

## *History and Project*

### **Utilitarianism and Retributivism in Cesare Beccaria**

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#### **Abstract**

In analyzing Cesare Beccaria's theory of punishment, this article emphasizes that, while he clearly endorsed a proto-utilitarian theory of punishment strongly at odds with positive retributivism, he also accepted some elements of negative retributivism. This fact, however, should not be seen as weakness of Beccaria's view, but as another proof of his genius. As a matter of fact, he acutely understood that a purely utilitarian conception of punishment, not mitigated by negative retributivism, may indeed generate deep injustices – a lesson that we should remember today, when many scholars interpret the huge amount of data coming from the neurosciences as a proof that a utilitarian theory of punishment recommends itself.

#### **I. 'Public Utility' and 'Human Justice'**

There is no doubt that, for his idea that 'public utility (is) the foundation of human justice',<sup>1</sup> Cesare Beccaria should be considered a forerunner of utilitarianism. He also writes:

'It is better to prevent crimes than to punish them. This is the fundamental principle of good legislation, which is the art of conducting men to the maximum of happiness, and to the minimum of misery, if we may apply this mathematical expression to the good and evil of life'. (§ 41, 147)

The purpose of prevention, therefore, is not punishment, as alleged by the retributivist tradition, but the increase of social utility – that is, the maximization of happiness. However, one should consider Beccaria as a forerunner of utilitarianism, but not an outright utilitarian. In fact, his

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<sup>1</sup> C. Beccaria, *An Essay on Crimes and Punishments. By the Marquis Beccaria of Milan. With a Commentary by M. de Voltaire. A New Edition Corrected* (Albany: W.C. Little & Co., 1872; original version 1764), § 7, 34. In this article, the quotes from Beccaria's *Of Crimes and Punishments* indicate the paragraph followed by the page number.

valuable comments on the purpose and the proper measure of punishment are not part of an actual theory – this theorization will only happen with Jeremy Bentham (who, incidentally, was deeply influenced by Beccaria) and then, with greater sophistication, with John Stuart Mill and Henry Sidgwick.<sup>2</sup> In particular, the reflection of the great Milanese still lacks precise definitions of the principle of utility and an appropriate discussion of the relevant terms ('useful', 'pleasant', 'pleasure', 'happiness', etc).

Moreover, as we shall see, it has been convincingly claimed that Beccaria does not actually defend pure utilitarianism. In fact, his proposal embodies – albeit in a conceptually subordinate role – some elements that can be plausibly traced back to the retributivist tradition; and these elements for Beccaria have an important function as safeguards against the possibility of disproportionate punishments and abuse on the part of magistrates.

In this article I will argue that, among the many reasons that make Beccaria's reflection relevant today, one is precisely the way in which he combines the utilitarian view of punishment with these retributivist elements. Finally, I will argue that only those contemporary conceptions that share Beccaria's semi-utilitarian setting are capable of withstanding the challenges currently emerging from research conducted in the fields of cognitive science and neuroscience.

## II. Retributivism and Utilitarianism

Imagine a small community living on an isolated island in the ocean. The living conditions of the community are very good: all the inhabitants are respectful and supportive, and potential conflicts are quickly resolved thanks to the reasonableness and good will of all. Much of the credit for such serenity goes to the moral leader of the small population: a wise old man that, with his advice and exemplary morality, inspires rectitude and a sense of civic duty in the islanders.

Thus life on the island flows placidly, to the point that the only local policeman, having nothing to do, is terribly bored. So, one day, the police officer decides to reopen the file of the last criminal case that took place in the island and remained unsolved: a murder that happened fifty years ago, in which a young man was killed during a violent quarrel. Going through the file, the officer notes that a hair was found on the crime scene but, of course, police did not know how to analyse it back then. Delighted to have

<sup>2</sup> On the historical and theoretical vicissitudes of utilitarianism, cf B. Eggleston and D.E. Miller eds, *The Cambridge Companion to Utilitarianism* (Cambridge: Cambridge University Press, 2014) and J. Driver, *Consequentialism* (London: Routledge, 2011).

found something interesting to do, our hero takes his set of tools and analyses the hair's DNA. What a shock it is to find that the hair belongs to the wise old man!

