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CRIMINAL LAW

ITS NATURE AND ITS FUNCTION

Contents

FOREWORD

The main purpose behind any law in any social context is to provide an antecedent universal legal norm, according to which it will be possible to resolve, adjudicate future conflicts. Thus there are two basic questions to be asked. When we are concerned with the nature of the norm according to which the decisions in future conflicts will be made, we are in essence concerned with the problem of making the decision-maker, the adjudicator, abide in his particular judgements to the universal norm. The principle of *legality* is thus in essence a question of the distribution of power between the legislature entitled to be arbitrary because it represents the sovereignty of the nation on the one hand and the individual decision-maker who cannot represent himself and can therefore act only on behalf of the compelling logic of the Law on the other. When we are concerned with how the decision is going to be made, by whom, under what conditions, with what attitude toward truth – then we are clearly asking questions about the nature of *adjudication*. Interestingly the idea of legality presupposes the knowledge of the "whole truth" about a past hypothetically criminal event, whereas the idea of adjudication of necessity implies the ideal of impartiality which is often in conflict with the goal of truth-finding.

Impartiality presupposes adjudication: we shall try to show that it is viable only as a dynamic concept concomitant to adversary adjudication. The latter, of course, presupposes a conflict, but the nature of conflict in criminal law is very different from what it is in other areas of law. Since the conflicts are of necessity concerned with interests and since the interests in the last analysis always attach to people qua individuals, it could be said that the conflict in criminal law is less genuine: it is a conflict between an abstract entity of the State (society, law, God, morality, etc.) and an individual defendant. For the same reason the impartiality of adjudication in criminal cases represents problems that never occur in private disputes, where the parties are much less disparate in their power and proximity to the adjudicator.

We shall also try to show that the centrality of truth and truth-finding in criminal law – as opposed to its secondary and instrumental nature in private disputes where it only serves

as a means towards the resolution of the conflict – derives from the same essential ambition of criminal law: to treat the individual case as a symbol of a broader conflict between reality and morality.

We shall try to answer why is the "truth" of criminal law so much more important. The answer to this lies in two distinct areas of understanding.

Since the "truth" in criminal law is not merely the question of an isolated human conflict of interest, since it is a truth about a past morally reprehensible event, i.e. a conflict between an individual and the group as an entity *sui generis*, it carries not only the private dimensions of an individual disharmony, but is rather intended to reverberate throughout the societal structures, or perhaps trigger even larger existential and philosophical dilemmas as for example represented in classical Greek tragedies. Criminal law, for this reason, cannot be reduced to Benthamian "utility" and felicific calculus; unless this almost transcendental moralistic connotation is understood, one cannot comprehend the central relevance of truth and truth-finding in criminal law.

One can, of course, approach the question pragmatically, e.g. in terms of Durkhemian *normative integration*, but one is then immediately forced to reduce the whole criminal law to some sort of brainwashing process that the rational legislator is trying to superimpose on the irrational population.

On the other hand, if one refuses to accept this pragmatic perspective, one may very well be pushed into its opposite: the categorical imperative of Kantian retributive philosophy must be based on values that cannot be explained, deduced, or justified by reason or ratiocination. While Bentham would punish only insofar as it is useful to do so – the rest is cruelty for him – Kant would punish without respect to any pragmatic and utilitarian consideration. In terms of normative integration, however, the Kantian philosophy may in fact turn out to be more of an effective crime control because it can appeal to deeper layers of human personality. Since people refrain from antisocial behaviour due to largely irrational moral inhibitions, rather than due to a cost-benefit analysis that Bentham's

model presupposes, the Kantian moralistic stance is more effective not in spite, but precisely because of it's *a priori* nature.

These socio-philosophical considerations must of necessity be at the centre of concern of the criminal law theorist. Unless they are answered, the social practice of punishment cannot be legitimized. Since criminal law is so intimately intertwined with the idea of blameworthiness and punishment, it is usually assumed that the policies underlying punishment must be the same as those underlying criminal law. And while in particular it is often true that distinctions are made by criteria of blameworthiness, e.g. between a possible and an impossible attempt, between a reasonable and an unreasonable mistake of fact, etc., if criminal law is seen as a whole, it does not exist in order to further the social practice of punishment: rather it exists to inhibit it. The same is true of criminal procedure. The simple proof of this lies in the fact that punishment would be possible without criminal law and criminal procedure, whereas its inhibition would not.

In other words, the role of criminal law and criminal procedure and the concomitant questions of legality and impartial adjudication are essentially the questions of the distribution of power. The best indication of this is the relatively recent development in the United States whereby the safeguards and standards of criminal law and criminal procedure have step by step crept into areas where no moral indignation attaches, i.e. into the areas of civil commitment, juvenile justice and even preponderantly administrative procedures.

We will touch on some questions of policy and utility in the rather extensive discussion of Beccaria" 1764 Essay ""On Crimes and Punishments"" which represents an early but nevertheless quintessential statement of all the relevant principles of criminal law. Following that discussion we will touch upon the two assumptions that especially Beccaria and Bentham and following them just about every criminal law theorist has made, namely <u>first</u>, that it is possible to have legal rules in criminal law that decide compellingly most of the cases in advance by virtue of their conciseness and strict interpretation thereof; and <u>second</u>, that it is possible to have an impartial adjudication in

an adversary procedural structure while at the same time consider truth and truth-finding the primary goal of such a procedure. We shall try to show that the principle of legality is mostly an illusion and that the idea of impartial adversary adjudication is essentially incompatible with the function of truth-finding.

Chapter I

THE GROUNDS FOR THE GROUNDWORK OF CRIMINAL LAW

Introduction

The age of modern criminal law starts with Beccaria and his Essay On Crimes and Punishments in 1764. It represents an introduction of a new mode of reasoning into criminal law and, especially, into the policy of punishment.

It represents a shift from deontological reasoning which admitted of no immediate calculative purpose of punishment, to a pragmatic evaluation of punishment as a social practice. One introduced, this mode of reasoning remained in criminal law. It godfathered the emergence of criminology with Lombroso. It was capable of rebutting such challenges as the philosophies of Kant and Hegel represented to the consideration of (and reduction to) utility of punishment. Moreover, it almost changed into the opposite of itself in Durkheim's theory that punishment has an impact on the collective conscience of society of which the State is a representative (deontologically pragmatic perspective).

But, by and large it remained the apparently rationalistic calculative reasoning without a serious challenger, except perhaps the reality of crime itself. It remains the basis of policy decision making in criminal law today very much in the manner, almost unsurpassed, expounded by Beccaria in 1764.

But, as we shall see, there are two basic problems with this utilitarian approach. First of all, it goes against the very origin of criminal law as we have explained it in our section on "Detachment": it reduces the irreducible psychological attitude of guilt and transcendental retaliation to a simplistic tariff of crimes and punishments according to a theory of counter-motivation based on Bentham's felicific calculus. It reduces the moral

reprobation essential to the function of criminal law to the manipulation of the motives of human behavior. It thus separates utility from the origin and the reason for criminal law's existence and, consequently, introduces an irreconcilable conflict into the very nature of punishment. This antinomy made criminal law eclectic and split apart: on the one hand it still serves instinctive responses, but on the other hand its function is rationalized in terms pretending to have nothing to do with aggression, vengeance, and transcendental reference (guilt).

A pragmatic revaluation of criminal law thus aspires to do the impossible: to couch punishment in rational terms and at the same time to serve the subconscious irrational powers of punishment as a means of normative integration.

This, of course, did not occur by chance. The "cause" for this shift is to be found in the impossibility of having punishment justified in aprioristic and axiomatic medieval postulates, which were possible only because they were founded on a sharing of unquestionable beliefs. Only the weakening of these values made the necessity of a different, more explicit, rationalization obvious.

Because of that, once the parameters of the rationalistic justification were made explicit (even though they were false), this fostered an explosion of codification, discussion and differentiation of concepts growing into a relatively consistent matrix of concepts which enabled the participants in this discussion to further detach themselves from the socio-psychological reality of punishment.

This brings us to the second problem. Because of this release of "reason" and "rational discussion" within the growing matrix of the concepts of criminal law, criminal law occurred as a special branch of public law. It thus established itself through its own negation, through the negation of its basic premises on which a utilitarian mode of reasoning was superimposed.

The introduction of a rationalistic discussion into the area of criminal law represents at the same time criminal law's culmination and the beginning of its end. Its culmination is manifested in the sudden blooming of concepts constituting the substance of what we call criminal law. It represents the beginning of the end of criminal law because the very need of the introduction of rational justification into the question of punishment testifies to the fact that the instinctive basis for punishment was (and is) no more sufficient for its persistence. It betrays the need of Western society to invent essentially false reasons for punishment in order to convince itself that it cannot do without it. Thus, it anticipates a future in which punishment as a social practice will no longer be taken for granted.

Moreover, it prepares the path for this future, by introducing into criminal law the idea that it ought to be the Magna Carta Libertatum of the defendant (Liszt). The introduction of this new protective postulate of criminal law, which changes its social function from the instigator of punishment to the barrier to it, represents a negation of the very essence of punishment. Because of this new development, quite apparent in Beccaria as we shall see, criminal law becomes a system of rules which prevent punishment. It becomes clear that it is possible to punish without law, but impossible to restrict punishment without criminal law.

This basic metamorphosis of the social function of criminal law, the transformation from the affirmation of punishment into its negation, clearly shows that the introduction of reason into the realm of punishment plays a double role: on the one hand it makes punishment legitimate with its rationalistic justifications, but on the other hand and by the same token, it introduces the growing spiral of the negation of punishment to conclude the role of oppression in the end.

The split between criminal law and punishment, the beginning of their mutual disconfirmation, has its origin in Beccaria and Bentham and their attempt to introduce "geometric precision" into the social conclave which can no longer be satisfied with the belief in transcendental retaliation.

A. UTILITARIAN PHILOSOPHY: BENTHAM

The basic parameters of Bentham's utility theory are:

(a) the individual can experience pains and pleasures;
(b) these pains and pleasures can be identified, denominated, and exhaustively enumerated;
(c) pains are evil, and pleasures are good;
(d) the purpose of existence and society is to maximize pleasures and minimize pains: utility is procurement of good and prevention of evil, the maximum happiness for the greatest possible number.

The source of Bentham's philosophy is in the teachings of Helvetius, 1715-1771). In 1958 Helvetius published his de L'Esprit (transl. into English by W. Mudford in 1807) intended to counterpoise Montesquieu's philosophy and theory as expounded in L'Esprit des Lois. Helvetius was a physician and thus it is perhaps less surprising that, according to him, all men's faculties can be reduced to sensation. Even memory, comparison, and judgment can be explained by self-interest founded on the love of pleasure and the fear of pain, the source of all actions and affection. All intellects are initially equal and their subsequent inequalities are attributable to the unequal desire for instruction. This desire springs from passions (c.f. Freud's sublimation), of which all men commonly well organized are susceptible to the same degree: "One becomes stupid as soon as one ceases to be passionate". According to Helvetius, philosophical rulers may achieve identification of interests by suitably contrived legislation.[1]

It has also been established that utility and the principle of the maximum happiness for the greatest number is not Bentham's original idea, but was derived from Beccaria.[2] We

[1] See Cummins, I., Helvetius: His Life and Place in the History of Educational Thought, London 1955, Encycl. Britt. s.v. Helvetius.

[2] Hart, H.L.A., Beccaria and Bentham, 4 Memorie dell'Academia delle Science di Torino 19.

shall discuss Beccaria *in extenso* and the reader will have opportunity to draw his own parallels between him and Bentham.

The lack of appreciation for the principle of utility prior to his arrival Bentham attributed to the fact that "the same ideas are not attached to this principle"; "the same value is not given to it"; "no uniform and logical manner of reasoning results from it".

He proposes to change this by:

1) "attaching clear and precise ideas to the word utility";
2) "to establish unity and sovereignty of this principle [of utility] by rigorously excluding every other"; and
3) "to find the processes of a moral arithmetic by which uniform results may be arrived at".[3]

Bentham, of course, cannot say that he, for the first time in history, introduces the principle of utility. He admits "that [the principle of utility] is rarely contradicted at all", moreover "that it is looked upon as sort of common-place in politics and morals".[4] His ambition is therefore to make the principle a uniform, sovereign, and articulate doctrine capable of giving consistently uniform results, rationally determined and, therefore, indisputably objective answers to all social policy questions. Clearly, he inherited this ambition from Beccaria, who, in contradistinction to Bentham, could not generate sufficient interest, persistence and energy for such an ambitious project himself.

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[3] Bentham, Theory of Legislation, French text by E. Dumont, transl. by R. Hildreth, London, 1864, pp. 1-2.

[4] Ibid.

Bentham looks at his own principle of utility as "the true route [with] milestones which cannot be shifted, [with] inscriptions in a universal language, which cannot be effaced".[5] In other words, he thought he was to become the Euclid of social theory and policy, that he would articulate the concept and theory so rational and so true as to eliminate all arbitrariness in social policy. He (by analogy with geometry) conceived of society as an objective and empirical reality to be reduced to a few iron laws of the felicific calculus much in the manner all rectangular triangles must obey Pythagoras' algorithm.

This is the "geometric precision" postulated by Beccaria: a characteristically rationalistic ambition which conceived of societal problems not as results of conflicts of interests, but as a consequence of the lack of true understanding of the laws that govern society.

