



University of Baltimore Journal of International Law

Volume 3
Issue 2

Volume III, No. 2

Article 2

2014-2015

2015

Cesare Beccaria, John Bessler and the Birth of Modern Criminal Law

Alberto Cadoppi
University of Parma, alberto.cadoppi@unipr.it

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ubjil>



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Cadoppi, Alberto (2015) "Cesare Beccaria, John Bessler and the Birth of Modern Criminal Law," *University of Baltimore Journal of International Law*: Vol. 3 : Iss. 2 , Article 2.

Available at: <http://scholarworks.law.ubalt.edu/ubjil/vol3/iss2/2>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Journal of International Law by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

**CESARE BECCARIA, JOHN BESSLER AND THE BIRTH
OF MODERN CRIMINAL LAW**

AUTHOR: Alberto Cadoppi Professor “ordinario” of Criminal Law and European and Comparative Criminal Law, University of Parma; Ph.D. in Criminal Law, Rome, 1988.

ACKNOWLEDGMENTS: I thank dr. Michele Boggiani for his help.

TABLE OF CONTENTS

I. FOREWORD	3
II. SUMMARY OF THE BIRTH OF AMERICAN LAW	3
III. OUTLINE OF THIS REVIEW	7
IV. UNCERTAINTY OF THE CRIMINAL JUSTICE SYSTEM IN THE 18TH CENTURY	7
V. BECCARIA ON LEGALITY AND THE CODIFICATION OF THE CRIMINAL LAW	10
VI. THE CRUELTY OF CRIMINAL LAWS IN THE 18TH CENTURY	14
VII. BECCARIA'S OPPOSITION TO CAPITAL PUNISHMENT	15
VIII. A BRIEF HISTORY OF THE DEATH PENALTY IN ITALY AND EUROPE	18
IX. PROFESSOR BESSLER'S CONTRIBUTION	22
X. IS BECCARIA STILL USEFUL TODAY?	23
XI. CONCLUSION	29

CESARE BECCARIA, JOHN BESSLER AND THE BIRTH OF MODERN CRIMINAL LAW

Alberto Cadoppi

I. FOREWORD

Professor Bessler's *The Birth of American Law* offers a contribution to the research on Cesare Beccaria of extraordinary value for legal historians and for legal scholars in general. Not only is the book extremely fascinating, but it gives us an enormous mass of information about the "celebrated Marquis" and his influence on the developments of the law and the legal jurisprudence in Europe and outside Europe over the last 250 years. Here follows a brief summary of Professor Bessler's book.

II. SUMMARY OF THE BIRTH OF AMERICAN LAW

The Birth of American Law is divided into six chapters, the first of which provides a biographical sketch of the Enlightenment philosopher and criminal-law theorist, Cesare Beccaria (1738-1794). A native of Milan, Beccaria first studied at a Jesuit school in Parma before getting his law degree in 1758 from the University of Pavia. A Roman Catholic and the eldest son of an aristocratic family, Beccaria was a voracious reader and read many books by leading Enlightenment writers, including Montesquieu and Rousseau. While still in his twenties, Beccaria wrote *Dei delitti e delle pene* (1764), a highly influential book that was translated into English in 1767 as *On Crimes and Punishments*. Although Beccaria never traveled to America, his book became both a European and American sensation. The "Marquis Beccaria," as he was often called, was hailed in America's founding era as a "genius," as "wise," and "immortal." Leading American founders, including George Washington, John Adams and Thomas Jefferson, bought Beccaria's book, and Beccaria's ideas were widely distributed and discussed in colonial and early America.

Chapter 1 of *The Birth of American Law* describes Cesare Beccaria's life in Milan, and highlights his participation in a reform-minded social club known as the Academy of Fists, a group known for his pugilistic debates. Alessandro and Pietro Verri, also members of the Academy of Fists, influenced and mentored the young Cesare as he

wrote *Dei delitti e delle pene*, along with members of that same group writing on a variety of subjects for *Il Caffè*, a leading periodical of the Italian Enlightenment. In 1763, Pietro Verri published *Meditazioni sulla felicità*, which translates as *Meditations on Happiness*, a subject that Beccaria himself then took up in *On Crimes and Punishments*. In a famous passage of *On Crimes and Punishments*, words later recited by America's Continental Congress in 1774 in a letter to the inhabitants of Quebec, Beccaria wrote: "In every human society there is an effort continually tending to confer on one part the height of power and happiness, and to reduce the other to the extreme of weakness and misery... [t]he intent of good laws is to oppose this effort, and to diffuse their influence universally and equally."

On Crimes and Punishments, the focus of Chapter 2 of *The Birth of American Law*, argued for proportion between crimes and punishments. Beccaria had a fascination with mathematics and became an economist, teaching economics in Milan and becoming a member of the Supreme Economic Council for the area in which he lived. Beccaria's book expressed the view that crimes are "distributed across a scale that moves imperceptibly by diminishing degrees from the highest to the lowest" and that there should be "a corresponding scale of punishments, descending from the most severe to the mildest." *On Crimes and Punishments* spoke out against torture, argued for proportionality between crimes and punishments, and became the first Enlightenment text to make a comprehensive case against capital punishment. Beccaria's book would inspire Dr. Benjamin Rush, a physician from Philadelphia and a signatory of the Declaration of Independence, to call for the abolition of the death penalty.

Chapter 2 of *The Birth of American Law* describes the translation of Beccaria's book into an array of languages. It recounts the reception and popularity of *On Crimes and Punishments* in countries like France, England, and the United States, and describes how it became a must-read text for lawyers, revolutionaries, and social reformers. For example, Chapter 2 describes how Beccaria's writings influenced the work of penal reformer Jeremy Bentham, the French *philosophes*, the Italian jurist Gaetano Filangieri, and American lawyers such as John Dickinson, Thomas Jefferson and William Bradford. In 1786, William Bradford—then Pennsylvania's attorney general—wrote to Luigi Castiglioni, an Italian botanist then touring America, that before the American Revolution, Beccaria's book "was common among lettered persons of Pennsylvania, who admired its principles without

daring to hope that they could be adopted in legislation, since we copied the laws of England, to whose laws we were subject.”

Chapter 3 of Professor Bessler’s book describes how *On Crimes and Punishments* influenced specific U.S. founders and framers. It describes how the views of the first four American presidents—George Washington, John Adams, Thomas Jefferson and James Madison—were shaped by Beccaria’s writings in various ways. For example, Thomas Jefferson copied more than two dozen passages from Beccaria’s treatise into his commonplace book. He also drafted legislation to severely restrict Virginia’s death penalty, legislation that James Madison advocated for as a state legislator. In 1807, Jefferson specifically recommended *On Crimes and Punishments* in a letter, and in the 1820s, in an autobiographical sketch, he wrote that Beccaria “had satisfied the reasonable world of the unrightfulness and inefficacy of the punishment of crimes by death.” Chapter 3 also describes how Beccaria’s writings influenced Jefferson’s Italian-American neighbor, Philip Mazzei; American generals; and various lawyers, attorneys general, penal reformers and jurists, including early U.S. Supreme Court Justices.