Appalled, he runs to him and asks him: 'Dear wise old man, why did you never tell me you were there on the day of the murder fifty years ago? You could have helped the investigation!' 'You see', said the wise old man, spelling out the words slowly, 'not only was I there when the murder was committed, I was actually the one who did it!' Then, staring at the dismayed policeman, he continues: 'We were drunk, we argued for a very futile reason and I hit him with a bottle. He fell and died instantly. Since then I have lived in remorse and tried to atone for my deed by behaving in the best possible way and putting myself at the service of others. But if our community decides to punish me, I'll be ready to pay my dues.' There is no doubt that the wise old man is guilty: the important question, however, is whether he should be punished or not. What would we do, if we were in the judge's place?

When I present this case to my students, there are usually two main views: on the one hand, there are those who believe that punishing the wise old man (albeit mildly) is morally correct; on the other, there are those who think that in such a case any punishment would be unjust. Both responses have an intuitive basis. On the one hand, it seems obvious that punishment serves to rehabilitate the offender, to deter other potential criminals and to protect society from dangerous people: these are utilitarian justifications, because they look to the usefulness of the punishment for the society as a whole. And from a perspective of this kind, to punish the wise old man would not make sense (he is completely rehabilitated, he is not dangerous and there is no reason to think that there are other potential criminals to be discouraged). On the other hand, it also seems reasonable to think that punishment serves to restore the balance of justice, if it has been broken by someone responsible for a crime; and that this person deserves to be punished, no matter what the consequences of punishment. This conception has a *retributivist* character, as it assumes that the foundation of the punishment lies in the fact that the convicted person deserves it, which is why it is right to punish them without considering the potential social effects. From this point of view, justice requires that the wise man be punished.

Utilitarian views look to the future (that is, the consequences of the sentence), while retributivist ones look to the past (that is, the guilt that the offender must atone for). Utilitarianism is thus a form of consequentialism, because it assumes that to evaluate the morality of punishment one should only look at the consequences. Retributivism, instead, is a form of deontology, as it makes the morality of punishment

depend on its ability to re-establish the balance of justice through the punishment of those who have broken it.

However, it is important to note that the retributivist ideal can be broken down into two very different components: one is *positive* ('all those who deserve to be punished ought to be punished') and one *negative* ('one who is not guilty must not be punished and one is guilty must not be punished in an excessive manner').<sup>3</sup> Both of these components are centred on the notion of *merit*, which in turn presupposes that of moral responsibility and consequently that of free action: whoever freely engaged in a certain wrong is morally responsible for it and therefore deserves to be punished.

It must be stressed that while the positive component is the main reason for the strictness of retributivism (that is, justice requires the severe punishment of all those who are guilty), the negative component acts, rather, as a safeguard. This happens for two reasons. First, it commands to not punish those who do not deserve it – even if such punishment were potentially capable of increasing public utility, as happens with the punishment of scapegoats, which satisfy the community's thirst for revenge. Secondly, it denies legitimacy to excessively severe and non-humane sentences (such as torture), even when these may bring obvious social benefits (which could happen, for example, if one tortured a terrorist to force them to confess the future plans of his organization).

As we shall see in the last paragraph, however, according to many contemporary authors, today's scholarship shows, or at least strongly suggests, the illusory nature of the ideas of free will, moral responsibility and merit. If these authors were correct, then all retributivist conceptions (and both their positive and negative components) should be abandoned.

### III. Rule Utilitarianism and Negative Retributivism

*On Crimes and Punishments* discusses many of the themes that will later become typical of the utilitarian tradition, starting with the insistence on the social utility of punishment and hedonistic anthropology as a backdrop to the entire concept. In the Introduction to his masterpiece, for example, Beccaria writes that laws should be considered from the point of view of '*the greatest happiness of the greatest number*'.<sup>4</sup> He then

<sup>3</sup> This conceptual distinction, now widely used especially in the English-speaking world, was introduced by J. Mackie, 'Morality and the Retributive Emotions' *Criminal Justice Ethics*, I, 3–10 (1982); see also A. Walen, 'Retributive Justice' *Stanford Encyclopedia of Philosophy* (2014), available at <http://plato.stanford.edu/entries/justice-retributive/> (last visited 24 May 2016).