The easiest way to understand Bentham in his strongest aspect is to look at his concept of utility as developed in its modern, mathematically elaborate version of Western economics, where maximization of profit is juxtaposed and correlated to the minimization of loss, absence of profit, income and production of material goods. The principal law of economics is the maximum output with the minimum input, or rather, the maximum output with the given input and vice versa. The market is conceived of as operating in this fashion.

Bentham, of course, did not intend to limit his theory to the area of appropriation of material goods. His ambition was to define human psyche as well as all interactions between individuals in society in terms of maximization of pleasure and/or minimization of pain. In a very important sense he superimposed the blueprint of market processes on the life of individual and society:

> Evil is pain, or the cause of pain;
> Good is pleasure, or the cause of pleasure;
> The principle of utility subjects

[5] Ibid., p.2.

everything to these two ideas.[6]

As we shall see later, Mini[7] claims that Bentham was aware of the circular nature of his reasoning. But consider the following:

> A principle is a first idea, which is made the beginning or basis of a system of a system of reasonings. To illustrate it by a sensible image, it is a fixed point to which the first link of a chain is attached. Such a principle must be clearly evident; - to illustrate and to explain it must secure its acknowledgement. Such are the axioms of mathematics; they are not provided directly, it is enough to show that they cannot be rejected without falling into absurdity.[8]

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[6] Id.

[7] Mini, Piero V. (1974), Philosophy and Economics, University Press of Florida, Gainessville, p. 46: It is not possible to think of Bentham as an enthusiastic and naïve follower of the Cartesian method. On the contrary, he emerges as its antagonist, the precursor of such determined foes of logic à la outrance as Nietzsche, Kierkegaard, and Dewey, but a man who, like Kant and Nietzsche saw that fictions are unavoidable. Now, it is simply absurd to put Bentham and Nietzsche into the same category if only in respect of fictions. Bentham's theory of fictions was simply a subtheory on language and had nothing whatsoever to do with his utility theory which, however, would be required were we to say that Bentham was aware of the precarious nature of his utilitarianism. But were he indeed aware of that, he would have never set up a laborious structure which comes to nothing the moment we realize the fictitious nature of the contents and elements of his analysis, the fictitious nature of his whole subject matter. Bentham's intent was precisely the opposite: to transcend the fictions and while trying to achieve that he discovered that this is impossible – linguistically. However, the nature of his work as such is still simply an attempt to construct criteria to avoid the arbitrary nature of the fictions themselves. The fact that he did not discover this basic antinomy in his own theory only betrays the minor caliber of a theorist that he was.

[8] Bentham, supra, note 3, pp. 2 – 3.

Without even trying to show that such a concept of a mathematic axiom betrays a misunderstanding of its hypothetical nature, we can say that Bentham conceived of his theory as absolute, not relative, fixed, not circular and explanatory, not tautological. He thought the principle of utility to be so obvious as to be demonstrable in terms of ostensive certainty. He saw this as a minor problem and from there on he thought he could simply proceed to articulation of his moral arithmetic. He leads his reader to believe that once the desirability of a goal of utility is sufficiently demonstrated, he does this retrogressively proving that this principle governs our behavior anyway, the case is won for utilitarianism and the rest is merely a question of sufficient articulation. Now, as we shall see, this is not the case at all.

> The logic of utility consists in setting out, in all operations of the judgment, from the calculation or comparison of pains and pleasures, and in not allowing the interference of any other idea.[9]

He, consequently, boldly proceeds to enumeration of the pleasures and pains. In the first section of the fourth chapter of his Theory of Legislation he gives us the following (very revealing) list of pleasures:

1) pleasure of sense
2) pleasure of skill (address)
3) pleasure of friendship
4) pleasure of good reputation
5) pleasure of power
6) pleasure of piety
7) pleasure of benevolence
8) pleasure of malevolence
9) pleasure of knowledge
10) pleasure of memory

[9] Id.

11) pleasure of imagination
12) pleasure of hope
13) pleasure of association
14) pleasure of relief (from pain)

To these, there corresponds a similar list of pains.

By virtue of this enumeration Bentham gets a sufficiently differentiated matrix ("grill") of different pleasures and pains which could be paralleled, for example, to Leontieff's input-output tables, where an increase in one pleasure, or pain, will have chain-reaction repercussions throughout the matrix.

If there are 13 pleasures and 13 pains he already has at his disposal an enormous number of combinations: he may, for example, take combinations of one pleasure with one pain (13 x 13), combinations of one pleasure and two pains (13 x 13:10), etc. In terms of social policy, where according to utility theory the goal is the maximization of different pleasures and the corresponded minimization of different pains, Bentham gets a sufficient number of possible combinations to explain and justify everything he wants just in terms of the above basic number of pains and pleasures and the combinations between them.

While some scholars admire Bentham for having throughout his theory so consistently used the language of utility, they tend to forget that – because of the number of possible combinations – this was perhaps the easiest task Bentham was facing when articulating his philosophy. He simply translated every social, political, and moral issue into the language of these combinations. There were a sufficient number of them to account for just about anything he wanted to tackle. One has to consider the fact that the knowledge of all humanity is compressed into a similar number of combinations of 26 letters of the alphabet to understand that this is not a difficult task at all.[10]

[10] Bentham wrote: "Happily language [enables a man] by making use of two words instead of one [to] avoid the inconvenience of fabricating words that are absolutely new. Thus instead of word lust, by putting together two words in common use, he may frame a mental expression 'sexual

The fact, however, that Bentham invented this language in which he translated everything else, is far from proving that his philosophy is false or even merely simplistic. Indeed, if the elements of this utility language were 1) adequate descriptions of real life phenomena and 2) independent variables in the sense that they were not tautologically validated, Bentham would be the greatest social theorist ever.

Unfortunately, Bentham disregarded one dimension: Time. This brings us to the question of the fictitious and circular nature of his pleasures and pains, and, therefore, of his whole theory.

No reasonable philosopher would deny humanity the right to be happy. After all it is very easy to agree with the idea that "the world should be good." Even it this "goodness" is phrased in hedonistic terms à la Helvetius, the principle itself would have few à priori dissidents. but to make the principle sufficiently abstract to allow everybody to agree is not exactly the purpose of philosophy.

Consequently, in the next step, when the above "goodness" becomes a question of more concrete definition, we have an explosion of interpretations. Some place the "good" into a transcendental projection, some into a distinction between virtue and hedonistic happiness[11]; some place it into time and space (Hegel), and some conclude with the stoic shrugging of shoulders. To reduce all this variety into the bifurcation of the "ascetic" and

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desire'…. This, accordingly, is the course I have taken. In these instances even the combination is not novel. In the catalogue of motives, corresponding to several pains and pleasures, I have inserted such as have occurred to me." Ogden, C.K., Bentham's Theory of Utility, London, 1932, p. xxii.

[11] See, for example, Fuller, Lon L., The Morality of Law, Yale University Press, 1964 (Revised Edition).

the "arbitrary" principle[12] as Bentham has done, is, of course, the no-nonsense kind of absurdity which separates common sense from serious philosophy.

The trick of Bentham's "philosophy" is as follows:

Step 1: Announce the principle sufficiently abstract to appear axiomatic (principle of utility);
Step 2: Announce the elements of this principle (pains and pleasures) by simple taxation but in a sufficient number to enable you to get a large number of combinations out of them in order to make every issue translatable into that language;
Step 3: Concede that these elements may be fictitious (in terms of language, infra) but assert that they are nevertheless useful.

We have sketched steps one and two. The crucial, however, is the third step.

The testing stone of Bentham's utility theory is not in the very abstract principle itself, which amounts to no more than a truism. The real question is where did he derive the elements of this truism from, for it is these elements that represent the innovation of his theory, and moreover how valid, how independent as concepts are they.

it is not widely known that Bentham had his own theory of fictions, and it was not until 1932 that Ogden published a compendium of Bentham's notes amounting to a theory of fiction and language. However, here we have to be very careful to distinguish two kinds of fictions.

Bentham wrote:

> Logic is the art which has for its object, or end in view, the giving, to the best advantage, direction to the human mind, and thence to the human frame, in its

[12] Bentham, supra, note 4, pp. 4-20.

> pursuit of any object and purpose to the attainment of which it is capable of being applied.[13]

Such a definition implies that "object and purpose" determine "the direction of human mind" in order for the purpose to be attained. In other words, it is the purpose, not the object matter itself, which determines the nature of thinking which is seen as instrumental and predetermined by the goal set for it (to attain). This is a strikingly modern theory asserting that reason itself is a dependent variable both of human purpose and objectivity. It is, incidentally, implied in such an approach that values cannot be achieved by means of reason; they may set its goals, but they cannot be deduced from reason itself. Such a conclusion, obviously, goes against Bentham's whole theory. If logic and reasoning are not only anthropocentric but also anthropogenous, thinking has no axiomatic value. This conclusion should be compared to the above citation of Bentham, where he asserts the immutable nature of his principle.

Thus, if this assertion were carried to its logical extreme it would amount to the above step three and Bentham would conclude saying: "I know that my pleasures and pains are fictitious. But they are useful fictions and although perhaps false, they are nevertheless 'life-promoting' "[14]. There, obviously, exists a necessity for false values[15] and, consequently, I am justified in using them."

But such a conclusion would pull the basis from under his theory of utility because it would reveal the circularity of its tautological nature. His opponent would ask Bentham: "Indeed, if these fictions are useful, do you determine their usefulness in terms of the

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[13] Ogden, supra, note 10, p. lxv, citing Bentham.

[14] See, for example, Kojève, Alexandre, The Introduction to the Reading of Hegel, Basic Books, New York, 1969.

[15] See, infra, note 17.

utility principle, since you do not admit of any other?" Bentham would be forced to answer that, yes, this is precisely what he would do, and the whole of utilitarianism would be unveiled as a matrix of mutually validating fictions, a multifaceted circular truism, very similar to Wittgenstein's "mode of life".

In fact, Mini (supra) believes that this is what Bentham did; that he knew and understood the tautological and circular nature of his utilitarianism, but that he nevertheless deemed it unavoidable in the following Nietzschean fashion:

> Behind all logic and its seeming sovereignty of movement, too, there stand valuations or, more clearly, physiological demands for the preservation of a certain type of life ….
>
> The falseness of a judgment is for us not necessarily an objection to a judgment; in this respect our new language may sound strangest. The question is to what extent it is life-promoting, life-preserving, species-preserving, perhaps even species-cultivating. And we are fundamentally inclined to claim that the falsest judgments (which include the synthetic judgments à priori) are the most indispensable for us; that without accepting the fictions of logic, without measuring reality against the purely invented world of the unconditional and self-identical, without a constant falsification of the world by means of numbers, man could not live – that renouncing false judgments would mean renouncing life and a denial of life. To recognize untruth as a condition of life – that certainly means resisting accustomed value feelings in a dangerous way; and a philosophy that risks this would by that token alone place itself beyond good and evil.[16]

This is why Mini puts Bentham and Nietzsche into the same philosophical category. But, of course, this is an incorrect classification betraying misunderstanding of both Nietzsche

[16] See, Zupančič, B., Criminal Law and Its Influence Upon Normative Integration, Acta Criminologica (Montreal), VII, Jan. 1974, Intr.

and Bentham; it would amount to saying that Bentham was not a Benthamite, which simply is not true.[17]

Bentham did come very close to the above standpoint when he spoke of logic. But when he labeled his pains and pleasures "fictitious", he meant to say something entirely different: "To language, then – to language alone – it is that fictitious entities owe their existence"[18]. Were he saying that his pains and pleasures are fictitious entities in the Nietzschean sense, he would not attribute them only to language, not even primarily to language. Bentham's nephew George Bentham in his "Outlines of Logic" (1827) defines – in terms of Bentham's own theory of fictions – the pains and pleasures as "Pathological fictitious entities":

> Pathological fictitious entities, which relate to the sensitive mind. These are denominated sensations and comprehend pleasure, pains, and neutral sensations. Pleasures and pains have been subdivided by Mr. Bentham in his Table of the Springs of Actions. (Emphasis added)[19]

Fictitious for Bentham meant not palpable, not demonstrable, but merely inferred from the use of language. Fictitious for Nietzsche meant logically circular, historically and demonstrably false. Nietzsche would have said for Bentham's pains and pleasures that they are fictitious, but Bentham never said that.

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[17] Nietzsche, Beyond Good and Evil, sections 3 and 4.

[18] It would make our argument here much easier were we able to agree with Mini's interpretation of Bentham, since this would lead directly to an established closed circularity of the step three, supra. But, unfortunately, Bentham's fictions were not conceived of as value fictions (as with Nietzsche), but were deemed fictitious only in a pure denominational sense.

[19] Ogden, supra, note 10, 156.

Bentham never said that he used pains and pleasures as fictitious entities in the sense that they – as fiction – are "life-promoting". had he ever come even close to that concllusion, he would have discovered the basic flaw of his theory, the flaw which makes out of both Beccaria's and his own rationalism a myth, so much more deceptive because it appears to be an opposite of an illusion.

The only other possible interpretation would be to say that he knew the fictitious nature of his pleasures and pains, that he was aware of their circular nature, but that he deliberately played the trick upon those who were apt to take his theory seriously, just as they have taken Beccaria seriously before him. But then, this could be said about every philosopher and every philosophy: that they had much to be silent about. Given that Bentham was so serious about his projects, that he offered his services to many foreign governments (without much success, however), this is an unlikely possibility.