Chapter 4 of *The Birth of American Law* goes on to describe how Beccaria’s ideas shaped both European and American penal reform. This chapter recounts, for example, early law reform efforts in Pennsylvania, including those set forth in Pennsylvania’s 1776 constitution and in statutes adopted after the Revolutionary War (1775-1783). Reform efforts in other states, including Connecticut, New York, Vermont, South Carolina, New Hampshire, Virginia and Kentucky, are also covered in Chapter 4, with the chapter also broadening the lens to describe the national movement to reform America’s penal laws. In particular, Chapter 4 highlights provisions of various state constitutions and declarations of rights that were shaped by Beccaria’s ideas. James Wilson—a signer of the Declaration of Independence and the U.S. Constitution, and one of the figures covered in Chapter 3—repeatedly cited Beccaria’s ideas in his writings and law lectures, with James Madison once describing Beccaria as being “in the zenith of his fame as a philosophical legislator.” Chapter 4 ends by describing how American penal reformer Edward Livingston—a statesman fascinated by civil codes—was influenced by Beccaria’s views, which plainly shaped American law reform prior to the U.S. Civil War.

Chapter 5 of Professor Bessler's book goes on to document the rise of English and American penitentiaries. This chapter contrasts punishments under early English and colonial laws with those brought about through Beccarian reforms. Chapter 5 discusses both capital and non-lethal corporal punishments, highlighting the move away from "sanguinary" laws and punishments to the "penitentiary" system. In discussing the influence of Quakers and other like-minded reformers on the creation of America's penitentiary system, Chapter 5 shows how the use of penitentiaries became a popular alternative to harsh bodily punishments. This chapter further shows how Beccaria's ideas continued to influence American thought even decades after the founding era. For instance, Chapter 5 describes how one American poet wrote a whole poem titled "Crimes and Punishments," an homage to Beccaria's treatise. Early American penal reformers frequently cited Beccaria's ideas, which fueled the building of penitentiaries as American lawmakers sought viable alternatives to barbaric bodily punishments.

Chapter 6—the final chapter of *The Birth of American Law*—describes Beccaria's legacy, not only in shaping the American Revolution, but in impacting American laws for decades to come. Beccaria openly opposed tyrannical practices, and his ideas resonated with American revolutionaries who felt oppressed by the British monarchy. Chapter 6 details how Beccaria's ideas shaped a wide variety of legal debates and contexts, from American views on infamy, cruelty, debtors, and pardons to dueling, suicide, education, extradition treaties, and republicanism. America's legal system was shaped by English customs and its common-law tradition, but Chapter 6 shows that American laws were also profoundly shaped by Enlightenment thinkers, including Beccaria, from civil law traditions. The U.S. Constitution and its Bill of Rights, following Beccaria's call for clear and precise laws, set forth various legal rights in writing, with American laws—both at the federal and state levels—codified over time. In rejecting the English Bloody Code, which made scores of crimes punishable by death, America's Founding Fathers—as Chapter 6 demonstrates—adopted a more enlightened approach to the law as they crafted America's social compact during the American Revolution and in the years following the Revolutionary War.

III. OUTLINE OF THIS REVIEW

My contribution and my interpretation of John Bessler's book will be derived from my experience as an Italian law professor. Beccaria is very well known in Italy, and the Milanese Philosopher is particularly popular among experts of philosophy and criminal law. Both historians of the criminal law and criminal lawyers who deal with modern criminal law are interested in the works of Beccaria and know well his famous book *Dei delitti e delle pene*. Being both a Criminal Law historian and a Professor of modern Criminal Law, I have always been particularly fascinated by Beccaria's ideas.

IV. UNCERTAINTY OF THE CRIMINAL JUSTICE SYSTEM IN THE 18TH CENTURY

First of all, I would like to describe very briefly the state of the criminal law in Italy and in most parts of Europe at the time when Beccaria wrote his essay *On Crimes and Punishments*. The criminal law of the *ancien régime* was dominated by the so-called "*Ius Commune*" which is nothing else than the Latin translation of "*Common Law*". This should not surprise anyone, because if we think of the structure of the Common Law in the English tradition, we notice that the English Common Law was typically an unwritten law. The Common Law of England was developed through centuries. The law was mainly developed by opinions of judges and courts, even though, of course, some statutes also existed. The main problem with the English Common Law was the lack of a complete system of written laws.

Bentham, who wrote some years after Beccaria, harshly criticised the nature of the English Common Law, precisely for this reason. It is well known that Jeremy Bentham compared the system of the English Common Law to the system of education of a dog.¹ In this system, you do not tell your dog his duties and prohibitions in advance. You wait until the dog does something wrong, and when he does it you use the stick and hit the dog. According to Bentham's opinion, this was the way in which the Common Law worked. Citizens could not avail themselves of any written law capable of ex-

1. JEREMY BENTHAM,, THE WORKS OF JEREMY BENTHAM VOL 5 235 (John Bowring, ed. 1843). See also H.L.A. Hart, *Beccaria and Bentham*, in *ATTI DEL CONVEGNO INTERNAZIONALE SU CESARE BECCARIA* 19-29 (Torino Accademia delle Scienze, 1966).

plaining to them in clear words the commands of the law itself. They did not have any written laws. They had to wait until a judge delivered a decision deciding whether their conduct was right or wrong, and perhaps deserving of criminal punishment. Such a system was against the very core of the scheme conceived by Bentham, founded on the utilitarian principle.

The system employed in Continental Europe was not very different from the English one. In Europe, they only had a small number of written laws. The sources of the law were mainly the Roman laws, very ancient laws based on the Justinian Digest. The decisions of the courts, then, had a great importance. For the rest, institutional writers had influence, though it would go too far to say that they counted as real sources of the law.

What in Continental Europe is called “Principle of Legality”, which is sometimes referred to as the Rule of Law in the US, and is described by the Latin maxim *Nulla Poena sine Lege*, was at that time far from being fully recognised. This led to real chaos in the Legal system. People were not capable of knowing in advance the real contents of the Law.²

Alessandro Manzoni, grandson of Cesare Beccaria, was an important Italian writer of the 19th century. In his bestselling novel *I Promessi Sposi*, he described the scene of one of the leading characters, Renzo, who had to go to the lawyer, in order to ask for advice for the protection of his wife-to-be, Lucia, who had been kidnapped by a nobleman. He went to the lawyer’s office, who had an impressive library, full of very old and big books. When Renzo asked the advice of the lawyer, the lawyer, named Azzecagarbugli (literally, tangle-guesser), took some enormous books from the shelves and started reading them. However, the books were in Latin and Renzo of course could not understand a word of what the lawyer was saying. The scene was funny in a way, but dramatic in another. Manzoni was describing the state of society and of the justice system in Italy, particularly in Milan, at the beginning of the 17th century, when Milan was under Spanish domination.