<sup>4</sup> See C. Beccaria, n 1 above, Introduction, 12.

goes on to say, in further detail:

‘(T)he intent of punishments is not to torment a sensible being, nor to undo a crime already committed (...) Can the groans of a tortured wretch recal the time past, or reverse the crime he has committed? The end of punishment, therefore, is no other, than to prevent others from committing the like offence. Such punishments, therefore, and such a mode of inflicting them, ought to be chosen, as will make strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal’. (§ XII, 47)

From this perspective, justice should not look backwards, to ‘the time that does not return’ – a stance which was rather common in the eighteenth century and sometimes still is, also due to the influence of religious ideas – almost as if justice had a responsibility to restore a supposed eternal order of justice that the offender has breached. According to Beccaria, rather, the goal that justice must set itself is, in fully secular terms, to increase the well-being of citizens, protecting them from dangerous people (the *special* function of punishment) and discouraging other potential criminals (the *general* function of punishment).

However, in addition to these canonically utilitarian arguments, Beccaria’s system also has other aspects, which point to different directions. First, as noted by Philippe Audegean,<sup>5</sup> Beccaria’s utilitarianism derives conceptually from his adherence to contractualism, and according to this perspective, utility should be pursued not because it is intrinsically right, but because natural necessity has led us to consider it as such: ‘Necessity alone hath produced, from the opposition of private passions and interests, the idea of public utility, which is the foundation of human justice’ (VII, 34). And then again: ‘If there be any society in which this is not a fundamental principle, it is an unlawful society; for mankind, by their union, originally intended to subject themselves to the least evils possible’ (§ XIX, 74).

Second, Beccaria explicitly rejects very harsh punishments not only when (as posited by utilitarianism) they are harmful to collective happiness, but also when, while not harmful, they are contrary to ‘enlightened reason’, justice and the spirit of the social contract that founded our penal system:

‘If it can only be proved, that the severity of punishments, though not

<sup>5</sup> P. Audegean, ‘Beccaria, Cesare’ *Enciclopedia Italiana Treccani* (2012), available at [http://www.treccani.it/enciclopedia/cesare-beccaria\\_%28Il-Contributo-italiano-alla-storia-del-Pensiero-Diritto%29/](http://www.treccani.it/enciclopedia/cesare-beccaria_%28Il-Contributo-italiano-alla-storia-del-Pensiero-Diritto%29/) (last visited 24 May 2016). Audegean is the author of a fundamental text on Beccaria’s philosophy of law, *La philosophie de Beccaria. Savoir punir, savoir écrire, savoir produire* (Paris: Vrin, 2010).

immediately contrary to the public good, or to the end for which they were intended, viz., to prevent crimes, be useless; then such severity would be contrary to those beneficent virtues, which are the consequence of enlightened reason, which instructs the sovereign to wish rather to govern men in a state of freedom and happiness, than of slavery. It would also be contrary to justice, and the social contract'. (§ III, 21)

'By *justice* I understand nothing more than that bond, which is necessary to keep the interest of individuals united; without which, men would return to the original state of barbarity. All punishments, which exceed the necessity of preserving this bond, are in their nature unjust'. (§ II, 19)

Finally, as Audegean notes, Beccaria – despite conceiving of legislation in a utilitarian sense (and, indeed, precisely because of this) – believes that, when applying the law, judges should act in accordance with an ethical perspective, not a utilitarian one. That is, they must apply the law without resolving to interpret it to increase the usefulness of the punishments imposed: 'no magistrate, even under a pretence of zeal, or the public good, should increase the punishment already determined by the laws' (§ III, 20); 'There is nothing more dangerous than the common axiom: *the spirit of the laws is to be considered*' (§ IV, 22).

Besides, also this thesis derives from the contractualist setting of Beccaria's view: the original agreement cannot provide for the arbitrary exercise of law that would follow from the magistrate's case-by-case interpretation. Thus, for Beccaria, the justification of punishment can only have a utilitarian basis; however, its implementation by the judges is deontological, because it should not be affected by the assessment of the consequences that a punishment could have, but rather only by its compliance with the law, which defines who should be punished and to what extent.

Beccaria therefore deviates from classical utilitarianism in three ways: with respect to the ultimate foundation of the concept; with respect to the formulation of the law (which cannot provide for excessively harsh punishments, even when they do not cause social damage); and with respect to its implementation (which cannot contemplate arbitrary decisions on part of magistrates). As said above, such derogations depend on Beccaria's adoption of the contractualist ideal. However, why Beccaria believes that the original contract cannot tolerate excessively harsh punishments or the magistrates' arbitrary decisions remains to be explained. Using contemporary philosophical jargon, one might interpret this incompatibility in two ways.

