrees: *levis* (light), *gravis* (harsh), and *gravissima* (very harsh) (Phillipson, 1923:35). As a result of Beccaria's treatise and similar literature produced around that time, torture in particular, but also Europe's general modes of legal punishment, were severely criticized for their savagery. Beccaria and other penal reformers argued for the fair

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and utilitarian administration of punishment. Indeed, Beccaria's objective was to use punishment not as a form of retaliation but as a deterrent.

Beccaria sees aggravated and violent punishments as possessing an element of overkill. Accordingly, he argues that punishment must be proportional to the crime and must not exceed its reasonable limits. In his view, punishment should not be simply a means of exacting vengeance and tormenting the offender; instead its primary purpose should be to *deter*, or prevent future acts of criminality. Beccaria further maintains that for punishment to be an effective deterrent it must meet three criteria: *severity*, *swiftness*, and *certainty*.

Considering people's hedonistic nature, the **severity of punishment** should just slightly outweigh the pleasure derived from the crime. Anything over that calculation, Beccaria contends, is superfluous and tyrannical. Moreover, Beccaria states that subjecting the offender to intense forms of castigation is counterproductive to the goal of deterrence. To his way of thinking the severity of punishment serves to incite individuals to commit the very crimes it is intended to prevent.

Based on the principles of what would later be known as behavioral psychology, Beccaria argues that **swiftness of punishment** is necessary so that the connection between the pleasure of the crime and the pain of the penalty is resolutely impressed in people's minds. "To this end, Beccaria suggests that the accused should be tried as speedily as possible in order to reduce to a minimum the time that elapses between the commission of the crime and its punishment" (Monachesi, 1972:44).

According to Beccaria, the third condition, the **certainty of punishment**, is the most important for successful deterrence. If people believe that there exists a high probability of getting caught and punished for their criminal actions, they, as rational individuals, will refrain from engaging in that behavior. In sum, Beccaria's three criteria of severity, swiftness, and certainty *decrease* the likelihood that punishments will be motivated by the irrational desire for revenge and applied arbitrarily. Conversely, the three criteria *increase* the likelihood that punishments will be motivated by the utilitarian goal of deterrence and applied systematically.

Finally, a few words must be said about Beccaria's opposition to the death penalty. In Beccaria's view, capital punishment is neither useful, just, or necessary and he inveighs against it for two main reasons. First, he believes that the intensity and momentary action of the death penalty is far less potent as a deterrent to crime than is the prolonged and painful duration of life in prison. Second, Beccaria sees capital punishment as a form of legal homicide, no different from the homicide committed by the criminal. According to him, the death penalty is useless because it is an example of the very barbarity that it seeks to prevent.

In the conclusion to his treatise Beccaria tersely sums up his ideas about reforming the penal system: "In order for punishment not to be, in every instance, an act of violence of one or of many against a private citizen, it must be essentially public, prompt, necessary, the least possible in the given circumstances, proportionate to the crimes, dictated by the laws" (1988:99). Beccaria's ideas were truly radical at the time that he proposed them. Nevertheless, it is noteworthy that his recommendations for overhauling the grossly unjust legal and penal systems of eighteenth-century Europe did not fall on deaf ears.

Beccaria's Influence in Europe and America

As a result of Beccaria's *On Crimes and Punishments*, legal and penal reforms took place in various European countries including Prussia, Russia, Sweden, Austria, and France. While England's legal system was undoubtedly more progressive than that of the Continent's, the former was by no means free of injustice. Indeed, Beccaria's ideas spurred the English utilitarian philosopher and penologist Jeremy Bentham (1748–1832) to speak out against the legal abuses in his own country.

The popularity and impact of *On Crimes and Punishments* also extended across the Atlantic to North America. To be sure, its "spirit" can be found in documents central to the political development of the United States such as the Declarations of Causes and Independence, the Constitution, and the Bill of Rights (Caso, 1975: 13). For example, Beccaria's concern with the excesses of punishments is found in the doctrine of *proportionality* as stipulated in the Eighth Amendment to the U.S. Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Founding Fathers Thomas Jefferson and John Adams were influenced by, and quoted from, Beccaria's book. Benjamin Rush, a noted physician and signer of the Declaration of Independence, also made reference to Beccaria in an essay that Rush wrote on the injustices of capital punishment (Maestro, 1973:137–143).

Clearly, Beccaria's recommendations for legal and penal reform have had a great influence in both Europe and America. Be that as it may, today's legal and penal systems in the United States are still endowed with a measured degree of quirkiness and bias. For example, opponents of capital punishment have argued compellingly that the death penalty is unfairly and discriminatorily applied against members of disadvantaged groups, namely, African Americans and the poor.

We now turn our attention away from Beccaria's efforts at legal reform in eighteenth-century continental Europe and toward legal influences during the Victorian period in England and America. In so doing we focus on the statements made by three near-contemporaries concerning the law and social change, the legal historian Sir Henry Maine and sociologists Herbert Spencer and William Graham Sumner. We begin with Maine since it is in his work that we may locate the first seeds of contemporary sociology of law.

Sir Henry Maine: Social Historian of Law

Sir Henry Maine's classic work on ancient legal history, and his notions about how certain types of law are connected to particular types of society, continue to enthrall students of the anthropology of law and the sociology of law. In this section we examine Maine's explanation of how legal conceptions are a product of historical development.

Life and Influences

Henry James Sumner Maine (1822–1888) spent his early childhood at Henley-on-Thames, England, until 1829 when he enrolled at Christ's Hospital (a char-

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