At that time, noblemen belonged to a higher class of people who often harassed the poor, and average citizens were subject to the law

2. See generally, ALBERTO CADOPPI, *IL VALORE DEL PRECEDENTE NEL DIRITTO PENALE*, (2nd ed. 2014) (discussing Beccaria and the Principle of Legality).

without having any real chance of knowing it. The main problem was that there were no written laws or at least no laws (or very few of them) written in the language of the people, Italian. All the texts were written in Latin, and even Criminal Law treatises were written in Latin.

Further complicating matters, the law was very uncertain because there were no criminal codes or clear criminal laws. Judges, for their part, did not generally contribute to make the laws any more certain. It is true that some important courts (*Tribunali*), distributed around Italy and Europe, were quite influential, and some of the most important decisions of these *Grandi Tribunali* were taken into account by judges in order to deliver a decision.³ Nonetheless, judges were subject mainly to their own Kings or Lords, and their decisions were probably more political than juridical.⁴ This is why injustice was very common. Poor people had to always succumb to richer people and equal treatment of citizens was just a dream.

Beccaria, when writing *On Crimes and Punishments*, had this kind of system in front of him. In the Fifth Italian Edition of his book, a famed foreword was added. It is called “*A chi legge*” (“*To the Reader*”), and there he harshly criticised the uncertainty of the criminal laws of his time:

“A few odd remnants of the laws of an ancient conquering race codified twelve hundred years ago by a prince ruling at Constantinople, and since jumbled together with the customs of the Lombards and bundled up in the rambling volumes of obscure academic interpreters – this is what makes up the tradition of opinions that passes for law across a large portion of Europe.”⁵

-
3. See Gino Gorla, I “Grandi Tribunali” Italiani fra I Secoli XVI e XIX: Un Capitolo Incompiuto Della Storia Politico-Giuridica d’Italia 629-652 (1969)..
 4. See generally Alberto Cadoppi, La Gran Congiura Il Processo di Ranuccio I Farnese contro I Feudatari Parmensi (1611-1612)(2012) (describing the famous trial for the “conjuraton” against Ranuccio I Farnese, Duke of Parma, that lead to the final execution in the main public square of many feudal lords not considered loyal enough by Ranuccio. The judge was in fact following the instructions of the Duke and of his cunning secretary)..
 5. Cesar Beccaria, *On Crimes and Punishments* (Philadelphia, Philip Nicklin, ed., 2d ed., 1819). The early English or American editions of the book did not contain this part.

Illustrious jurists such as Carpzovius⁶, Clarus⁷, and Farinacius⁸ were depicted as examples of those “obscure interpreters,” whose often unpredictable opinions were “obeyed as laws” by the judges of his time.

V. BECCARIA ON LEGALITY AND THE CODIFICATION OF THE CRIMINAL LAW

An important part of *Dei Delitti e delle Pene* is devoted to the so-called Principle of Legality. Let’s read a part of Chapter III:

“The laws only can determine the punishment of crimes; and the authority of making penal laws can only reside with the legislator, who represents the whole society united by the social compact. No magistrate then, (as he is the one of the society) can, with justice, inflict on any other member of the same society punishment that is not ordained by the laws”.⁹

In Beccaria’s view, the judge has no power to interpret. Nor he can refer to the spirit of the laws. Let’s read a bit from Chapter IV:

“There’s nothing more dangerous than the common axiom, *the spirit of the laws is to be considered*. To adopt it is to give away to the torrent of opinions. This may seem a paradox to vulgar minds, which are more strongly affected by the smallest disorder before their eyes, than by the most pernicious though remote consequences produced by one false principle adopted by a nation”.¹⁰

The first Criminal Code enacted in Europe was the Austrian Code of Joseph II of 1787. The Austrian Emperor followed the ideas of the celebrated Lombard philosopher. His Code was a comprehensive code composed by a huge General Part and by an extensive Special Part. Joseph II abolished the death penalty, as suggested by Bec-

6. See Benedikt Carpzov, *Practica nova Rerum Criminalium* (1635). Important also was the Böhmer edition, 5 vols., Frankfurt am Main, published in 1758..

7. See Giulio Claro, *Receptae Sententiae* (1568).

8. See Prospero Farinacci, *Praxis et Theorica Criminalis* (1594).

9. BECCARIA, *supra* note 6.

10. BECCARIA, *supra* note 6.

caria. The Austrian Emperor kept the death penalty only for exceptional political offenses, but he abolished capital punishment for every other kind of offense.

In Italy, in 1786, the so-called *Leopoldina* was adopted by the Grand Duke of Tuscany Peter Leopold. The *Leopoldina*, following Beccaria, abolished capital punishment for every kind of offense, with no exception. It also abolished the infamous category of Crimes against the Sovereign (*Crimen Laesae Majestatis*), known in English Law by the name of “Treason”. However, from the point of view of the Principle of Legality, we cannot call this act adopted in Tuscany a real Criminal Code, because it was not really comprehensive, and the previous laws, even Roman laws, could still be applied in case gaps existed in the new law. It must also be said that some years after, the death penalty was reintroduced both in Tuscany and in Austria.

After Beccaria, the idea of a Code and the idea of “Codification” spread all over Europe. In 1791, the French enacted a Criminal Code, which followed the ideas of Beccaria. For example, the Code of 1791 provided for fixed criminal penalties. That is to say that the judge did not have any discretion in sentencing: the sanction was fixed and there were no minimum nor maximum penalties provided for each offense. The idea was that a judge should not have any kind of discretion, even in determining the right amount of punishment for any particular case.

Nevertheless, the French Code of 1791 was not completely satisfying in terms of legal certainty, because the General Part of this Code was quite slim, and not very well developed. This means that when a judge had to apply a particular offense, he would not have sufficient guidelines in the General Part enabling him to find the right solution for the case. Let us think, for example, about *mens rea* notions such as “intention” or “recklessness”. If the General Part of the code does not say anything about these concepts, there is no way for a judge to find the answers to these problems in the written law. He would be obliged to resort to precedents or to his own understanding of the law.

In Italy, the movement towards Codification developed in the same years. In 1787, a draft Criminal Code for Lombardy was prepared. Then, in 1791, a commission to prepare a draft Criminal Code was appointed by the Austrian Government that ruled Lombardy at that time. One of the members of this commission was, as Bessler points out in his book, Marquis Beccaria.