Interestingly enough, Bentham could have discovered the precarious nature of the parameters of his philosophy, because he started with legal fictions. The essence of every legal fiction and presumtio juris et de jure, even the presumption of innocence as we shall see, is the prevalence of purpose and policy over truth. The primary nature of purpose, which was apparently clear to Bentham in regard of logic, could have indeed brought him close to realizing that he is using pains and pleasures not as linguistic fictions but as purposive fictions.[20] But Bentham reacted fiercely against legal fictions protesting that "the fiction of law may be defined as willful falsehood, having for its object the stealing of legislative power".[21]

From here on he engages in an angry fight against legal fictions and lands in an imbroglio of the philosophy of language.

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[20] Ogden, ibid.pp. xvii-xix.

[21] Ibid., p. xviii.

This linguistic buffer, interposed between his definition of fiction and his theory of utility prevented him from seeing the fatal circularity of his doctrine. It is as if he had half of the critical mass of this philosophical explosive in each of his hands, but he never brought the two together. He never realized that language itself can be interpreted in this purposive fashion (Wittgenstein) and thus fiction for Bentham remains a second-hand truth rather than a purposive lie. He sincerely believed that the enumeration of pleasures and pains, although incomplete, is an expression of real, independent and psychologically given entities, as if they were sort of preeminent structures.

At this point in our argument we would have to prove the purposive and prescriptive and determining nature of language insofar as it mediates the values of the dominant social consciousness. This would mean a detailed discussion of the relationship between language and social consciousness with the conclusion that meanings people assign to words in a particular society and a particular historical period manifest the historic "purpose" of that specific stage of development. thus, even the linguistically determined fictions, aspiring to refer to existing psychological entities, are ultimately determined by the values inherent in the dominant social consciousness whose hegemony over the behavior of the members of society induces individuals to in fact perceive them as given, as moral axioms and psychological determinants, which determine the behavior, the assignments of energy, the inhibition – in short everything that can possibly be projected into the above cited list of pleasures.

And, consequently, in this argument we would say that language does not by chance produce these, and not some other kinds, of fictions; that it is "the historical utility", the level of development, and the nature of conflict in society which supplies contents to the pleasures and pains; that the real question is not what are the pleasures and pains, but wherefrom do they derive; in other words, what makes a particular pleasure a pleasure and not something an individual is indifferent to (such as riches, reputation, etc.). In the last analysis the contents of Bentham's utility would be interpreted as no more than an articulation of the dominant social consciousness attempting to validate itself and to make

itself legitimate through theoretical and philosophical pretensions. Bentham's philosophy would boil down to Bentham's ideology.

That in itself would not invalidate the descriptive validity of Bentham's doctrine. It would, inevitably, annul his claim to prescriptive rationalism, because his theory qua theory, even though perhaps an adequate description of the society he lived in (and especially the class of this society he was a member of), offers no real guidance at all. It does not offer guidance because it does not transcend the time and the space in which it was conceived: it merely ex post articulates the already given parameters of decision making in the 19th century England.

What Bentham was doing, when he described his pleasures and pains, was only a translation of the values he held into an apparently rationalistic language of the felicific calculus. The most hostile interpretation would simply reduce him to an arbitrary and limited pretender to philosophy, who translated his own private prejudices into the apparent objectivity of the theory of utility. The most unpleasant question one could ask the author of the felicific calculus is: "Whose utility, in whose favor? In favor of whose happiness?"

That his theory was so widely accepted, or at least considered, is perhaps one of the best proofs of the existence of the hegemony of the dominant social consciousness, of the hegemony of the values and aspirations of the dominant class over law, social practices, and the behavior and aspirations of all classes, not only the members of the class whose harbinger Bentham was.

That is what we would say. But since we cannot engage here in an extensive analysis of the relationship of the circle fiction- language – hegemony – fiction – value, the argument can be presented through a short-cut proving the same end result.

One simply has to look at the above list of pleasures enumerated by Bentham to see that these pleasures are not the independent variables they would have to be in order to serve

as parameters of the computation of utility. The easiest example is that of the pleasure of "good reputation".

Reputation is what others think of us. Others think of us, i.e., they evaluate us in terms of then-and-there social values –insofar as they are integrated in the judging individuals). Social values (and individual with them) are a result of the long term social policy (and the resultant social practices), which however, according to Bentham, is in turn determined and established by a computation of utility employing the pleasure of "reputation" therein.

For example, a woman having an abortion in times of Bentham, would be labeled as a murderer: a very bad reputation. Social policy (and the practice of punishment) computed in terms of utility and related to abortion would necessarily take the please of "reputation" into account. It would, therefore, tend to prohibit abortion. What, then, this is reduced to is the pleasure of "reputation", self-validating criteria reproducing themselves through social practice: a true self-fulfilling prophecy.

Bentham, of course, could compute a different utility taking into account, for example, the pleasure of "relief", but insofar as the pleasure of "reputation" influences the computation of utility, the system is entirely circular. Moreover, if Bentham chose to introduce different other pleasures and pains the whole compound of them would not only produce the above self-fulfilling prophecy, but would face the insurmountable problem of quantification.

It is impossible to say that the pleasures of "piety" are more important, than, for example, pleasures of benevolence, or malevolence, even in one particular individual, not to speak of society as a whole (even if one conceives of it, as Bentham did, as the mere sum of individuals). One can make an arbitrary value choice (as is in fact done in all decision making to a certain extent), but for that one does not need Bentham's theory. Since neither pleasure, nor pains, are quantifiable, and since, therefore, it seems impossible to

establish an objectively valid rank order among them, the theory of utility loses all its prescriptive value.

If we return back to our market analogy, however, we see that the descriptive value is not lost. The market is a giant matrix of individual preferences which, through monetary "quantification" and in terms of the law of great numbers, describes the statistical order of preferences insofar as material goods and services are concerned. But, as Galbraith has shown, even there, preferences can be created, not merely reproduced, and thus even the market – in the long run – cannot be taken as having any prescriptive orientative value.

Thus, both Bentham and the economists are caught in the tautological limbo of instrumental rationality, in which ultimately there are no independent variables they could point to, and the whole system becomes one giant self-reproducing and self-validating circle. This is a necessary outcome of the disregard for the dialectical interpretation of time (future as a negation of the present) in which becoming, and not solely being, is the mode of interpretation. Bentham's philosophy and modern economics are based on a pre-supposition of causality, and they require a set of independent variables to explain their extrapolations. the conflict of interests between different classes of society in terms of present, and especially in terms of future, is simply ignore, and thus the adherents of this "philosophy" lose the only possibility, viz., to theorize in terms of a least relatively independent variables of the conflict of interests and their structures in society.

Bentham's own preferences, in spite of their apparent arbitrariness, are a product of past policies and practices, which however did not come into being by some "rational" computation of utility but by balances of power resulting from private ownership and the level of development.

Besides, as we have seen, his utility is entirely retrospective, whereas we know that policy's essence is anticipation determined not only by present and past, but by future itself: every action is a negation of the present. Such a perspective accommodates the

need for more radical changes in the structure of values of the future, whereas Bentham's utility accounts for the future only in terms of present, i.e., future's past. This is why we said before that Bentham's theory ignores time, i.e., the probability (not only the possibility) of the change of values, or, in Bentham's terms of the intensity and quality of pleasures and pains.

If Bentham's philosophy were valid, history would come to an end. It would be a big circle of homeostasis, because his constant pleasures and pains would result in constant utilities in turn reproducing constant values (=pleasures and pains).

If, on the other hand, he were able and willing to shuffle and change these intensities and, therefore, the priorities of different pleasures and pains, he, again, must do that in terms of utility and this makes the system circular on the second.

In other words, Bentham's theory is not only useless, but also misleading. The reason for that is simply that values are not independent, are not quantifiable, but, on the contrary, are the most dependent variables of social practices and policies. In spite of Bentham's almost cynical "rationalism" we must conclude that he was a moralist, a theologian, who interpreted values as given and constant.

B. BECCARIA: HIS THEORIES AND HIS INFLUENCE

We have criticized Bentham's development and extrapolation of Beccaria's theory.[1] Beccaria, of course, does not deserve all of this blame since he did not, in his Essay on Crimes and Punishment, indulge in the explicit pretension of offering a philosophical theory.

It was, however, Beccaria, who launched the idea of "maximum happiness". It was he who first drew the explicit analogy between the market and society[2]. This analogy is without doubt due to the prosperous and blooming future capitalism was looking forward to at that point in history. It was Beccaria who postulated first – at least in the realm of social policy – the ideal of "geometric precision" and who first seemed to advocate the view that arbitrariness is due solely to the absence of concise rational criteria of judgment. Beccaria crystallized is ideas in a short and precise manner, as if he wanted to prove the possibility of "geometric precision" and thereafter his ideas remained the Bible of criminal law[3]. His influence was largely due to precise timing: when his Essay was

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[1] H.L.A. Hart, Beccaria and Bentham, 4 MEMORIE DELL'AC.DI TORINO 19.

2 The true relations between sovereigns and their subjects, and between nations have been discovered. Commerce has been reanimated by the common knowledge of philosophical truths diffused by the art of printing, and there has sprung up among nations a tacit rivalry of industriousness that is most humane and truly worthy of rational beings. Such good things we owe to the productive enlightenment of this age. (Emphasis added.)

C. BECCARIA, ON CRIMES AND PUNISHMENTS, Paolucci, Introduction and Transl. (1963).

3 Ancel & Stefani, Introduction to Beccaria, Traité des délits et des peines, Cujas, Paris (1966):

L'œuvre de Beccaria, en effet, ne marque-t'elle pas l'avènement du droit pénal moderne? La science pénale tout entière, telle que l'a construite le XIXe siècle, n'est-elle pas largement dérivée de ses doctrines et même n'a-t-on pas pu ranger leur auteur parmi les

published the Western societies were ready for a radical change in the mode of perception of criminal law. His ideas represent a retotalization of the postulates of criminal law upon a rationalistic basis: a new and newly organized system of justifications of punishment. This retotalization may well have been conceived in reaction to the arbitrariness of aristocratic criminal justice, but the range of the doctrine he proposed goes well beyond the scope of the 18th century. In fact, with Beccaria punishment and criminal law reached the objective limits of justifiability[4] because Beccaria was perhaps not only the first, but also the foremost rational legitimizer of the practice of punishment and if his justifications cannot be adopted than the only remaining resort is back to the Kantian categorical imperative of simple retribution.

Our analysis of Beccaria's ideas will be in terms of general theoretical framework, rather than confined to explanations of the historical origin of his ideas in the perceptions of his own time. Because of this we shall analyze him not merely as the originator of modern criminal law but as a still very relevant theorist.

It is not by chance, however, that his ideas still hold fast; they were brought forth in anticipation of the social order we now live in, which therefore justifies our criticism of him from the standpoint of modernity.

Cesare Beccaria was born in Milano in 1738. After eight years of what he himself called "fanatical training" under the Jesuits of Parma and his graduation in 1758 from the University of Pavia (with no distinction) he became involved in the main current of

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'pionniers de la criminologie'? Enfin, à l'imitation de celui qu'il a souvent nommé "son maître", Montesquieu, ne fonde-t-il pas son examen critique du système en vigueur et ses propositions de réforme sur une recherche que, sans trop d'anachronisme, on peut déjà considérer comme une application de la méthode comparative?

4 See supra, introductory note to this section.

enlightenment thought. He contributed regularly to Il Caffe and other newspapers, and became a member of a close intellectual circle of friends. Brothers Verri leaders of this group are reported to have been highly influential in Beccaria's writing. From 1768 to 1794, when he died of apoplexy, he occupied a series of sinecure teaching posts in Milan and produced only one larger book, a book on political economy in which he is noted to have been among the first to apply mathematics to the theory of economics.

His essay called Dei delitti e delle pene was originally published anonymously in Tuscany in 1764. Voltaire called it "le code de l'humanité"; Frederick II of Prussia, who abolished torture even before the publication of Beccaria's book[5], wrote to Voltaire and said, Beccaria "has left hardly anything to be gleaned after him"; Maria Theresa of Austria and the Grand Duke of Tuscany publicly declared their intention to be guided by the postulates proposed in Beccaria's book, and Catherine the Great of Russia called upon Beccaria to attend the realization of the necessary reforms of the Russian criminal justice system in person and to reside in her court[6].

If apart from all that we consider the whole series of codifications which emerged from this period of enlightenment – emerged because of the need of the enlightened despots to instruct their subjects in a rather paternalistic manner concerning right and wrong – then we see that Beccaria's ideas did indeed fall on receptive ears[7].

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5 Frederick II of Prussia in a letter to Voltaire: "Beccaria has left hardly anything to be gleaned after him".

[6] Paolucci, supra note 2.

[7] Tuscany published its own rather disorganized Criminal Code in 1786; Austria promulgated its own code in 1787. This code, called Josephine because of Joseph II, son of Maria Theresa, was already a very well organized code. it was the first to have incorporated the principle of legality and to have secularized its incriminations in a total manner. The only exception there was blasphemy which even an atheist such as Joseph II felt obliged to incriminate. But a way around that was found just as well: there was a presumption of insanity valid for anyone who committed

This, in short, was the series of repercussions that followed – not entirely in terms of cause and effect but surely under the strong influence of – the essay written by a 26 year old man without any substantial training in jurisprudence. And we have not even mentioned the corresponding procedural changes of which, as we shall see, Beccaria also had a lot to say in his little book.