First – and this is the interpretation preferred by Audegean – it can be assumed that Beccaria does not merely anticipate the principles of the

concept that is now called ‘act utilitarianism’ (according to which moral actions are those that maximize social utility), but rather foreshadows an embryonic form of ‘rule utilitarianism’: the notion that the morality of an action is determined by its compliance with the norms that maximize overall happiness.<sup>6</sup> For example, with regards to the limit that Beccaria sets for the prosecutors’ subjective interpretation of the law, Audegean writes:<sup>7</sup>

‘The criminal law must (...) follow a rule-utilitarianism *avant la lettre*: it produces the best consequences when the judges respect the rules deontologically, not ideologically. This combination of norms to be respected and values to be maximized reflects the fusion of contractualism and utilitarianism. The contractors - equal, different, driven by their interests – can only be bound and punished in the name of utility. But utility itself presupposes security: the satisfaction of their desire prescribes the strict, absolute sovereignty of the norms. Therefore the end justifies the means, but not *à la Machiavelli*, as the means designate a unconditioned respect of the rules. Such rules must equally apply to everyone, regardless of people’s status and circumstances: otherwise, some would have more rights, or more freedom than others, and one would go back to the insecurity of the natural state’.

However, some scholars, such as White,<sup>8</sup> leverage the idea of negative retribution to propose an alternative and not implausible interpretation of Beccaria’s theses on the harshness of the law and the magistrates’ arbitrary decisions.<sup>9</sup> Their idea, essentially, is that for Beccaria the pursuit of utility – which is still the ultimate horizon of the penal system – is bound by the principle that you should never impose punishments that, however useful, would affect people who do not deserve to be punished or deserve to be punished less harshly. From this perspective, in fact, within the set of those whom it would be useful to punish, only those who deserve it are

<sup>6</sup> On rule utilitarianism, cf B. Hooker, ‘Rule Consequentialism’ *Stanford Encyclopedia of Philosophy* (2008), available at <http://plato.stanford.edu/entries/consequentialism-rule> (last visited 24 May 2016).

<sup>7</sup> See P. Audegean, ‘Beccaria, Cesare’ n 5 above.

<sup>8</sup> M.D. White, ‘On Beccaria, the Economics of Crime, and the Philosophy of Punishment’ *2 Philosophical Inquiries*, 121-137 (2014).

<sup>9</sup> Of course, to insist on the role of negative retribution in Beccaria is very different from considering him as an outright retributivist, as D.B. Young, ‘Cesare Beccaria: Utilitarian or retributivist?’ *11 Journal of Criminal Justice*, 4, 318-319 (1983), surprisingly proposed. Indeed, it cannot seriously be doubted that Beccaria refused the positive component of retributivism without hesitation.

to be punished. In this way, to the benefit of the defendants and in the overall interests of justice, Beccaria imposes a dual condition upon the possibility of punishing someone: the utilitarian limitation and that based on negative retribution.

In this regard, let us examine the famous passage in which Beccaria writes:

‘That a 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’. (§ XLVII, 161)

Indeed, it seems reasonable to assume that some of the requirements of justice that Beccaria mentions in this passage – that of proportionality and that of strict observance of the laws in the infliction of punishment – may intuitively hint at his adherence to the ideal of negative retribution, according to which a punishment, to be fair, should only be imposed upon those who deserve it, and only to the extent that they deserve it. It must be noted that this holds even if punishment thereby loses part of its powers of deterrence and social protection – that is, some of its ability to increase public utility.

In my opinion, this latter interpretation is more plausible than that which refers to rule utilitarianism; still, it should be recognized that textual evidence is not enough to unravel the issue. It is also possible, and even probable, that Beccaria was ambivalent on the subject.

#### **IV. Scapegoating and Excessive Sentencing**

Finally, it might be interesting to move the discussion from the historical and interpretative level to the theoretical level and attempt to understand if, in this sense, Beccaria anticipated rule utilitarianism or if, on the contrary, he limited the effects of act utilitarianism by implicitly referring to negative retribution. Indeed, there are very good reasons to believe that rule utilitarianism is not capable of responding convincingly to an objection concerning utilitarianism in general: that is, the scapegoat issue mentioned briefly above. How can one prove, by merely using the conceptual tools of act utilitarianism, that scapegoating or excessive sentencing are unjust practices, regardless of the circumstances?