The code of 1791 was partially drafted and a version of it is still held in the archives in Milan. In 1975 Professor Adriano Cavanna wrote a very important book on the early history of the Codification of the Criminal Law in Italy.¹¹ He analyzed the manuscript of the draft code held in Milan. He remarked that the Italian approach to codification was something in between the Austrian and the French ones. The Italian Code envisaged by Beccaria and his companions was composed of a pretty large General Part, dealing with the most important concepts related to the notions of crime and punishment. Nonetheless, the style of this code was different from the Austrian one. The latter was more a Criminal Law treatise than a code, while the former was more strictly compiled in the spirit of the written law. The commands of the law were quite precise, and not too “scientific”, but at the same time, the Italian approach avoided the shortcomings of the French code of 1791, since it was not so sparing in describing the general elements of the crime.

In Milan, in the following years, and under different dominations, more draft criminal codes were written. The most important one was completed in 1806. It was then published in Brescia in 1807 and commented on by various Italian judges and professors. This Criminal Code was quite in line with the partial code drafted in 1791 by Beccaria and other jurists. Also, it confirmed the same drafting method, which then became known as the Italian approach to the Criminal Code.

In 1810 the Napoleonic *Code Pénal* was enacted. It was a little bit more developed than the one of 1791, so it was a bit more in the spirit of the code conceived by Beccaria and by the Italian drafters of the end of the 18th century and the beginning of the 19th century. The style, though, was still resoundingly the French approach. In other words, the general concepts of crimes were not fully developed as in Austrian, German or Italian codes of the time. However, the Napoleonic Code of 1810 became the law of many parts of Europe because of the growth of the Napoleonic Empire. The Code of 1810 would become a model for many other codes in the future, even though it was not as good as the civil code of 1806. The great Napoleonic code was a civil one, as opposed to criminal code. The *Code*

11. See generally, Adriano Cavanna, *La Codificazione Penale in Italia, Le Origini Lombarde* (1975).

Pénal was too authoritarian, and it reflected the tyrannic ideas of the Emperor so, in the end, it did not thoroughly reproduce Beccaria's proposals, especially in the field of moderation of punishments. For example, capital punishment was not abolished at all, but was applicable throughout the Code to a great number of offenses. More generally speaking, the penalties were very harsh, and some kinds of punishments strongly criticised by Beccaria were adopted in that code.

In 1815, as we all know, the fortunes of Napoleon collapsed. The Napoleonic code, at least the criminal one, was repealed in many countries in the Restoration period. In Italy, every little State enacted their own new Criminal Code. In 1819, the Kingdom of Naples adopted the first Criminal Code; in 1820, in Parma, the Parmesan Criminal Code was enacted. In 1832, in Rome, the Code of the States of the Church was approved. In 1839, in Turin, they enacted the Criminal Code for the Kingdom of Sardinia. In 1853, in Florence, the Criminal Code for the Grand Duchy of Tuscany was adopted. In 1855, in Modena, the Criminal Code for the Duchy of Modena and Reggio came into force.

In 1859, in Turin, a second edition of the Code of 1839 was printed, after the adoption of the so called "*Statuto Albertino*" which was a sort of Constitution. In 1861, Italy united and lawmakers had to think about the codification for the unified Country. For a number of years, they were not able to adopt a new criminal code for the whole Nation. They extended the application of the code of the Kingdom of Sardinia to the rest of the Country, but excepted Tuscany, where the code of 1853 continued to be in force. The main reason for this was that the Tuscan Code did not provide for the death penalty (abolished some years before). Tuscans did not want a code that they considered to be bloody because of its retention of the death penalty.

In 1889, finally, the so called "Zanardelli Code" was enacted for the whole Country. It was a liberal code, and most of Beccaria's ideas were followed. For example, in that Code the death penalty was completely abolished.

Nonetheless, Italy was not the only Country where this movement towards codification was heeded. In most European countries, during the 19th century, either the Napoleonic Code of 1810 remained in force, perhaps with modifications, or new codes replaced it. By the mid-19th Century almost all the countries of Europe had

their own criminal codes, in the style of the French code, while also not forgetting the ideas matured in Milan at the end of the 18th Century and during the beginning of the 19th Century, in the codes drafted by Beccaria and his followers.

This digression on the history of codification of continental Europe enables us to say that the ideas of Cesare Beccaria were followed all over Europe and one century after the first anonymous edition of his book in Leghorn, his conceptions on the needs of a Criminal Code and of codification were accepted and put in practice everywhere in Europe. Even in Britain, where they do not yet have a Code, the codification movement was very strong during the 19th Century, thanks to the work of various thinkers, but especially of Jeremy Bentham, a follower, on this matter, of the “celebrated Marquis.”

VI. THE CRUELTY OF CRIMINAL LAWS IN THE 18TH CENTURY

The law that Beccaria had in front of him back in the mid-18th Century was not only chaotic and without any certainty, but also incredibly harsh. The punishments were unbelievably cruel, and poor people who committed perhaps little offenses were castigated by the criminal law in a brutal manner.

The humanitarian ideas of the Milanese Marquis were totally opposed to this kind of barbaric society. The criminal law was, in name, a branch of the law but in fact, it was really a pitiless fight against any sort of criminals. The types of punishments were the most bizarre.¹² Capital punishment of course was the most widespread and the best known by modern people. Nonetheless, the death penalty was not just the death penalty. “Death penalty” meant that people could be killed and then cut in slices to be exposed to the public in the various quarters of the town. The head had to be put on a pole and left to the sight of people for days. The purpose of this was to frighten the people and make them aware of the dangers of breaching the law.

12. See ALBERTO CADOPPI, *TRA STORIA E COMPARAZIONE, STUDI DI DIRITTO PENALE COMPARATO* (2014) (discussing the history of the codification of criminal law in Italy and Europe).

Other barbaric types of punishments were, for example, the “brand”, or the “pillory”, and other kinds of “infamy”. Also, one very harmful punishment was the “confiscation,” which still exists today in many law systems, even if in a very different form from what it was then. In the middle of the 18th century confiscation meant that for certain offenses, the whole properties of the accused were seized and subsequently confiscated. This meant that not only the accused, but the whole family would lose all its property and all its money. This way, the sons and daughters would receive very heinous consequences from the crimes committed by their fathers.

VII. BECCARIA’S OPPOSITION TO CAPITAL PUNISHMENT

Beccaria opposed this entire system. He strongly maintained that the need for proportion between crimes and punishment was a tenet of the criminal justice system. He thought that any punishment exceeding the minimum one required to restrain criminals from committing the offence was arbitrary and tyrannical. John Bessler describes this very well through an explanation of the theories of Beccaria and tells us how his ideas were subsequently accepted by the most sensible men around the world.