In terms of historical interpretations of the events described we would like to say only that all this activity most surely must not be attributed to the personalities of the enlightened rulers themselves. If there is to be an historical interpretation here with explanatory power it ought to give a structural interpretation, i.e. one framed in terms of the rise of rationalism in the 18th century.

Our interest here is focused on the parameters of utilitarian philosophy because it is this that has left its trace on modern criminal law. Beccaria thrived on this source, and the connection of the pleasure-and-pain principle with punishment as a negation of pleasure and the creation of pain must have been persuasive enough to seduce both Beccaria and Bentham. Beccaria saw in this the vehicle towards the principle that "reasoning rather than force" ought to prevail among men. He thus opened the Pandora's box of rational justifications of the practice of social punishment which up to that time prevailed on a

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blasphemy: the language of Josephine is already very clear and concise ant the reason for that too can be traced back to Beccaria and even Montesquieu who postulated that people have to understand what is prohibited, if they are to be punished after they have committed a wrong. Prussia's Frederick II promulgated the Criminal Code in 1794. That code is typical of the attitudes of the enlightened despots: it is a catechism of right and wrong and its first article says that every authority – parents, teachers, etc. are obliged to fight against vice and crime. France's Code pénal of 1810 already knew the principle nullum crimen … from the 1789 Declaration of the Rights of Man yet it still punished the crime of laesion majestatis by cutting off a hand – intended for those who attempted a physical attack upon the European – followed by Guillotine. Typically this was the punishment provided for parricidism, i.e. parricidism and laesio majestatis were regarded as analogous.

more or less intuitive basis. He was able, with one sweep, to throw overboard all the theological justifications on which the heretofore accomplished concepts of the subjective elements of criminal responsibility were based. When he says that there are three moral and political principles that govern men, i.e. revelation, natural law, and the established conventions of society, it is not by chance that he places revelation at the top of the list. All three, however, are supposed to lead to happiness "in this mortal life". Laws are supposed to "promote the universal distribution of advantages". Power and happiness are juxtaposed to weakness and misery – the motion of history is "a tacit rivalry of industriousness" in the pursuit of pleasure and happiness. The enlightened ruler ought to take advantage of these mechanisms to promote the cardinal principle of "the greatest happiness shared by the greatest number". In analyzing which mechanisms ought to be utilized in attaining that goal one ought to use "geometric precision" rather than "the mist of sophism, and seductive eloquence". Tangible motives have to be introduced, "motives that directly strike the senses" because, as he repeatedly points out, this is the style designed to influence "the unenlightened and excitable masses". This insistence on the paternalistic show-teach attitude towards the masses to be educated is typical of the period. The "enlightened", be it philosophers or rulers, obviously conceived of themselves as being in possession of the truth to be demonstrated to the population in the most simple and palpable way. Therefore insistence on the simplicity of the laws and the distrust of the judiciary who ought to follow the concise wording of the law with a well oiled syllogism of which premise major is the rule, premise minor the act and the conclusion acquittal or punishment. Again and again Beccaria insists upon "the ineradicable feelings of mankind" – pleasure and pain as the causa prima of all happening: "Every man who has ever extended his thought a little beyond the mere necessities of life has at least sometimes felt an urge to run toward nature, who, with secret and indistinct voices, calls him to her".[8]

Of course much has been omitted from Beccaria's clarté de la pensée latine. Given that he was not a particularly industrious individual the work of toil has been left to Bentham, who, with little added originality, elaborated fully and consistently on what was

[8] Beccaria, supra, at 34.

conceived by the physician of the wife of Louis XV – Helvetius, and launched into the legislative and political arena by the shy Euclid of social relations, Cesare Beccaria. Beccaria's geometric precision evolved into the felicific calculus of Bentham who sat down with the theory of utility and brought it to bear – apparently at least – on every single aspect of legislation. Yet Beccaria's influence was considerably greater than Bentham's in spite of the fact that the former was a timid recluse while the latter offered his felicific science to the governments of Spain, France and Latin America – without much success.

Can we attribute the influence of Beccaria's essay to his ideas and knowledge? Most certainly not, even his most rational arguments were usually devoid of rigorous scholarly analysis. But his writing has a certain literary quality, a certain original "poetry", which can be attributed more to his sensitivity to developing public opinion than to his knowledge and intelligence.[9] This enabled him to anticipate the development of criminal

[9] The essence of Erickson's explanation of the emotional appeal of the charismatic leader is that people of this kind are unable to establish their adult identity without a proper resolution of their "inner polarities". This reconciliation is projected upon a particular social problem, through which the person achieves his own emotional stabilization, but at the same time offers an ideological solution to the society which his own identity crisis reflects. See E. ERIKSON, IDENTITY, YOUTH AND CRISIS, (1968); his works on GANDHI and YOUNG MAN LUTHER. I think it not to be an exaggeration to ascribe Beccaria's influence at least partly to this, especially because his own biography is one of a protracted adolescence and a revolt against authority.

Such an hypothesis obviously entails a statement concerning the importance of regular rigorous scholarly work. If this change in the attitude toward criminal law has been prompted by Beccaria's intuition and emotional appeal and if the rest is to be attributed to mere elaboration of the principles and postulates Beccaria established, this suggests a certain division of labor between different kinds of minds. Compare the following passage from Nietzsche:

> "We are something different from scholars, although it is unavoidable for us to be also, among other things, scholarly. We have different needs, grow differently, and also have a

> different digestion: we need more, we also need less. How much a spirit needs for its nourishment, for this there is no formula; but if its taste is for independence, for quick coming and going, for roaming, perhaps for adventures for which only the swiftest are a match, it is better for such a spirit to live in freedom with little to eat than unfree and stuffed. It is not fat but the greatest possible suppleness and strength that a good dancer desires from his nourishment – and I would not know what the spirit of a philosopher might wish more to be than a good dancer. For the dance is his ideal, also his art, and finally also his only piety, his 'service of God'."

Nietzsche, Seventy-Five Aphorisms from Five Volumes, in NIETZSCHE, ON THE GENEALOGY OF MORALSL and ECCE HOMO, 198 (1969). Cf. Deutsch, The Nerves of Government, Free Press, New York, 1966, at 3:

> "The history of many fields of science shows a characteristic pattern. There is a time in which the science goes through a philosophical stage in its development; the emphasis is on theory, on general concepts, and on the questioning of the fundamental assumptions and methods by which knowledge has been accumulated. At the end of such a philosophic stage often stands an agreement on some basic assumptions and methods – though not necessarily on all of them – and a shifting of interest to the application of these methods to the gathering of detailed facts. The philosophic stages in the development of science define the main lines of interest; in the empirical stages these interests are followed up. Philosophical stages in the development of a particular science are concerned with strategy; they select the targets and the main lines of attack. Empirical stages are concerned with tactics; they attain the targets, or they accumulate experience indicating that the targets cannot be taken in this manner and that the underlying strategy was wrong." (Emphasis added.)

This would tend to explain another element of Beccaria's success: This would tend to explain another element of Beccaria's success: This "philosophical stage" in which criminal law found itself received a powerful impetus from Beccaria's "poetry"; it was precisely the "poetic" nature of his argument that did not get lost in the mass of minute scholarly considerations and which enabled him to see the whole, to propose new principles and to question old assumptions. In this sense the lack of knowledge is more an advantage than disadvantage for the writer.

law at a time when this was not apparent to those deeply involved in the administration of criminal justice as it existed. The fact that he posited the kind of humanitarian and utilitarian argument he did was more important than the fact that his "geometric precision was rather superficial.

Today when Beccaria and Bentham are compared we tend to think of Bentham as the more serious and scholarly, but let us not forget that the idea was originally Beccaria's. Bentham merely elaborated on Beccaria's theory, and that required much less genius than drawing the coordinates for a whole new definition of criminal law. In a very important sense Bentham can be considered the bridge between Beccaria and the practical application of his ideas to legislation.

Benthamian philosophy, derided as it was and is, has nevertheless, left a deep imprint on the modern bourgeois mind, decision-making has hardly departed from it, and the dominant social consciousness in capitalism constantly propagates the utilitarian method of reasoning. Social phenomena are more susceptible to the perception, i.e. the observer and the observed are one in the same and utilitarianism de facto influences the perceptions of most of the members of the society and therefore influences most of the social practices despite the apparent lip service paid to other philosophies.[10] Its basic vice, however, is not its hedonism, but the modesty of it: the aspirations of Benthamian philosophy are so constrained by the given narrow spectrum of bourgeois aspirations that it cannot be anything but a reinforcer of the society structured around that narrow and humble spectrum of values.[11]

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[10] Fuller, THE MORALITY OF LAW (3rd ed. 1970).

[11] Bentham, as I have subsequently discovered, knew that his utility, felicific calculus and pleasures/pains philosophy was in fact circular. This is confirmed by the fact that he conceived of them as "fictions". This brings into play the whole underlying "Cartesian dualism with its emphasis on thought and logic and de-emphasis of matter and sensations" (Mini, Piero V., Philosophy and Economics, 1974, U. Press of Florida, p. 25) and the resultant supposition that

Characteristically, Bentham conceives of the sum of individuals to be not different that the society as a whole: consequently he is satisfied with a rather simple arthmetic projection of the individual's pleasures into social utility. If something is good for society but not good for individuals, it is not good for Bentham. This principle is excellent, so far as it goes, but Bentham forgets that the whole economic progress of humanity has been predicated precisely on the concept Bentham rejects.[12]

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fictions qua fictions may well be operational even though – similarly to geometric laws – they are conceived as swell as valid exclusively on the level of mind. This then confirms the true nature of utilitarianism saying: "Never mind if this is not true. There is no such thing as truth anyway, not after Descartes, Hume and Locke. What matters is whether this particular untruth (fiction) can be operative not merely as an explanation, but as a means of manipulation of reality!"

> [I]t is not possible to think of Bentham as an enthusiastic and naïve follower of the Cartesian method. On the contrary, he emerges as its antagonist, the precursor of such determined foes of logic à outrance as Nietzsche, Kierkegaard, and Dewey, but a man who, like Kant and Nietzsche, saw that fictions are unavoidable, (idem, p. 46).

See also Ogden; C.K., Bentham's Theory of Fictions, New York and London, 1932.

[12] > The falseness of a judgment is for us not necessarily an objection to a judgment … the question is to what extent is it life-preserving, species-preserving, perhaps even species cultivating. And we are fundamentally inclined to claim that the falsest judgments (which include the synthetic judgments a priori) are the most indispensable for us; that without accepting the fictions of logic, without measuring reality against the purely invented world of the unconditional and self-identical, without a constant falsification of the world by means of numbers, man could not live – that renouncing false judgments would mean renouncing life and a denial of life. To recognize untruth as a condition of life –that certainly means resisting accustomed value feelings in a dangerous way; and a philosophy that risk this would by that token alone place itself beyond good and evil.

F. NIETZSCHE, BEYOND GOOD AND EVIL, Sec. 4.

Additionally, Bentham's philosophy is circular. By being circular it is merely a common sense and ordinary private value judgment translated into the language of what he calls utility. Even so, however, it was extremely valuable because by translating these concepts into the language of utility, he introduced the ideal (simplistic though it was) of rationality; the ideal of calculability and contextuality rather than scholastic dogmatism, theological deontology and unreasoned aristocratic arbitrariness.

Yet Bentham's philosophy remains circular, and it is as latently apologetic as it is apparently rationalistic. This is disguised, however, in the garb of differentiated and often quite elaborate, lucid, and articulate common sense. This explains in fact why Bentham succeeded so well in translating all things into the language of utility: the variable part of his philosophy, the freedom of manipulating the essences of pleasures and pains, afforded him sufficient space to maneuver everything in the waters of utility. He merely translated previously unarticulated or deontologically imposed assumptions into a multifaceted circular truism. Insofar as his ideas were indeed innovative they ought to be antithetical (a) to his private genius and (b) to the liberating effect (even though only apparent) of reason set free.

That shaking off of the shackles of individual theological inhibitions of rationalism, shackles so evident in most of the enlightened and rationalist writers, and epitomized in Descartes' "Cogito ergo sum!", was the negative side of Beccaria's and Bentham's adventure into criminal law. Thus, again both Beccaria and Bentham ought to be

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But even if we assume that Bentham indeed took advantage of this knowledge in the full degree, this still does not invalidate our argument here. It only changes the niveau of discussion from true-false to operational-non-operational: Bentham's utility theory was a good articulation of the contemporary (mis)understanding of the world, but the time has come to switch to a different and new (mis)understanding, the reason being, accordingly, pragmatic rather than logical. The element neglected by Bentham is time.

interesting not so much because of what they were, but primarily because of what they were not.

The ideal of both Beccaria and Bentham was "geometric precision" (Beccaria) or "moral arithmetic by which uniform results may be arrived at". This represents a triumph of discovery – reason can be applied to questions of morality too, only to be immediately suffused into the circularity of the definition of pains and pleasures: "Nature has placed man under the empire of pleasure and of pain. We owe to them all our ideas; we refer to them all our judgments, and all the determinants of our life. He who pretends to withdraw himself from this subjection knows not what he says".[13]

Given, however, that the books of Helvetius have been burned in France and that he himself publicly disavowed his hedonistic principles he would have most certainly exclaimed: "nemo propheta in patria!".