According to its most traditional version, ‘act utilitarianism’, if one is to behave morally, one must perform the actions that maximize ‘general utility’ (which is often interpreted as meaning general happiness). This definition has the advantage of being very simple; unfortunately, it leaves room for the obviously unjust practices of scapegoating and disproportionate

sentencing. Suffice it to consider the simple cases in which an innocent individual is punished or a convicted person is punished too harshly, in order to deter potential criminals. This practice may produce a general benefit for the community (and would thus be *ipso facto* acceptable from the perspective of act utilitarianism); however, its injustice is clear. This proves that, *pace* act utilitarianism, the mere maximization of social utility cannot be the ultimate standard of just punishment.

Some philosophers have attempted to respond to this objection by developing an alternative version of utilitarianism: ‘rule-utilitarianism’, according to which in order to behave morally, instead of merely performing those actions that maximize general happiness, one should rather perform those actions that conform to the norms the application of which guarantees the maximization of general utility.

To prove that this form of utilitarianism is capable of solving the scapegoat and excessive sentencing problems, it should be demonstrated that a norm that, in specific conditions, would make it possible for an innocent individual to be punished could never maximize general utility – and thus should not be followed. Upon a first glance, this appears to be the case: indeed, if potential criminals knew that they could be punished even if they did *not* commit any crimes, they would not be discouraged from committed their crimes. Moreover, it may be argued that the punishment of innocent individuals would generate widespread indignation among the community, and indignation does not appear to be a good catalyst for maximizing utility.

However, upon a closer analysis, it may be seen that rule utilitarianism cannot eradicate the problem of scapegoating and excessive sentencing. Indeed, cases are conceivable in which accepting a rule that allows for the possibility of sentencing an innocent person (or of disproportionately sentencing a guilty person) may increase general happiness more than accepting a rule that would consistently rule out that possibility. An example to this effect is the practice of decimation, which was common during World War I especially among the Italian, Russian, and French armies; there were many less (if any) such instances in the armies of the Central Powers.<sup>10</sup> The practice of decimation entailed the execution of several soldiers chosen at random from a company that had allegedly, as a whole, fought cowardly. Its purpose was to set an unforgettable example for the victims’ surviving comrades. It should be noticed that, given the random procedure used in choosing which soldiers to execute, also those who

<sup>10</sup> A. Bach, *Fusillés pour l'exemple 1914-1918* (Paris: Editions Tallandier, 2003); I. Guerrini and M. Pluviano, *Le fucilazioni sommarie nella Prima guerra mondiale* (Udine: Gaspari, 2004).

personally should not have been accused of cowardice may have been executed (as shown in Stanley Kubrick's famous movie *Paths of Glory*, which is based on a true story). Moreover, if one examines the data, it could be reasonably argued that the practice of decimation may have played a role in the Allies' victory – in other words, it may have been very useful to them, as the general utility of those countries had been substantially raised. However, even if true, would this fact make such a practice morally acceptable? The answer is, inevitably, no.<sup>11</sup>

Briefly, the main problem of every form of utilitarianism is that it cannot translate, without exceptions, the ideal of justice in terms of general utility. If pure utilitarianism, in any of its versions, were to be accepted, there would always be situations in which obviously morally wrong practices – such as scapegoating or excessive sentencing – would become acceptable.

A much more promising alternative is that of limiting act utilitarianism by means of negative retribution. This perspective was chosen, for example, by the two main legal-ethical thinkers of the twentieth century in the English-speaking world: John Rawls<sup>12</sup> and Herbert L.A. Hart.<sup>13</sup> Hart, in particular, has offered the most convincing treatment of the issue. In his view, punishment can only be justified on a utilitarian basis: one can punish only those whom it is useful to punish. Such a thesis is obviously incompatible with positive retributivism, according to which one should punish those who deserve it, whatever the consequences of their punishment. Nevertheless, when it comes to punishments established by judges, Hart introduces a negative-retributivist constraint – just like Beccaria, according to White's interpretation. In this light, given the usefulness of punishment, one must never punish those who do not deserve it, nor can one punish someone more than they deserve.