Beccaria is well known for his opposition to the death penalty. He thought that the death penalty was unjust. Beccaria was a follower of the theory of the social contract. In his view, nobody, while accepting the social contract, would be ready to put his own life into the hands of the Sovereign or of the State. This is how Beccaria puts it:

“What *right*, I ask, have men to cut the throats of their fellow creatures? Certainly not that on which the sovereignty and laws are founded. The laws, as I have said before, are only the sum of the smallest portions of the private liberty of each individual, and represent the general will, which is the aggregate of that of each individual. Did anyone ever give to others the right of taking away his life? Is it possible that, in the smallest portions of liberty of each, sacrificed to the good of the public, can be contained the greatest of all good, life? If it were so, how shall it be reconciled to the maxim which tells us, that a man has no right to kill himself,

which he certainly must have, if he could give it away to another?"¹³

The reasoning of Beccaria, though surely not new,¹⁴ was bright and astute, in a way. In fact, on the one hand, it is logical to think that a person would not be inclined to put his own life in the hands of the State. On the other hand, Beccaria's reference to suicide is quite sly. As we all know, the Church, surely the Roman Catholic Church, did not allow suicide. Suicide was prohibited by religion. Beccaria, when he wrote his book, lived in a deeply Catholic country, to the point that even the law was strongly influenced by religion. The Church was very powerful. His book contained many revolutionary ideas that the Church would not at all appreciate at the time.

It is well known that the Church had used the death penalty for centuries in Europe during the Inquisition. The proposal to abolish the death penalty was, at that stage, against the convictions of the Church. Beccaria, though, with a very subtle argument, tries to make use of religion itself in order to show the unlawfulness of capital punishment. Religion prohibited suicide, and if it prohibited suicide it meant that the life of men was not considered in the hands of men themselves. So no man could dispose of his life by surrendering it to the state, when adopting the social contract.

It is not my purpose here to follow all the arguments of Beccaria about the abolition of the death penalty, but I would like to add that the Italian Marquis not only thought that the death penalty was unjust, but also that such a punishment was not useful. Beccaria (as Bentham) being a utilitarian, once he demonstrated that the death penalty was useless, he had negated any good reason to keep it.

So even if a King or Sovereign thought that inflicting the death penalty was lawful, he should not make use of it, simply because it is not useful. In order to demonstrate the uselessness of the death penalty, Beccaria resorts to the argument that perpetual slavery (life imprisonment) would be a harsher penalty than death itself. As John Bessler reminds us in his book, the arguments employed by Cesare Beccaria for demonstrating the case for the abolition of the capital

13. BECCARIA, *supra* note 6 at Ch. 28.

14. See Gianni Francioni, *comments in footnote 1 of CESAR BECCARIA, ON CRIMES AND PUNISHMENTS* (Luigi Firpo ed., national ed. Vol I).

punishment are still more or less the same today. Bessler quotes Bentham, who said: “The more we examine the punishment of death, the more we shall be induced to adopt the opinion of Beccaria. This subject is so well discussed in his work that there is scarcely any necessity for further investigation”¹⁵

Beccaria was likely not so optimistic about the prompt acceptance of his revolutionary opinions by monarchs or Governors. He used as a motto at the beginning of his book a famous maxim by Bacon: “*In rebus quibuscumque difficilioribus non expectandum, ut quis simul, et serat, et metat, sed praeparatione opus est, ut per gradus maturescant*” (“In the most difficult things one must not expect, to sow and harvest at the same time, but there must be a preparation in order that they gradually mature”). He probably thought that the abolition of the death penalty would take a very long time.

One problem with the discussion about capital punishment by Beccaria is that he apparently puts two exceptions to his idea of abolishing this type of punishment (Ch. XXVIII). One of them is when the criminal,

“though deprived of his liberty, he has such power and connections as may endanger the security of the nation, when his existence may produce a dangerous revolution in the established form of government. But even in this case, it can only be necessary when a nation is on the verge of recovering or losing its liberty, or in times of absolute anarchy, when the disorders themselves hold the place of laws: but in a reign of tranquillity, in a form of government approved by the united wishes of the nation, in a state well fortified from enemies without and supported by strength within, and opinion, perhaps more efficacious, where all powers lodged in the hands of a true sovereign, where riches can purchase pleasures and not authority, there can be no necessity for taking away the life of a subject”.

In the Italian versions of the book, since the first edition, Beccaria added a second possible reason for capital punishment. According to Beccaria, the second case in which capital punishment might

15. John Bessler, *The Birth of American Law: An Italian Philosopher and The American Revolution*, 454 & 564, fn. 78 (2014).

be thought of as “just and necessary” is when the death of the convicted person is “the only means for preventing other people from committing criminal offences”. It is interesting to notice that there is no trace of this second case in the best known English translations of the late 18th Century and early 19th Century. It is not clear why the translator of Beccaria’s *Essay on Crimes and Punishments* omitted this second possible motive for applying capital punishment. This could be an interesting investigation to be pursued in the future. It might be added here that even in Morellet’s famous translation in French of 1765 the second case was eliminated.

After citing this second reason for possibly inflicting capital punishment, Beccaria concludes that the death penalty is not necessary, or useful. As a matter of fact, Beccaria thinks that perpetual slavery can be more efficacious than capital punishment even in this case.

Summarising Beccaria’s ideas on the death penalty, we should say that first of all he thinks that the death penalty is always against justice. It can be necessary, although still unjust, only when the criminal can be dangerous to the survival of the whole nation just because he is alive. In this case, the death penalty might be inflicted, but as a war against the criminal and not out of justice: and only “in times of absolute anarchy”. In different cases, even when it might be thought to be “the only means for preventing other people from committing criminal offences”, the death penalty would not be as useful and effective as perpetual slavery.¹⁶ Moreover – Beccaria says – “The punishment of death is pernicious to society, from the example of barbarity it affords [...] [i]s it not absurd, that the laws, which detest and punish homicide, should, in order to prevent murder, publicly commit murder themselves?”

VIII. A BRIEF HISTORY OF THE DEATH PENALTY IN ITALY AND EUROPE

The abolitionist idea maintained by Beccaria made its way into legal thought much faster than the “celebrated Marquis” himself thought was possible. We can cite again the law enacted in Tuscany in 1786, the so-called *Leopoldina*, where the Grand Duke Peter Leopold abolished the death penalty. Then, in the following year (1787),

16. BECCARIA, *supra* note 6 at Ch. 28.

the Emperor Joseph the Second, in Austria, rejected the death penalty as well in his Criminal Code. However, the death penalty was not abolished totally in Austria, it was left alive in cases of serious political offences, such as treason and related offences. Unfortunately, these reforms adopted in some European states shortly after Beccaria's book did not last long. We cannot re-write the history of the death penalty, but it is noticeable that in some years, these two reforms, both in the Austrian Empire and in Tuscany, were repealed, and the death penalty was restored. In continental Europe, we had to wait for one more century for a new wave of abolitionism. As we all know, during the French Revolution, the death penalty was abused, and Robespierre, who in his speeches, following Beccaria, was a convinced abolitionist, in the end, became the protagonist of the so-called "Reign of Terror" of revolutionary France.