But the industrial revolution was and is closely linked to hedonistic rationalism and when Bentham's book, Traités de Législation, was presented by Talleyrand to Napoleon, he returned it the next morning saying: "Ah! C'est un ouvrage de génie."[14] Marx later confirmed this by calling Bentham a genius – of bourgeois stupidity.

The resultant effect of criminal law is but a small portion of the impact of the general movement of rationalism on society as a whole. It is impossible to understand the origins of the modern goals of criminal law without at the same time encompassing the psychology of rationalization of the given at the time this occurred. In that sense society does to the offender whatever is "done to it".

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[13] For further explication of this concept, see J. Bentham, AN INTRODUCTION TO THE PRINCIPLE OF MORALS AND LEGISLATIONS, Chapter I.

[14] L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 – 1830 (1948) note 5 at 39.

Beccaria's rationalistic argument, just as Bentham's, is an ex post rationalization. His convictions were the product of the interaction of his personality and the dominant social consciousness of the time he lived in; they were not the product of his knowledge of criminal law. His work is not one of theoretical ambition, and his arguments were concocted to support his postulates, the very essence of his writing. Thus, if Beccaria is to be judged justly in light of history, he ought to be judged primarily for what he was not (a pedantic scholastic hypothesis-monger), and not for what he was, or pretended to be.

What Beccaria did was crystallize his ideas in such a manner as to make his demand for precision seem reasonable and attainable. Beccaria's demand for precision and his justification of punishment appealed initially to the enlightened despots of the 18th century, but in fact his theory filled a void in the emerging bourgeois society, and that is why it remains relevant and important today. A 20th century Beccaria can not change the justification of punishment, that possibility has been one and forever exhausted by Beccaria, one must show instead that there are no justifications for punishment, and one could be sure that today's "despots" would not be as receptive to that idea as Leopold of Tuscany, Frederick the Great, Catherine the Great and Maria Theresa were to Beccaria's ideas.

I. The origin of punishments and the Right to Punish

Starting from the most logical point, i.e. assuming that punishment is just a part of the pleasure and pain system upon which society is erected, Beccaria advises the enlightened despot to take advantage of this process, the basis of which is the "ineradicable feelings of mankind". Opposed to dogmatism, which superimposes an imperative whatever the situation, disregarding the given and irreducible mechanisms that govern society, he predicts that any law "that deviates from these [ineradicable feelings] will inevitably encounter a resistance that is certain to prevail over it"[1]. This position is in itself revolutionary: it is exactly the reverse of the theological presumption that God and his principles are given, and that humanity will simply have to adjust to it. In other words, he proposes that we treat the people, for him this is the same as society, by taking into account their own idiosyncrasies, which we cannot change no matter what, but can take advantage of, just as in geometry there are laws which cannot be changed but can be taken advantage of.

Once this is established we know why we want to punish, but not to what extent we can punish. The limits of punishment for Beccaria are imbedded in the social contract, whose central dialectic is the conflict of two postulates: 1) the tendency of the individual to make himself the center of his whole world, and 2) the need to associate in order to enable the individual to exist at all. These are two conflicting postulates, and Rousseau himself recognizes that when he says: "The fundamental problem of the social contract is to find a form of association which will defend and protect the person and property of each associate, and wherein each member, united to all others, still obeys himself alone, and retains his original freedom".[2] Thus Beccaria, faithful to his balance of pleasures and pains, logically concludes that one cannot be presumed to have alienated more than the

[1] C. Beccaria, On Crimes and Punishments, (M. Paolucci, trans. 1963) at 9.

[2] Rousseau, Social Contract (I, 6), cited in C. Beccaria, ON CRIMES AND PUNISHMENTS, note 13, page 11 by M. Paolucci.

difference in these balances between the point before he enters society and after that: "no man ever sacrificed a portion of his personal liberty merely on behalf of the common good."[3] Hegel (see supra sec. , p.) disagrees on the grounds that the state is no social contract, but he could have justifiably said that since man without a society is not even a man, and, therefore, everything that he is and has he owes to society, the society can ask just about any price from the individual, including his life.

Thus Beccaria's argument that "no man ever freely sacrificed a portion of his personal liberty on behalf of the common good" is incorrect the moment we abandon Beccaria's implicit assumption that man can exist as man before he "joins" as an associate of the social contract. On that point matters were clearer to Aristotle, who called man a political animal – zoon politikon.

Beccaria, however, goes on to say that "the sum of all the portions of liberty sacrificed by each for his own good constitutes the sovereignty of a nation." Again he introduces the arithmetic reasoning as if he were say society =$\Sigma\measuredangle$i-a' where $\measuredangle$i-a' is the difference in pleasures an individual sacrifices in order to enter the social contract, and $\Sigma\measuredangle$ are all these differences summed up in the sovereign. The reasoning here is superficial even in terms of social contract theory because presumably liberty = Σ pleasures that an individual qua individual can attain, whereas his pleasures where he joins the society are 1) presumably quite different from the pleasures he can have outside the society (assuming that were possible) so that we are really comparing the incomparable, and 2) obviously if the individual is not a member of society he cannot kill or otherwise harm people, cannot steal, or really do any wrong whatsoever; therefore, what does this sacrificed "liberty" really consist of?

Despite all ostensible devotion to rigorous mathematical thinking Beccaria here remains speculative and intuitive – and in a way correct. It is true that the individual feels

[3] Beccaria, 11.

constrained by social norms and would not feel constrained were he alone. But this latter feeling of freedom is a simple imaginary projection of the kind of freedom which never existed because man would have never become man were it not for his associations. The feeling of constraint, however, derives from structural social conflicts of interest, in principle traceable back to need – scarcity dialectic. This is the basic flaw in the social contract theory: imagining that constraints are due to mere association rather than to that which the association is intended to fight – namely scarcity.

The fallacy of this intuitive judgment concerning constraint invalidates the whole series of Beccaria's logical deductions from it, such as the proportionality of punishment, abolition of capital punishment, etc.

Also, Beccaria is quite inconsistent in his treatment of everyman: on one hand he conceives of him as somebody who intelligently sacrifices a portion of his "liberty" to join the society; on the other hand he talks of "vulgar minds", which ought to be impressed by "tangible motives", presumably because they could not understand anything more abstract.

His conclusion, therefore, that "the aggregate of the least possible portions [of freedom sacrificed in entering the social contract] constitutes the right to punish; all that means right"[4]. Justice for Beccaria was not what it had been for say Gratian who said that one punishes for the love of justice. No, for Beccaria it is "a human way of conceiving things, a way that has an enormous influence on everyone's happiness"[5].

This little statement – insofar as it is representative of the prevalent attitude thereafter concerning justice and law – was the beginning of the end of criminal law as a field of autonomous legal reasoning, autonomous because norms derived from revelation and undifferentiated "love of justice" could not be questioned, they were a priori given

[4] Id. at 13.

[5] Paolucci, supra., note 18, page 13.

categorical imperatives, whereas norms derived even from only apparently reasoned utilitarian judgment could always be challenged on their own grounds. And the moment they are challenged, what matters is not the rule qua rule any more, but the underlying social policy. Thus the discussion centers around social policy rather than around a rule, and the reasoning becomes clearly purposive instead of autonomous. Furthermore, this reasoning defective as it necessarily is, still leads to the elimination of one irrational element after another from the structure of the postulates of criminal law, until it stands totally stripped of all its "utilities" as pure oppression.

Beccaria opened a Pandora's box, while probably thinking that he had just closed one.

II. Consequences

From his interpretation of the theory of the partial relegation of liberty according to the social contract doctrine of Rousseau, Beccaria derives his principle that "only the laws can decree punishments for crimes"[1], a principle of the utmost importance for the whole social role of criminal law. Le principe de légalité, and its transformation into the principle of negation of crime concerning everything that is not prohibited in advance (nullum crimen …) represents a total metamorphosis of the social role of criminal law: before that it was there to punish, after that it was there to prevent punishment. In time it developed into an elaborate system of negotiations of the right to punish (safeguards) extending its protective role in the modern welfare state even in the area of "insanity" and the protection of those who are "insane". To this he adds the idea that the sovereign can promulgate only general laws whose application must be left to the judiciary as the third party not involved in making them. And, to conclude, he says that the right to punish is not based only on one necessary condition – namely that of the partial relegation of liberty and its adequate following via the separation of powers – but also on the condition of rationality: "if it were possible to prove merely that such severity (of punishments) is useless … it would be contrary to justice itself and to the very nature of social contrast."[2]

The real problem with this set of arguments is not to prove that they are wrong – that would be easy. The real problem is to explain how and why this "wrongness" cane to have such a tremendous influence in shaping, not only criminal codes, but whole constitutions and governments. One can prove that in 1764 a certain Cesare Beccaria was superficial in his logic, but that matters little unless one is able to demonstrate the reasons for the tremendous appeal of his theory and those of others of the same fold. But this is for later, our task here and now is to follow the argument posed by Beccaria step by step in an effort to discover 1) whether it is logically consistent and 2) what its strong points are in spite of its logical flaws.

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[1] C. BECCARIA, ON CRIMES AND PUNISHMENTS 13 (H. Paolucci, Trans., 1963)

[2] Id. at 14.

III. Interpretation of the Laws

A fourth consequence for Beccaria of the tandem social contract and the maxim "la missima felicita divisa nel maggior numero" is that the "judges in criminal cases cannot have the authority to interpret laws" because they are not legislators who represent the relegated portions of liberty of all the members of society through the national sovereignty. In this Beccaria is overreacting against the arbitrariness of the medieval justice forgetting that before his period the nature of criminal law was more a kind of guidance to judges, than a restriction of the repressive powers of the state. "For every crime that comes before him a judge is required to complete a perfect syllogism in which the major premise must be the general law; the minor, the action that conforms or does not conform to the law; and the conclusion, acquittal or punishment".[1]

Typically enough Beccaria's thirst for logic and reason, and the fact that he is a harbinger of the ascending class which demands – before it has in fact reached power – protection against the arbitrary aristocratic use of power synthesize into the rather naïve idea that "the legal system will dictate a singe correct solution in every case … as if it were

[1] Ironically enough Italy today – apart from Scotland's ancient Scots law verdict of "not proven" – is the only country in the world which does not, even in formal appearance, follow the Baccaria's tertium non datur: its art; 27, sec. 1, of Constitutione della Republlica Italiana, does know the presumption of innocence, but art. 479, sec. 3 of its Codice di procedura penale (Codice Rocco) knows the Italian kind of not proven, non lizuet, called el assollutione per el insufficienza di prove, saying in effect that if there is not sufficient proof to convict on legal grounds it is logically impossible for the court to acquit. The accused can be released (absolution, assolutione), but a new procedure can be initiated against him at some later date if there is new evidence against him. This in effect means that the presumption of innocence is not operative in criminal procedure, where in effect it means that the court, if not convinced of guilt, ought to presume that the defendant is innocent even if there is still some suspicion against him. The presumption of innocence is thus not a logical anticipation of statistical probability, is not a logical presumption: it is a political postulate not carried over into the Fascist code of criminal procedure still valid in modern Italy.

possible to deduce [logically] correct judgments from the laws by an automatic process [and] through a technique of adjudication…disregard the 'policies' or 'purposes' of the law." here it becomes evident that Beccaria was not trained in and never practiced law.

But again we shall not embark here on the rather futile discussion of whether a "perfect syllogism" is possible. It is clear that life cannot be pigeonholed into legal rules, and that legal rules are not their own essence. They are an expression of the postulates behind them, in our case the conflicting postulates of the control of "society" on one hand and on the other hand the residual postulate of concessions the feudal state was forced to make in order to accommodate the demands for protection against arbitrariness that the rising bourgeois class was making. thus any purely jurisprudential argument is bound to miss the mark because the demand for formalism, i.e. a restrictive interpretation of the rules is one thins in criminal law but something quite different in commercial law. The essence of the problem is not the "perfect syllogism" but the balance of forces in a particular society. A powerful ruling class with no organized opposition operating within a non-polarized social consciousness can afford to make concession in terms of a strict interpretation of penal statutes, but the same class and its judicial exponents will be incapable of these same concessions in a situation in which it is in fact or only apparently endangered. It is obvious why this question exists more in criminal law than in other area of law: given a sufficiently intense polarization of social forces, the state and whomever it serves will be ultimately forced to use sheer physical force to defend itself. And while an apparent peacefulness and respect for rules may exist insofar as the given social order is stable, we can be sure that this would be immediately thrown overboard if there was a real danger of resurgence.[2]

Nothing really explanatory, however, can be said of this in terms of a discussion of legal formalism vs. e.g. purposive legal reasoning. What de facto matters here is not the rules but question such as where are judges recruited from in a particular legal system, what is the consciousness of legal profession, its tradition, the extent of the separation of powers between the judicial and the executive branches; to what extent is there an articulate

[2] R.M. Unger, Knowledge and Politics, 92 (1974).

consciousness among people concerning the real oppressive nature of the law and the state; what are the economic conditions in society and the polarization around the issues of scarcity, etc.

The question is, would Beccaria have postulated the same perfect syllogism 100 years later in 1874? If one were to say here that Beccaria was himself a member of the aristocracy, our answer would be that so were all the enlightened rulers, from Leopold of Tuscany to Catherine the Great – all admirers of Beccaria. The point is, of course, that the class struggle analysis is basically a very crude conceptual tool, and in the last analysis quite valid but incapable of catching all the nuances and deviations which superficially at least seem to negate it. It is clearly applicable only in already marginalized social situations.