## V. The Challenge of the Neurosciences

These observations are relevant to a discussion of particular importance today. Indeed, a growing number of authors – interpreting in a very controversial manner the vast amount of data issuing from science, in particular from cognitive neuroscience – argue that (i) the ideas of free will,

<sup>11</sup> A rule utilitarian could perhaps argue that this objection that this reasoning is hypothetical (since it is not certain that the decimations helped the cause of the Allies in WW1). However, first, the point is a principled one (it shows that there may be situations in which just punishment is disconnected by the maximization of general utility). Second, certainly one would not want to decide if the practice of decimation is an acceptable one on the empirical ground of whether it helped the country that accepted it to win a war!

<sup>12</sup> J. Rawls, 'Two Concepts of Rules' 54 *The Philosophical Review*, 3-32 (1955).

<sup>13</sup> H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968).

responsibility and merit are merely illusory and therefore (ii) retributivist conceptions, insofar as they rest upon those ideas, should be abandoned altogether. According to this view, the only way to offer an acceptable theory of punishment comes from utilitarianism (whether act utilitarianism or rule utilitarianism). The proponents of this view believe that this radical resetting of the foundations of the law and theory of punishment should be warmly welcomed by all those who care about the fate of justice and garantism. For instance, Joshua Greene and Jonathan Cohen<sup>14</sup> wrote that:

‘At this time, the law deals firmly but mercifully with individuals whose behaviour is obviously the product of forces that are ultimately beyond their control. Some day, (that is, when we accept the fact that free will is an illusion and therefore the behaviour of all of us is beyond our control) the law may treat all convicted criminals this way. That is, humanely’.

Positions of this kind are increasingly common.<sup>15</sup> And yet, they face serious problems. First, they over-idealize the way that society treats those who have committed crimes but do not have the capacity to discern. Second, they assume that the supposed illusory character of free will, moral responsibility and merit has been actually demonstrated by science – which is actually extremely doubtful.<sup>16</sup> Finally, and this is the most interesting point for the purposes of our analysis, these positions are unjustifiably optimistic with respect to the consequences of a radically utilitarian conception of punishment. The crucial fact is that, if it were true that the ideas of free will, moral responsibility and merit are illusory, then, in addition to positive retributivism, negative retributivism (according to which one can only punish those who deserve it and only as harshly as they deserve) would also be disproved. Therefore, there would be no counterarguments to the possibility that scapegoating should be considered acceptable: indeed, as seen above, neither act nor rule utilitarianism possess the conceptual resources to prove this practice is unjust.

Therefore, while assuming a utilitarian background, only negative retributivism can place a theoretical limit upon the possibility of accepting

<sup>14</sup> J. Greene and J. Cohen, ‘For the law, neuroscience changes nothing and everything’ *Philosophical Transactions of the Royal Society of London B*, CCCLIX, 1784 (2004).

<sup>15</sup> See M. Gazzaniga, *Who’s In Charge? Free Will and the Science of the Brain* (New York: Harper Collins, 2011); S. Harris, *Free Will* (Oxford: Oxford University Press, 2012); D. Pereboom, *Free Will, Agency, and Meaning in Life* (Oxford: Oxford University Press, 2014).

<sup>16</sup> See the brilliant pamphlet by A. Mele, *Why Science Hasn’t Disproved Free Will* (New York: Oxford University Press, 2014) and D. Dennett, ‘Reflections on Free Will’ (2014), available at <https://www.samharris.org/blog/item/reflections-on-free-will> (last visited 24 May 2016).

unfair but socially useful practices, such as the condemnation of those who do not deserve it or the infliction of disproportionate punishments. After all, already two centuries ago, a great Italian thinker appeared to have a better/clearer? ('better' is a bit generic) idea of the subject than many contemporary authors do today:

'It is doubtless of importance, that no crime should remain unpunished; but it is useless to make a public example of the author of a crime hid in darkness. A crime already committed, and for which there can be no remedy, can only be punished ... with an intention that no hopes of impunity should induce others to commit the same (This is Beccaria's *act utilitarianism*). If it be true, that the number of those, who, from fear or virtue, respect the laws, is greater than of those by whom they are violated, the risk of torturing an innocent person is greater, as there is a greater probability that, *cæteris paribus*, an individual hath observed, than that he hath infringed the laws'. (This is Beccaria's *negative retributivism*) (§ XVI, 60)<sup>17</sup>

<sup>17</sup> I wish to thank Pasquale Femia, Patrizio Gonnella and Dario Ippolito for their helpful comments on an earlier version of this essay.