In Italy during the 19th century, the debate about capital punishment started again. Tuscany was once again the first Italian State where they succeeded in abolishing capital punishment in 1859. In the rest of the peninsula, capital punishment continued to apply. Then, after Italy got united, in the 1860s, there was a huge debate about abolition of that penalty. Among the most important Italian criminal lawyers opposing the death penalty, we may cite Francesco Carrara, professor of Criminal Law at University of Pisa, who strongly advocated for the abolition of capital punishment. This movement was not only national, but also international.

In March 1871, then Minister of Justice Pasquale Stanislao Mancini, a strong supporter of the abolition of capital punishment, officially inaugurated in Milan a monument in remembrance of Beccaria. The opening ceremony of the monument was very interesting and the proceedings of it have been published in a book.¹⁷ Many people around Europe donated money for the erection of the monument. Also, the erection of the statue and its touching ceremony was likely particularly effective in convincing people around Italy that the country was ready for the abolition of capital punishment.

As a matter of fact, when the new criminal code was enacted in 1889, Pasquale Stanislao Mancini was not the Minister of Justice anymore, but his battle was won. In the name of Cesare Beccaria, the death penalty had been abolished in the whole Country with that very

17. Cesar Beccaria e L'Abolizione Della Pena di Morte (Milano, 1872)..

important new code. The so called Zanardelli Code was very appreciated around the world. Not only did South American Countries adopt codes similar to the Zanardelli Code, but also some European Countries used it as a model in drafting their own codes. It is quite noticeable that even the Queensland Criminal Code of 1899 (in force from 1901) was the product of three models, one of which was the Italian code of 1889. The drafter of the Queensland Criminal Code was Samuel Walker Griffith, a judge originally from Wales who became one of the most influential lawyers in Australia.¹⁸ He knew Italian, as many of the American founding fathers did, and he was given a copy of the Zanardelli Code by a friend of his who had visited Italy just after 1889. A number of provisions of the Queensland Code were derived from the Zanardelli Code, especially in the General Part. Justice Griffith did not go as far, though, as abolishing the death penalty.

The history of the death penalty is a long one to tell but surely we can proudly say that in recent decades, practically all the countries in Europe have done away with it.¹⁹ Recently, even the European Human Rights Convention was amended to provide for the total abolition of capital punishment. In 1983 a Protocol was added to abolish the death penalty in time of peace, while in 2002 the abolition was extended to crimes of war.²⁰

The abolition of capital punishment has now a constitutional recognition in Europe, so that it would be almost impossible now for a European Country that ratified the aforementioned Protocols to re-adopt it. If a European Country re-enacted capital punishment now, a citizen living in that country could appeal to the European Court of Human Rights, and the Country (except for the few ones that did not ratify the Protocols) would surely be convicted by the European Court of Human Rights for that reason.

In Italy, in 1930, a new Criminal Code was enacted. 1930 was in the middle of the Fascist era and that is the reason why that Code – the so called *Codice Rocco* – re-adopted the capital punishment. It

18. See, Justice K.A. Cullinane, *The Zanardelli Code and Codification in the Countries of the Common Law*, 7 James Cook U. L. Rev. 166 (2000).

19. While the death penalty still exists in Russia, after some moratoriums, it has not been applied since the mid 1990s.

20. This Protocol has been signed and ratified by most states, except Russia and Azerbaijan; Armenia signed it but did not ratify it yet.

was a very bad period for Italy. Jews had to escape the Country. For about 20 years in Italy there was no more democracy and instead, we had tyranny and dictatorship. Benito Mussolini was the dictator, and, similar to Germany, we experienced a period of Authoritarianism. Accordingly, capital punishment was reintroduced in the criminal code. Many people were executed in those years, especially for political reasons. It is interesting to note that the politicians who advocated for the reintroduction of capital punishment in the Code had to “manipulate” Beccaria’s ideas, arguing that he did not really support its abolition.

After the fall of Fascism, in 1947, a new Constitution was adopted in Italy, which provided for the abolition of capital punishment. The abolition was not total, though, because it was still available in cases of military laws of war. In 2007, even that particular exception was removed from the Italian constitution, and now the abolition of capital punishment as a possibility at a constitutional level is absolute.

Beccaria was probably the first author who, in the context of a global criticism of the criminal laws of his time, firmly proposed the abolition of the death penalty. His ideas did not encounter the appreciation of the Catholic Church. An Italian monk, Ferdinando Facchini, harshly criticised Beccaria thinking his ideas were heretical. Beccaria’s book was put on the Index of prohibited books by the Roman Church, even though if you read Beccaria’s book today it does not sound so sinful to us. On the contrary, this book was probably the manifest of the true Christians, because Beccaria’s ideas were full of humanity and charity.

It is extraordinary that his revolutionary ideas were so promptly applied in the last decades of the 18th Century. It is even more extraordinary to notice that during the 19th Century a number of codes in Europe abolished capital punishment. But what is really striking is that today, the death penalty in Europe has been abolished at a constitutional level so that any kind of law contrasting with that tenet would be unconstitutional.

It is true that many legal systems today still retain capital punishment. However, most of them are countries where there is no democracy or the democracy is too young to deserve the implementation of a real abolition. In some American States, the death penalty is still present. Professor Bessler, in many of his articles and books, strongly supports the cause of abolition and I think that one of the

merits of this particular book, *The Birth of American Law*, is that Professor Bessler very convincingly explains how Beccaria's ideas on the reform of the criminal law strongly influenced the Founding Fathers of the American Constitution. This can be of great help in proceeding on the road towards the total abolition of capital punishment, even in the USA.

IX. PROFESSOR BESSLER'S CONTRIBUTION

The information and the citations that we derive from Professor Bessler's book are innumerable. It is then striking for we Italians to find out that a little book written by an Italian nobleman of the Enlightenment proved to be so powerfully inspiring to the minds of the men who emancipated the American laws from the English ones, and who drafted the American Constitution in the last decades of the 18th Century.

It is true that it was already known, even in Italy, that the success of Beccaria's book was not confined to Europe, Russia, or to South America. We knew that the book had an important recognition in the US as well, especially amongst the Founding Fathers of the American Constitution.²¹ But I must say that even though many books have been published so far on Beccaria, and hundreds of articles in legal or philosophical journals have been written so far on his famous book, the mass of documents and information recollected and commented upon by Professor Bessler are really something new and important.

After reading Bessler, we get the feel that Beccaria was probably even more important than Montesquieu in shaping the minds of these crucial Framers of the American Constitution, at least in the field of criminal law. We must concede that Beccaria's ideas were probably more influential than anyone else's writings on the law of crimes.