The bourgeoisie in Milano in 1764 must have already been an influential and coherent social class in ascendance. It surely made its voice clearly heard and such a seemingly paradoxical development as a member of the aristocracy propagating bourgeois demands and being accepted and limited by other members of the aristocracy is easy to explain. The bourgeoisie did not rise in a vacuum: it rose in social influence in a specific society. It had no direct access to the helm of the state, but its vigorousness was felt in the economy, in literature, in the press, etc. Its ideas were progressive and they seemed progressive event to those who – in view of the class struggle – ought to have reacted negatively against them. To see the situation in terms of vulgar Marxism would be to reduce the particulars of this ascendance of the bourgeoisie to the universal law of the class struggle. In fact, however, it was not only bourgeoisie who was making progress at that time, the whole society, engaged in the movement of enlightenment, was advancing into the age of reason. The bourgeoisie happened to be the embodiment of the future of society, the embodiment of progress. Because its interests coincided with those of the society as a whole at this particular stage of development, the influence of the liberal bourgeois thinking was therefore by no means limited to its own members. When Beccaria made his demand for legality, for the equal protection of the laws, he in fact represented not merely the interests of the rising middle classes: he represented the idea

that was present in the whole society, even in the aristocracy, insofar as it was not aware of its own class situation. This, of course, coincided with a whole range of other social processes, e.g. the interest of the enlightened rules exercise a centralized authority over the whole judicial apparatus. Maria Theresa of Austria, for example, typically required that every pronounced death sentence in the vast Austro-Hungarian Empire be submitted to her personally for confirmation.

"Our understandings and all our ideas have a reciprocal connection; the more complicated they are, the more numerous must the ways be that lead to them and depart from them. Each man has his own point of view, and, at each different time, a different one. Nothing can be more dangerous that the popular axiom that it is necessary to consult the spirit of the laws. [T]he 'spirit' of the law would be a product of a judge is good or bad digestion".[3] When Beccaria said that, he meant exactly the same thing as Iavolenus when he wrote "parum est enim ut non subverti posset", except that the remedy in Roman law was exactly the opposite of the proposed by Beccaria: "Omnis definitio in iure civili periculosa", whereas Beccaria insists precisely on definitions and their clarity: "The disorder that arises from rigorous observance of the letter of penal law is hardly comparable to the disorders that arise from interpretations. The temporary inconvenience of the former prompts one to make the rather easy and needed corrections in the words of the law which are the source of uncertainty, but it curbs that fatal license of discussion which gives rise to arbitrary and venal controversies. When a fixed code of law, which must be observed to the letter, leaves no further care to the judge than to examine the acts of citizens and to decide whether or ……..text missing

Lawyers tend to reduce this question to one of formal logic, to which it is in fact irreducible. Problems such as the extent of the sharing of vallues and interests; the fact that once launched into the social arena the norm tends to live a life different from the one intended for it by the legislator, etc. are necessarily and incorrectly left out of such a discussion. The problem may present itself in the form of the extent of interpretation the society is willing to allow, but this is a false dilemma. It presents itself as both the result

[3] C. Beccaria, On Crimes and Punishments, 16 (H. Paolucci, Trans. 1963).

and an apparent problem in a particular case or in an abstract jurisprudential debate. In fact, however, it incarnates a whole swarm of other problems which are apparently not connected to it and are not discussed 1) because they are not reducible to legal reasoning, 2) because they are not as easy to reach as the legal norm in the book on the shelf in the office of a university professor. To mention just a few:

a) the quality of the judges

    1. their intelligence
    2. their valuations
    3. the amount of work they have to do
    4. their class derivation, etc.

b) the structure of the procedure, i.e.

    1. does the judge have to reason his syllogism or is the subsumption left to the jury unexplained?
    2. is there any evidence law to separate consistently questions of fact from questions of law? – a question that will vary from case to case
    3. in the appellate structure: is the judge afraid to interpret the law freely because of judicial review and the attitudes of the appellate court judges?
    4. to what extend does the judge feel responsible for his decision given that he may decide alone, or together with assessors, or may relegate his decision to the jury, etc.?

c) What is the political separation of powers like?
    1. are the judges elected, nominated?
    2. for how long a period of time are they nominated?
    3. where do the funds for their courts come from?
    4. what is the general impression in society about the role of the judiciary, etc.?

d) What is the legal education like?
   1. prestigious, or not;
   2. intellectually challenging, or not;
   3. what strata of population feel attracted towards the study of law, etc.?

This list is far from being exhaustive, yet these and many other factors converge in producing the resultant single "perfect syllogism". Everyone who has ever practiced law knows how little in a particular case is ever determined by the mere letter of the law: parum est enim ut non subverti posset: and yet in many European law school the reasoning taught today concentrates on the legal syllogism, and Beccaria's influence is still felt. Not that the question of the possible extent to which the legal definition of crime can be fixed and determined concisely would not be legitimate. It just is not very relevant, when one considers all the "causes" and all the actual "consequences" of a particular legal decision of a criminal case. And if one admits, as many lawyers are willing to, that most of legal reasoning proceeds in the fashion exactly the reverse of Beccaria's "perfect syllogism", so that the conclusion of guilt and punishment is reached first and then reasoned out in terms of law just to repel the danger of reversal on appeal – then it becomes clear how simplistic and naïve Beccaria's proposal in fact was. But Beccaria's influence, as we have already pointed out, ought not to be attributed to the smoothness of his rather superficial argument.

It was precisely this innocent naiveté that was required to create a postulate of legality: no judge in the 18th Century could have been naïve enough to believe what Beccaria believed. But his task was not to persuade the judges; his reasoning was sufficiently persuasive to convince the despots, and that is what counted. Consequently, utilitarian reasoning should not obscure the pregnant fact that Beccaria was creating an ideology – not a sociology – of criminal law. It was the appeal of his ideals, not the vigorous reasoning of his ideas, that won over the grateful public of the enlightenment. And in that sense he succeeded all too well. Many of his false rationalizations were carried over through the ages and were very instrumental in obscuring the real nature of his essentially political postulates.

IV. Obscurity of the Laws

Beccaria touches here upon two issues: (1° the question of the law made clear and transparent if it is to have the preventive effect and (2) the question of the fixity of the law. In addressing both of these question he gives essentially correct answers for essentially incorrect reasons. Beccaria says, "If the interpretation of the laws is an evil, another evil, evidently, is the obscurity that maples interpretation necessary. … Ignorance and uncertainty of punishments add much to the eloquence of the passions".[1] But again, the question of obscurity and interpretation has many more facets than just the prevention of arbitrary interpretation and the inaccessibility of the law to those who are subject to it.

(a) Conciseness

The ideal of the Continental criminal law ever since Beccaria has been to make the criminal code a logically coherent matrix of apophthegms, which, even while condensing the meaning of the norm in as few words as possible, would still be intelligible to the man on the street. And indeed those two goals go hand in hand since this forces the legislator into a clarity of thinking: qui bene distinguit bene docet.

This ideal stems from the idea, prevalent during the Enlightenment, that crime, to a large extent, was the product of ignorance. If the mass of people could only be educated or enlightened crime would decrease. This enlightenment process was to take two forms, each was to take two forms, each requiring clarity and fixity of the law. First, the laws were to be prescriptive in that the criminal code was seen by many enlightened despots of the 18th century as a book of instruction, an outline of proper and improper behavior (a minimal moral code). Frederick the Great, for example, believed just that and the criminal portion of the "General Prussian Territorial Code" prescribed acceptable and

[1] C. BECCARIA, On Crimes and Punishments 17 (H. Paolucci, Trans. 1963).

desirable modes of behavior in even the most trivial aspects of domestic life.[2] Clarity was desirable not because of a desire to achieve justice or ensure against the abuse of power by the state; clarity was required so that the rules could be understood, so that the code could function as a book of instruction. Secondly, the law should be clear so that people would be aware of the price they would be forced to pay if they broke the law, and again clarity was necessary.

It is interesting to note that Beccaria believes "that ignorance and uncertainty of punishments add much to the eloquence of the passions".[3] If all the people were acquainted with the punishments they were to receive for particular offenses, he thought that the chance that they will in fact commit the offense would be much smaller. Characteristically, he fails to differentiate between knowledge of the law and knowledge of the probability that one will actually be caught, tried, and punished. Thinking of

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[2] C. Von Bar, History of Continental Criminal Law 255 (T. Bell and others, Trans., 1968). Von Bar points to a few sections of the code in particular:

> § 906: "Any person to whom an unmarried pregnant woman communicates her secret must not reveal the same, under pain of discretionary but substantial penalties (§§ 34, 35) as long as there is no reason to anticipate an actual crime by the woman".. § 929: "It is also incumbent even upon persons who do not occupy a special relation to said woman, if she has communicated to them her pregnancy or has confessed, to admonish her to observe the statutory provisions (§§ 901 et seq.)."
>
> §§ 1308, 1309: "Anyone who with a view to his own profit shall by means of slander promote discord among near relations or married couples shall suffer a substantial fine or corporal penalty proportionate to the malicious intent and the harm resulting therefrom". "Anyone who promotes this discord with a view to deprive the natural heirs of their inheritance or legacies and to direct such to himself or others, shall be punished as a swindler". § 933: "No one shall commit against or in the presence of a person, whose pregnancy is evident or known to him, acts which are likely to arouse violent emotions".(!)

[3] Beccaria at 17.

morality in terms of a market, wherein the prices for all immoral items are known and therefore everybody is well informed and a rational "buyer", he presumed that this would have a general preventive effect. But, of course, the realm of misbehavior is not a market as simple as this: the prices attached to different offenses are one thing, and the actual probabilities that one will be punished something else again. In modern criminology, for example, it is well known that the "dark numbers" are very high, but the general public is not aware of this. One, therefore, speaks in exactly opposite terms of those proposed by Beccaria: one speaks off "the positive influence of public ignorance".

(b) People's understanding of the laws

Returning to the concept of construction of a code, we note that the general part of the code defines the parameters of criminal responsibility possibly applicable in every specific incrimination, which in turn may qualify these parameters for the purpose of every policy behind a given incrimination.[3a] Instead of iterating the applicability of the

[3a] This has just recently become a very fashionable issue in legal theory. Namely, are the elements of a definition (corpus delicti) of a crime only those specifically mentioned in corpore delicti, or do they encompass the implied issues from the general part of criminal code or law. In view of In re Winship, 397 U.S. 358 (1970), where the Supreme Court held that the prosecution has to prove every single element of the crime, it becomes very important to know whether the general issues are, by virtue of once being raised in the criminal process, "elements of the crime". If they are, the prosecution has to prove a sense of e. g. mistake of fact, and the defense must onlly raise an issue to make it "an element of the crime".

But see the (il)logical sequence of Mullaney v. Wilbur, 421 U.S. 684 and Patterson v. New York, U.S. 97 S. Ct. 2319, L.Ed. 2d (1977).

Fletcher proposes a "minimal definition" theory, which is unacceptable for the same reasons as Patterson "solution". Burden of proof in criminal cases is far too central an issue far too intenselly connected in the safeguarding role of criminal law, to be decided on essentially fortuitous, if formalistic, grounds of the criterion called "minimal definition" of the crime. FLETCHER, RETHINKING CRIMINAL LAW (1978) at 695. More on that in Ch. IV, infra.

respective question such as sanity, intent, recklessness, negligence, responsibility for praeterintentional consequence, mistake of fact and law, self-defense and necessity, place and time of the commitment of the offense, attempt, inadequate attempt, conspiracy and the question of accessories, all the punishments and their limits (general maximum and minimum), the criteria for measurement of appropriateness of punishment (mitigating and aggravating circumstances), rules for punishment of recidivists, conditional sentence, the so-called security measures, the limits of time and place insofar as the applicability of the code is concerned, - instead of iterating every single issue as many times as is the number of particular incriminations, these rules are articulated in the so-called genera part. Obviously their applicability will occasionally represent a problem not capable of being solved without "interpretation". But the other alternative would be to have a code many times larger.

This of course means that every connection between an issue in the general part and a specific incrimination has to be subsequently worked out. To put it in legal terms, the rule of the general part has to be "applied" to the specific incrimination and the "conclusion" which follows again "applied" to specific circumstances of the act. For example, if it is a question of attempts in the case of rape, one has to draw the specific rule that coniunction membrorum suffices for accomplished rape and negates the issue of attempt. Now, these connections are not worked out in the code itself, i.e., they are left to the law professors and judges. In time, of course, all usual connections are in fact determined but many are not and are in fact still left to the "good or bad digestion" of the judge. The procedural instrument of appeal is an attempt to cure that – but what is the guarantee that the appellate judges will in fact know better that the first instance judges? In the above case of rape the criterion called coniunctio membrorum is purely arbitrary and implies private value judgement, i.e., "interpretations" according to teleological interpretation, i.e., ratio legis is projected into the law very much in the fashion the perceptions are projected into the Rorschach ink blots.