Of course his ideas expressed in *Dei delitti e delle pene* were not confined to the principle of legality on the one hand, and the humanity of punishment on the other hand. Beccaria discussed a *huge* number of problems concerning the criminal law and what we now call criminal procedure. It would be interesting to verify how many

21. See e.g., MARCELLO MAESTRO, *CESARE BECCARIA AND THE ORIGINS OF PENAL REFORM* (1977).

of these suggestions proposed by Beccaria were accepted in Europe or in America. Professor Bessler's book gives us a lot of answers in this field.

However, much work can still be done in order to test the level of influence and practical achievements of what Beccaria proposed 250 years ago. Thinking about torture, for example, it is well known how Beccaria contributed, with the help of other eminent philosophers and lawyers of his time, to the gradual abolition of torture around the world. But if we think about some other procedural issues, we notice for example that according to Michael Defeo's opinion,²² Starkie, in his seminal book *On Evidence* (1824) derived the doctrine of reasonable doubt that became the rule in the US, from what Beccaria wrote in his book *On Crimes and Punishments*.

X. IS BECCARIA STILL USEFUL TODAY?

In this last part of this review I would like to deal with some final issues. First of all I would like to discuss briefly what is dead, and what is alive from Beccaria's work. Is it still useful to read Beccaria? Or is he just one of these writers who wrote a very important book back in the 18th century, and this book is now just a monument of the past? Can Beccaria's book have any impact now on the legislation or judicial decisions in some countries? Can Beccaria's work be useful to 21st Century readers in order to shape their minds to a particular conception of the criminal law?

In Italy, this problem has been discussed many times in the last hundred years. Whenever there is an anniversary of Beccaria's book or Beccaria's birthday, there are celebrations around in Europe and Italy, and we discuss again about the usefulness of his seminal book today.

There are people who think that Beccaria is not useful at all today because his ideas are totally anachronistic nowadays. A German author, Wolfgang Naucke, for example, in an *Introduction* to a German reprint of the book some years ago argued that Beccaria's thoughts are opposed to many of the recent tendencies of the Crimi-

22. Michael A. Defeo, *The Practical Influence of Beccaria on Criminal Proceedings in the United States of America*, in *CESARE BECCARIA AND MODERN CRIMINAL POLICY*, 216-217 (1990).

nal Law in modern Europe.²³ For example, Professor Naucke thinks that Beccaria's ideas about Legality (or the Rule of Law) are not at all at pace with the more recent trends on the matter. He argues that the idea of the written law purported by Beccaria is too strong, and that today nobody would accept a total submission to written laws as Beccaria did in his book dealing with the problem of interpretation by judges. His conception was obviously a little bit too extreme, because nobody now seriously thinks that judges do not have any power to interpret laws.

We must understand that when Beccaria wrote his book, it was during a particular period in legal history. During the *ancien régime* in Europe, judges could do what they wanted, oppressing poor people and favouring rich people. The French *Parlements* in that period were extremely powerful, and were the real lawmakers in the country. Beccaria, who was then 26 years old, followed what Montesquieu had maintained a few years before, and tried to establish a new order, a revolutionary order, where the legislator would be the only one entrusted with lawmaking authority. If we try to wear the vests of Beccaria and read or interpret his thoughts in the context in which they were written, we perfectly understand Beccaria's outcomes, even though it is true that they might seem a bit too extreme today. However, Beccaria's ideas about the importance of the legislator as a lawmaker, the importance of codification, and of the obedience to the law by judges are still valid today.

Even in Common-Law countries, where unwritten laws dominated for a long time, in more recent times we find that the ideas about the Rule of Law maintained by Beccaria have slowly made their way into the law. In England, it is true that they do not have a Criminal Code yet, but they have a vast number of written laws. Now we can say that in the so-called Common-Law world almost all the systems of Criminal Law are codified: all the American States have a Criminal Code, most Australian States have a Criminal Code, in Canada they have a Criminal Code, in New Zealand they have a Criminal Code. In Ireland they have a draft Criminal Code which has not yet become a law, and so too do they in Scotland. Even in England and

23. Wolfgang Naucke, *Einführung: Beccaria, Strafrechtskritiker und Strafrechtsverstärker*, in C. BECCARIA, *VON DEN VERBRECHEN UND VON DEN STRAFEN*, XXIX-XXX (Thomas Vormbaum ed., 2005).

Wales, there are very important draft Criminal Codes that were drafted a number of years ago but never came into force. However, parts of these proposals by the English Law Commission have become written laws in the meantime.

Professor Bessler has dealt with this matter of the codification of the criminal law in the United States.²⁴ Here it is shown that this movement towards the recognition of the Rule of Law in the field of criminal law has experienced a long development since Beccaria's times. Now we can say that even in the Common-Law world, the codification of the Criminal Law is not utopian anymore. We must also remember that the word "codification" was invented by Jeremy Bentham, a follower of Beccaria on this matter.

Even in our continental European countries, where we have had criminal codes since the beginning of the 19th century, we can say that Beccaria's words are still important now. It is true, in fact, that we had criminal codes for a long time, but it is also true that in our countries, judges tend to have more and more power as time goes by. So the warnings that Beccaria made 250 years ago, even though exaggerated, are still very significant today. As a matter of fact, judges should take these warnings into account even today, though they should adapt them to the different environment of today's Criminal Law. More practically, judges should be loyal to the law and should not trespass the boundaries of the possible meanings of the words of criminal statutes. If they do this, they abuse their powers and they will create all the harm envisaged by Beccaria 250 years ago, resulting in tyranny against individuals.

This is why I consider Beccaria's opinions on the Rule of Law still very important today. A young student who wants to become a lawyer, should start reading Beccaria and derive from him an education in terms of respect of the law even today.

We can also discuss about the usefulness of Beccaria's ideas on matters related to the humanity of criminal sanctions. The aforementioned German professor, Naucke, argues that Beccaria's thoughts could appear a little bit out of date in certain respects. For example, his rejection of the death penalty and his substitution of capital punishment with perpetual slavery, according to the German professor, is

24. BESSLER, *supra* note 16 at 412-421.

nothing other than cruelty.²⁵ So he claims that Beccaria's ideas on punishment, against the appearances, are really not human at all, since the Milanese Marquis is brutally oriented towards the pure ends of deterrence and of general prevention of criminal offences. I do not agree with these points of view. It is true that for Beccaria, the aim of punishment is essentially general prevention. In this way, Beccaria rejects the old theory of criminal retribution. He thinks that the criminal sanction cannot restore the damage done in terms of the so-called *lex talionis*. It is not the "tooth for tooth" law that can resolve problems in the field of the criminal law. It is also true that the idea of substituting capital punishment with perpetual slavery sounds quite harsh to our modern soft ears.