It is possible to avoid that and Anglo-Saxon law has achieved this to a considerable degree. There all these combinations are articulated in specific cases which in fact -–

legally speaking – represent particular combinations of specific issues. The consequence is the obvious difference between the Continental criminal codes of pocket size and the fifty cubic feet of American legal opinions concerning criminal law. These may then be condensed back into different "digests", but the fact remains that there is a trade-off between the two goals postulated by Beccaria: if one is to avoid interpretation and arbitrariness, one is bound to pay for that in terms of obscurity. Obscurity, here in fact the whole mass or recorded judicial working out of particular combinations of issues requiring specific terminology, organization of data, know-how as to how to extract the ruling out of the mass of obiter dicta, allows, because the system quickly readies the threshold of self-immolation, for even greater arbitrariness that the abstract European system. Besides, law becomes a science, another thing Beccaria would abolish: "happy the nation where laws need not be a science!"[4]

The irony here is that we find very obscure laws in what are often considered to be the most democratic countries. This is ironic because, as Hegel pointed out, obscurity is booth unjust and undemocratic. It is unjust because individuals within the society are not aware of what constitutes prohibited behavior, or if they are aware of what is prohibited they may not be aware of the amount of punishment which will be handed out for a particular crime, and as such, there is no guarantee against the abuse of power by the state. Obscurity is undemocratic because knowledge of the law is possessed by only a few rather than by the community as a whole.[5]

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[4] Id. at 21.

[5] Hegel's Philosophy of Right 138 (Trans. and Notes by T.M. Knox 1971):

> To hang the laws so high that no citizen could read them (as Dionysius the Tyrant did) is injustice of one and the same kind as to bury them in row upon row of learned tomes, collections of dissenting judgments and opinions, records of customs, cc, and in a dead language too, so that knowledge of the law of the land is accessible only to those who have made it their professional study. Rulers who have given a national law to their peoples in the form of a well-arranged and clear-cut legal code – or even a mere formless collection of laws, like Justinian's – have been the greatest benefactors of their peoples

(c) The Fixed Nature of the Law

Beccaria mentions in his section on "Obscurity" the importance of the law being written. He notices correctly that without fixed "writing a society can never acquire a fixed form of government with power that derives from the whole and not from the parts".[6] He was

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> and have received thanks and praise for their beneficence. But the truth is that their work was at the same time a great act of justice. [A.] (notes omitted)

Hegel also says at 135 – 136:

> English national law or municipal law is contained, as is well known, in statutes (written laws) and in so-called 'unwritten' laws. This unwritten law, however, is as good as written, and knowledge of it may, and indeed must, be acquired simply by reading the numerous quartos which it fills. The monstrous confusion, however, which prevails both in English law and its administration is graphically portrayed by those acquainted with the matter. In particular, they comment on the fact that, since this unwritten law is contained in court verdicts and judgments, the judges are continually legislators. The authority of precedent is binding on them, since their predecessors have done nothing but give expression to the unwritten law; and yet they are just as much exempt from its authority, because they are themselves repositories of the unwritten law and so have the right to criticize previous judgements and pronounce whether they accorded with the unwritten law or not. (notes omitted)

All of the above, with the exception of the first sentence – a translation from Hegel's NATURRECHT UND STAATSWISSENSCHAFT IM GRUNDRISSE and GRUNDLINIEN DER PHILOSOPHI DES RECHTS – are notes Gans interlaced into the text of Hegel's work in 1833, notes taken from Hegel's lectures.

[6] Beccaria at 18.

probably the first to perceive the warranting importance of writing and its fixed form in criminal law.

In contract law this was already clear to the Roman jurists: the form is indeed essential, because a stipulation is made at present to govern the behavior of the parties in the future. The form thus represents a bridge over the element of time, and this is why, for example, the Romans were very particular in the stipulation ceremonies, if the contract concerned chattel, or land, or the so-called traditio requiring a participation of seven people (witnesses, parties, the person concerned with weighing money, etc.). Thus form in law was and still is intended to preserve the informational essence of the stipulation in the memories of as many people as possible anticipating in fact that future disputes might arise as to the precise content of the stipulation, then the memories of those involved would be very helpful.

In a more philosophical language the fixed form and ceremony in law usually serves the purpose of carrying over to the future a development of a human relationship concerning things and even people (e.g. marriage) as they are in the present. Probably the most central problem in contract law, as well as criminal law after Beccaria, is the interpretation of a clause stipulated in the past and in abstracto, whereas its "interpretation", i.e., the concretization of this abstract rule, occurs in the future and is usually connected with a dispute since otherwise there would be no need for adjudication and concretization.

A will, for example, has exactly the same role to play, and thus its written form in fact represents an artificial memory which survives the testator. Writing is in law a crystallization of a relationship in the present intended to govern the future and thus its fixed form is of utmost importance, because no matter what happens afterwards, it remains as it was at the moment of stipulation. As such the written fixation represents a greater guarantee that something will or will not happen in the future, or else there will be a sanction attached to the behavior violating the stipulation.

This is probably one of the most important questions of jurisprudence, yet the above explanation does not transcend the usual circularity of the formulation. Words such as “memory”, “fixation”, “crystallization”, “bridge from the present to the future” are all circular descriptions and do not reach the essence of the question. Here Kropotkin’s maxim – law being a crystallization of the past to strangle the future – again comes in handy, but its explanatory power is just as weak as ours.

Fixation of a stipulation is necessary only in anticipation of a dispute over the realization of the stipulated rule. Fixation, thus implies a high probability of conflict, disagreement, and dissension. Insofar as these do not occur, the fixation is in itself unnecessary and superfluous, yet often the conflict is prevented precisely by the clarity and fixity of the written stipulation whose anticipation of the parameters of the possible future conflict means, in fact, that the criteria of working out the conflict have been stipulated in advance. Thus the fixity of a stipulation is in itself the best indicator of the probability that a future conflict might arise and this is just as true in family law (marriage, adoption, etc.) as it is in contracts, torts (there the law stipulates the rules in anticipation of tortuous behavior), or criminal law (as a stipulation between the society as a whole and the society as a sum of individuals). In this very real sense the theory of social contract applies very well but inadvertently it implies in its very nature the probability of a future conflict. It is concerning the parties of this conflict, anticipated in the theory of social contract, that the modern social theories vary: Marxism emphasizes the frictions between the classes, non-Marxist theories see various other protagonists of the conflict.

Until Beccaria, criminal law was never conceived of as a contract between the state and individuals, and criminal legislation never paid respect to this element of fixity, which allows for a degree predictability with respect to what the state will do. Beccaria noticed the preventive effect of that, and as we said, believed that by making the writing available to the masses they would be deterred from crime, knowing the price to be paid for the violation of criminal provisions.

But more important than this general preventive aspect is the fact that Beccaria, for the first time, emphasized the other side of the coin too. Namely that the fixed form of criminal legislation prevents the punishment of acts not viewed as punishable at the moment of promulgation. Clearly, Beccaria derived this from the analogy with the social contract, noticing that the function of writing in the contract has that guaranteeing role to play. When he drew this analogy, he introduced into criminal legislation, for the first time, the idea that the role of criminal law is not just to be a manual of instruction to the judges (instrumental roles), but that it is a part of public law, an element of the separation of powers and as such a contract of concession between the legislator and his subjects (prescriptive rules). In the 19th century there emerged the formula "Nullum crimen, nulla poena sine lege praevia", and thus again have the parables of the day before yesterday (Rousseau's Contrat Social) become the analogies of yesterday (Beccaria) which developed into the concepts of today (Feuerbach).[6a]

"No magistrate [who is part of society] can, with justice, inflict punishments upon another member of the same society. But a punishment that exceeds the limits fixed by the laws is just punishment plus another punishment".[7] (emphasis added.) The idea of the law "fixing the limits of punishment" was never detected before in this articulated form. It was an invention of Beccaria and it is obvious what an enormous change in the function of criminal law results from it.

The idea itself is a logical consequence of the analogy with the contract law, an analogy which is characteristic of the period of Enlightenment in which Beccaria lived. Consequently, it cannot be said that Beccaria was its exclusive father; nevertheless, it was he who was the first to apply it to the real of criminal law where it remains one of the most powerful principles. Consider for example the ideas related to the "strict

[6a] But see D. 50.16.131: "Poena non irrogatur, nisi quae gaeque lege vel quo alio jure specialiter huic delecto imposita est".

6 Id. at 17.

interpretation of the statutes", the protective role of the safeguards of the criminal law's drawing upon the Constitutional Amendments in the United States; the prohibition of the use of "analogy" in criminal law all over the world; principles such as "ne bis in idem" (or in the United States "double jeopardy" principle); the presumption of innocence, etc. – all these insofar as they are an expression of the protective role of criminal law. "Protective" against the abuse by the police, by the judiciary, by the prosecution, even by institutions such as the parole board, or psychiatrists in cases of detention, etc.

Today this is taken for granted, but it was not until Beccaria that this new role became fully central to criminal law. Indeed, Constitution Criminalis Carolina was in fact promulgated in response to the prevalence of abuse of judiciary power and in fact all the subsequent codifications can be seen from this point of view. Yet in the case of codifications, this was an intuitively practical policy, in terms of an immediate response to the abusive state of affairs, rather than in terms of a postulated long range policy of framing the principle of the protective role of criminal law as a sacred postulate, a natural law, etc.

Beccaria, thus, is the great ideologue of the modern criminal law. Although his "geometric precision" was in fact not the real reason for his postulates, he was a rational harbinger, rational on a level altogether different than the level of "geometric precision". His conclusions and especially his general principles are often valid but not because of the utilitarian justifications he offered for them. In fact he would have been in many an instance more "rational", had he never made clear the reasons for his proposed reforms of criminal law, but instead simply postulated them as a "revelation". Revelation was for him the first origin of moral and political principles anyway: "The moral and political principles that govern men derive from three sources: revelation, natural law, and the established conventions of society".[8]

[8] Id. at 4.

One of the basic differences between Beccaria and Bentham is the fact that Beccaria seems wholeheartedly to believe in his utility principle. Unless, of course, we are willing to interpret the above mentioning of "revelation" as an indication that he was aware that rationalistic reasons for his postulates were in fact derived from much more than a shallow and simplistic utilitarian analysis. One can, on the other hand, argue that Bentham knew his proposal to reason in terms of Helvetius' pleasures and pains, utility, etc., to be a fiction[9] and that his pains and pleasures as conceptual tools rest upon a circular self-validation.

Beccaria never reveals that he is conscious of the ex post facto nature of his reasoning. Had he emphasized this in his Essay, it would not have been less persuasive, since anyway ideas like his are usually accepted only insofar as they accentuate the already existing premonitions in a particular society. But by making his reasoning more honest, he would have prevented much of the later reliance on the reasoning behind his postulates; the reasoning in fact responsible for eclecticism and many antinomies within the structure of modern criminal law.

In Beccaria's defense, it ought perhaps to be emphasized, the he reacted to what he calls "the mist of sophisms, seductive eloquence, and timorous doubt",[10] - the disgust he mentions again and again. This, on the one hand, indicates that the reason for his leaning towards the utilitarian justifications, rational but not exhaustive, was essentially a reaction to the deontological, teleological scholastic sophistry. On the other hand this makes it all the more probable that he, unlike Bentham, indeed believed in what he was saying.

Beccaria, of course, concentrate his attention on the law, knowing intuitively that the law is that form of social control, which is most manipulable by will and intellect [Ross,

[9] See C.K. OGDEN, BENTHAM'S THEORY OF FICTIONS (1932).

[10] Beccaria at 10.

Pound, Gurvitch][11] and this was a correct orientation. Still to reduce criminal law to non-science, as he would have it for the reason of the above general prevention, would perhaps be wrong. Yet this precisely happened in many European legislations and added to the dysfunctional processes we described above.

"Anyone acquainted with the history of the last two centuries, and of our own time, may observe how from the lap of luxury and softness have sprung the most pleasing virtues, humanity, benevolence, and toleration of human errors."[12] In 1918 George Herbert Mead advanced a similar theory of the "friendly attitude": he thought that the juvenile justice system – at that time newly created – in which the state acts in the role of parens patriae was a step towards making the criminal justice system "friendly" rather than "hostile". This corresponds to the behaviorist notion that positive reinforcement of positive attitudes is a much more effective learning device than punishment as negative reinforcement of undesirable behavior.

Beccaria, as we shall se later, advanced many similar notions perfectly compatible with the modern theory of learning and punishment. His intuition in this respect was a clear sign of genius. The idea here is not reducible to the simple truism of "violence breeds violence", Beccaria meant much more than that. He thought of the social system as a whole, and he connects the amount of crime (meaning violent crime) to the general amount of violence in society. "[These] were the real effects of the so-called simplicity and good faith of old humanity groaning under implacable superstition; avarice and private ambition staining with blood the golden treasure-chests and thrones of kings; secret betrayals and public massacres; every noblemen a tyrant over the people; ministers of the Gospel truth polluting with blood the hands that daily touched the God of mercy

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[11] See, A. ROSS, ON GUILT RESPONSIBILITY AND PUNISHMENT (1975);
G. GURVITCH, DETERMINISMES SOCIAUX ET LIBERTE HUMAINE (1955);
R. POUND, SOCIAL CONTROL THROUGH LAW (1949).

[12] Beccaria at 18.

….[13]. He clearly perceives that the amount of frustration in a particular society is connected with the amount of violence – he does not think in terms of parts being the constitutive sum of the whole; he talks in terms of the whole having a separate reality: the society as phenomenon sui generis. Here again his ideas correspond to those of Skinner's 200 years later: Skinner talks of "automatic goodness" being a consequence of the absence of frustrations in society, i.e., the absence of negative reinforcement of the socially desirable behavior, and the presence of positive reinforcement of desirable behavior. If we contrast this with the ideas of the Calvinists and Puritans in the 17th century, then we see just how far beyond them Beccaria saw.