However, we must also understand the context, once again, in which Beccaria operated. He had to fight a centuries old criminal law tradition where capital punishment was abused and widespread in all of Europe. He had before him a cruel system, where people were sent to death even for small crimes. His ideas were at that stage revolutionary. As said before, his book was even put in the Index of prohibited books by the Roman Catholic Church. He did not want to become a martyr, as he wrote to Morellet, his first French translator, in a letter in the beginning of 1766.²⁶ This is probably why he proposed to substitute perpetual slavery for capital punishment, which nowadays seems too severe. But we must remember that at that stage, if a reform like the one suggested by Beccaria came into force, it would have been an extraordinary achievement for the criminal law and, paradoxically, an achievement for human rights of that era.

If we link Beccaria's work to that context, we fully understand his own words. We must remember that nearly every time law reformers tried to abolish capital punishment in the last 250 years they invoked Beccaria and his little book. We must also remember that when, on the contrary, law reformers wanted to re-establish capital punishment, they had to defeat Beccaria and his treatise *On Crimes and Punishments*.

If we read most passages of the book, we find very clear hints of the spirits that animated the "Celebrated Marquis" in writing these

25. Naucke, *supra* note 24 at XXV-XXVII.

26. See CESARE BECCARIA, CARTEGGIO, 221 (Carlo Capra, Renato Pasta, and Francesco Pino Pongolini, eds. National ed. 1994).

words. Beccaria was of course a utilitarian, but I think that his humanitarian thoughts prevailed in the end in his book.

This is why I think that his views on crimes and punishments are still useful today even though, of course, today we would recognise more sophisticated aims to criminal sanctions. For example we think now that punishments should tend to the rehabilitation of the offender, which is something Beccaria did not analyse in his book. So now penal laws and penitentiary systems have more modern aims to pursue, but Beccaria's fundamental thoughts have not been blown away at all by modern trends.

Some critics of Beccaria have argued that he was not a refined jurist.²⁷ In this view, he was just a philosopher, a utopian, a dreamer. His reasoning, according to these critiques, were illogical, or not supported by strong legal arguments. I do not entirely agree with this opinion. I think that is only one way to measure the strength of Beccaria's legal arguments and the strength of his juridical doctrines. If we count all the proposals of Beccaria which might have seemed utopian at that stage, we must recognize that most of them have been approved and enacted at some point or another in the most advanced systems of criminal law. It is striking to see how many of the suggestions made by Beccaria were adopted by legislators in subsequent history.

Professor Bessler shows us how strong the influences of Beccaria's book were on the Founding Fathers of the American Constitution. But even in Europe, the influence of his thoughts, as I underlined before, has been incredibly strong. This is why I think that, though Beccaria's little book was probably not the product of a refined juridical mind, sometimes jurists are not so convincing when their arguments get too hair-splitting. Bentham admired the Milanese Marquis, but he thought that his accounts were often "more oracular than informative". I quote Herbert Hart on this point:

"It is easy indeed to imagine how shocked Bentham must have been to find Beccaria giving as a reason for not examining and distinguishing the various kinds of crime and modes of punishment the fact that the result would be a cat-

27. See Kai Ambos, *Cesare Beccaria und die Folter – Kritische Anmerkungen aus heutiger Sicht*, 122 *Zeitschrift für die gesamte Strafrechtswissenschaft* 506-507 (2010).

ologue of enormous and boring detail – *un dettaglio immenso e noioso*. No doubt these words “un dettaglio immenso e noioso” – aptly describe many pages of Bentham’s writings, but Bentham would not have thought them for that reason unnecessary in the great campaign for reform.”²⁸

The answer to the question posed above, then, is that it is still extremely useful today to read Beccaria. Beccaria, as it has been written in a recent Portuguese translation of the book, must be considered “*um nosso contemporaneo*” (“a contemporary man”).²⁹

His book might be of little importance when in a Country (if it be possible) where the criminal justice works properly and abstains from oppressing the people. But in times of crisis and revivals of cruelty, when human rights are threatened by unjust laws, *Dei delitti e delle pene* becomes once again crucially important for preventing mistakes by lawmakers and protecting the fundamental rights of the people.³⁰

One field in which Beccaria is still extremely useful today is his clear distinction between religion (or morals) and criminal laws, or between sins and crimes. He wrote (Ch. VII):

“[i]n short, others have imagined, that the greatness of the sin should aggravate the crime. But the fallacy of this opinion will appear on the slightest consideration of the relations between God and Man [...] [h]ow can the degree of sin serve as a standard to determine the degree of crimes? If that were admitted, men may punish when God pardons, and pardon when God condemns; and thus act in opposition to the Supreme Being.”

This distinction is well received today by most scholars and legislators, but is not entirely applied in practice. If we examine our “modern” criminal codes (both in Europe and in the US), we still find

28. HART, *supra* note 2 at 27.

29. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 25 & 29 (Jose De Faria Costa trans., 1998).

30. Piero Calamandrei, *Preface* to CESARE BECCARIA, ON CRIMES AND PUNISHMENTS, (2d ed., 1944). Piero Calamandrei a well reputed Italian lawyer, wrote his comment on *Dei delitti e delle pene* in 1944, at the end of the Fascist period during which Italian citizens lost some of their fundamental rights.

a great number of offenses, which can be barely distinguished from sins or pure immoralities. Beccaria thought that the real measure of crimes was “the injury done to society,” but we know that even now certain conducts are penalized only because they are immoral.³¹ The path towards the secularization of the criminal law, especially in certain jurisdictions, is still a long one.

XI. CONCLUSION

Beccaria earned his degree in law in Pavia, after studying for some years at the Jesuit Farnesian College in Parma when he was a teenager. He labelled that kind of teaching as “fanatic” in a letter to Morellet,³² but in these years he learned very well the French language, and he studied with success logic and mathematics. In Parma he was nicknamed “the little Newton” (“il Newtoncino”) because of his skills in mathematics. He probably applied his talents in logics and mathematics in writing his little book, and this was probably one of the reasons of its fortune. But we must recognise that *On Crimes and Punishment* is also a literary work full of sentiment and passion, and this has probably been another key of the enormous success that he encountered around the world.

We must thank Professor Bessler for his extraordinary contribution to the research on Beccaria and of the huge influence that this young nobleman from Italy had on the legal systems all over the world. As Italians, we now feel even more proud of having given birth to this generous young man, who had the courage in those difficult times to denounce the brutality of the system of the criminal law that he had in front of him. We hope that Professor Bessler will continue to investigate Beccaria and will write another book on this extraordinary man.

31. Beccaria, *supra* note 6 at Ch. 8; *see also* Joel Feinberg, *The Moral Limits of the Criminal Law*, Vol 4., Harmless Wrongdoing (1988).

32. Beccaria, *supra* note 27 at 220.