Thus we return to the question of clarity and the need for clarity in the law – not so that the laws can be understood and known, and then serve as a book of instruction for the common man, but so that the laws can be understood and known in order that they might provide a degree of security for the individual. The question then becomes not whether clarity is desirable, but whether or not it is achievable.

If clarity did in fact exist in a particular criminal code, every case would be decided by simply looking at the facts and then deciding which category of criminal behavior the activity should be placed in. There would be one correct decision in every case. This concept of clarity, however, is dependent on a view of rules which presupposes intelligible essences within the law, and Professor Unger has revealed the flaws in this notion. The concept of intelligible essences is dependent on the premise that words have clear meanings, yet it is clear that the meaning of words varies from time to time, place to place, and person to person. The concept of intelligible essences is dependent on the premise that the mind can distinguish the essential qualities of a particular factual or legal situation which renders it different from all others and thus requires placement in one category rather than some other category. But the moment one begins to speak of the purpose for an act – as one must in criminal law – this type of distinction becomes impossible. Finally, the concept of intelligible essences is dependent on the premise that

[13] Id. at 18.

certain values are shared throughout society, yet this ignores the fact that conflicts are in fact the result of a lack of shared values, and it is also contradictory to the concept of adjudication which attempts to resolve conflicts while preserving individuality and subjectivity of values".[14]

In conclusion we can say that clarity can, in reality, never be more than an illusion, and if it is an illusion, rules can never serve as a true guarantee against the abuse of power by the state, for the moment interpretation is required – and it always is required – the rule ceases to be such a guarantee.[15]

[14] R.M. UNGER, KNOWLEDGE AND POLITICS (1975); especially the section entitled "THE ANTINOMY OF RULES AND VALUES: THE PROBLEM OF ADJUDICATION" pp. 88-100.

[15] Id. at 93.

V. Imprisonment

In Beccaria's time imprisonment was primarily preventive detention, i.e. the main form of punishment was not yet the deprivation of liberty but was rather corporal punishment, banishment and capital punishment. The later institutionalization of prisons encompassed a more calculative perspective, namely that one can be bettered, that what criminal law is all about is not atonement for the past acts, but rather a future ne peccetur. This perspective, although greatly catalyzed by Beccaria, did not yet exist when he appeared on the scene.

Thus, when he talked of imprisonment, Beccaria primarily had in mind preventive detention: "Detention in prison is a punishment which, unlike every other, must of necessity precede conviction for crime, but this distinctive character does not remove the other which is essential – namely that only law determines the cases in which a man is to suffer punishment.[1] Of course, it is a contradiction in terms to talk of punishment before someone has been convicted, especially if one advances the presumption of innocence as one of the main principles of criminal law. Yet in a more important sense (than the pure formally-logical one) Beccaria was again correct: if criminal law is perceived through its protective, not punishing, function then the criterion of what punishment is, and is not, ought to be left to the one subjected to a particular form of deprivation.[2]

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[1] C. Beccaria, On Crimes and Punishments. 19 (H. Paolucci, trans.; 1963).

[2] Peculiarly enough this notion is now emerging slowly in American criminal law, i.e., it is through this doctrine that the protection of criminal law is extended to areas such as behavior modification, Knecht v. Gillman, 488 F.2d 1136 (A7): "The mere characterization of an act as 'treatment' does not insulate it from the eight amendment scrutiny". Citing Trop v. Dulles 356 U.S. 86, 95, 78 S.Ct. 590, 2 L.Ed. 2d 630, (1958, Van v. Scott 467 F.2d 1235, 7th Circuit 1972, Boys Training School v. Affleck 346 F.Supp. 1354, 1366, (D.R.I. 1972). "to be sustained as a non-penal statute, in its application to the defendant, it is necessary that the remedial aspect of confinement thereunder have foundation in fact. It is not sufficiency that the legislature announce a remedial purpose if the consequences to the individual are penal". Commonwealth v. Page 339

Criminal law's function of the protection of the individual from the growing power of the state (a function that implies a separation of powers because otherwise it would boil down to what Weber called khadi justice, i.e. one seeks justice from the same authority which claims he has violated it: "khadi accuses, khadi judges" maxim) can be broken down into particular safeguards only from the point of view that the criterion of violation ought to be left to the individual; that only the individual himself ought to have the right to decide what is good for him and what not, or in Benthamian terms: "The individual is the best judge of his own interests"[3].

Beccaria agrees that detention is necessary although he does not point out why, but he again emphasizes that the conditions ought to be determined in advance. He enumerates these conditions: (1) The notoriety of a man as a criminal, (2) his flight, (3) his nonjudicial confession, (4) the confession of an accomplice, (5) threats, and (6) the constant enmity of the injured person, (7° the manifest fact of the crime and (8) the general clause he calls "similar evidences".

Most European codes of criminal procedure have the following three reasons that comprehend most of Beccaria's preconditions: (1) "iteration danger", i.e., the danger that the offender will repeat the offence he is suspected of having committed;[4] (2) "danger of fugitiveness", i.e., it there are actual grounds for belief that the suspected, viz., the

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Mass. 313, 159 N.E.2d 82, 85, (1959). For a broader discussion of this development see the section on behavior modification (infra, pp …).

[3] J. Bentham, Theory of Legislation, Chapter 7.

[4] Here it becomes quite obvious to what a limited extent the presumption of innocence has been built into the codes of criminal procedure: how can a suspicion that someone will repeat an offence, which he is presumed not to have committed, be a valid reason for preventive detention?

accused, will try to flee; (3) the danger that the suspect will hinder the proceedings by influencing the witnesses, trying to remove the evidence, etc.

Beccaria focused his attention mostly upon the availability of evidence of the actual guilt of the suspect, whereas this is not the main preoccupation of criminal procedure today: the short term goal at this point is rather to secure the availability of the suspect, to preserve as much evidence as possible, and to do whatever is reasonably necessary so that the society will not suffer another deprivation, if it is logically probable that the suspect has in fact committed the offence and that he is likely to repeat it.

There is, however, another rather notorious reason in some Continental codes of criminal procedure, namely that the court ought to detain the suspect in prison in case his crime is of such a nature that the public would be upset if the suspect remained at large. This “danger-of-an-upset-public” – reason for preventive detention is widely criticized in theory, because it is obvious that this can be said of any serious offence: the mere largesse encompassed in the word "public” already allows the judge to project into the precondition whatever he thinks is suitable.[5]

[5] As a clerk at the circuit court in Ljubljana I had the opportunity to test this. As part of my duties there I was supposed to offer legal aid in all cases that involved the Circuit Court. A suspect in a murder case, in fact he had already admitted the murder of his wife, requested legal aid on the question of his preventive detention. The period between the end of the investigation and the trial proceedings is not really limited and thus he wanted to be at large in between, especially because he was a farmer and the time was autumn and he thus would have a lot to do. His farm was a lonely place in the mountains, far away from any other farm and a two hour walk to the next town. There was no street and the place could not be reached other than on foot, or on horseback. The reason for his detention, as articulated in the “detention decree” by the investigating judge working on the case, was that the public would get upset if they knew that the murderer wass at large. No specific reasons, needless to say, were articulated as to why the court assumed that the public would in that case indeed be upset. On the contrary, from the file it was quit obvious that (1) not many people knew that a murder in fact had been committed and there was no press coverage of the case; (2) most of the people who knew the suspect thought that it was quite natural that something like his murdering his wife happened, because she was notorious as a

The policy reasons behind the three reasons enumerated for preventive detention are entirely acceptable. The real problem, however, is how to objectify these in order to make the position of the suspect less precarious. Consequently, Beccaria's lament that "these proofs must be determined by the law, not by judges, whose decrees are always contrary to political liberty when they are not particular applications of a general maxim included in a public code[6], is misdirected.

But again, as long as even this operation of "application" is left to people and not to some machine, there will necessitatae nature be abuse, arbitrariness, bias, etc. There is

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vicious person and an alcoholic. Thus, it was obvious that there was no reason to detain him, first, because not many people would know that he was not in prison since he meant to return to his farm and see to the work to be done there; and second, because those people who would in fact know that he had been released pending the trial would probably approve of his release since the suspect was well liked in spite of the murder. I pointed out all these reasons on his appeal to the Supreme Court of Slovenia, demonstrating, in fact, on the basis of the file available to the Court, that the reason for detaining him was untenable.

The Supreme Court affirmed the decision of the investigating judge, formally reasoning that, in spite of everything there was still a possibility of the public being upset at hiss release. The moral to be drawn from this case is that, not matter what the legal restrictions are in such a case, the judge can always rationalize his decision, even if it is reached on grounds such as: "The murderer should not be at large, period". It is in fact always possible to fabricate objective grounds for the possibility and probability that the suspect will flee, or for believing that he will try to remove the evidence or to repeat the crime.

The outcome of all that is not, as one would expect, that every suspect is imprisoned awaiting his trial. But that is true for reasons that have little to do with the law and its preconditions: prisons for detention are often too small to accommodate all the suspects; judges like certain offenders and dislike others; they feel strongly about certain cases and less strongly about others, etc.

[6] Beccaria at 19.

just no remedy for these problems, yet traditionally much more attention has been paid to the formulation of procedural rules in this respect, according to the fiction of the perfect syllogism, than to more activist policies. Of course, there is little the law can do in this respect and even less that can be done by a legal theorist. But again it is only realistic to keep in mind here the irreplaceability of the "human element", and to devote attention to whether judges ought to be appointed, or elected, whether their appointment ought to be for life, etc.

Generally speaking, if our goal is legal security (S), then procedural safeguards (P) are necessary in inverse proportion to the quality of judges, i.e., to the efficiency of the recruitment process (R): S = P x R.

Every improvement in R amplifies the value of P (safeguards) throughout the structure of criminal procedure and thus to achieve the goal of security (s), the improvement of R is immensely more important than the improvement of the legal conciseness of safeguards (S): the span of the possible improvement of the latter is relatively narrow, because there in fact is not much that a legislator can do to improve conciseness, whereas a deliberate social policy, in light of the neglected process of recruitment, varies from "very bad" to "very good".

But this demands real action, thinking about the mechanisms that bring particular people to the study of law; pondering the selection mechanisms that bring particular law graduates into the practice of criminal law and the selection process leading to the quality of judges a country has. In a very real sense it is possible to say that every country has the kind of law enforcement system it deserves, because there are numerous other factors which influence the mentioned recruitment processes: some of those reflect the society as a whole, its structure of values, the image of the law at a given moment in a given locality, the characteristics of the dominant social consciousness whose harbingers and executors the judges are more often than not, the width of the gap between society as it exists on the level of material development and its social consciousness. There are other

factors which reflect the state of affairs in the legal profession, its organization of the law, the prestige of the study of law, the level of its monopoly over all the negative and positive consequences, etc.

In the end the particular judge will likely have his own particular reasons; he might be a hunter and therefore more likely to detain a suspect in the case of an illegal hunting than a murder suspect, and there, of course, not much can be done. The policy in these, as in other matters, is always concerned with average effects, statistical, and not particular probabilities.

Consequently, when Beccaria spoke of "laws, which always lag several ages behind the actual enlightened thought of a nation", he was in fact misleading; he ought to have spoken of the mentality of judges, lawyers in general, legislators, because the rules themselves are merely a surface of the numerous and interconnected sub-surface social processes. The same criminal code in two different law enforcement systems, will produce two different law enforcement systems; the same rule will be interpreted restrictively in one culture and loosely in another, and this practice reflects so many factors in a particular society that one is indeed justified of talking of the whole society as being reflected in a single decision to detain or not to detain.

On the other hand, this particular decision, as an expression of the whole society, is also a reinforcement of many of the very processes which it manifests: for example, if the murderer (see note …., supra) is detained in spite of the obvious fact that the law is on his side, he will react with a greater amount of frustration, he will spread distrust among his fellow inmates, he will proclaim that "the system" is unjust, that one should not really believe judges, that it is not clear what is good or bad, and that one should behave solely according to the criteria of his own best interest.

This "secondary deviance" and "secondary anomie" is then reintroduced into the social system as a product of this particular piece of judicial practice and it reinforces the low image people have of the law, produces the disdain for the lawyers and the further decline

of the quality of candidates for judgeships. Of course, in any particular case it is possible to prove that the effects are in fact the opposite of those described, but by and large, statistically, the accidentalities neutralize one another and the regularities of the public perception, for example, emerge crystallized from the process: vox populi, vox Dei. In this sense Unger is correct in pointing out that "law is a social practice mediated through the social consciousness".[7]

Another point Beccaria was making in connection with preventive detention, or "imprisonment" as he called it, was that "a man accused of crime, who has been imprisoned and acquitted, ought not to be branded with infamy".[8] In modern literature this is called Montero's aim (supra, p.): namely to reduce the unofficial ostracism and punishment as adverse to the goals of the resocialization of the offender. Beccaria emphasized that those already convicted ought to be separated from those detained for reasons of preventive detention, since Beccaria's 'unenlightened masses" are likely to find the man guilty by association, merely because he was detained with those already convicted.

Most modern codes of criminal procedure have regulations (1) requiring that suspects not be detained with convicted offenders, (2) prohibiting the administrative authority from making them work, except insofar as their own personal needs require it (cleaning the cells, etc.), (3) stating that they ought to be given the opportunity to eat their food, to read newspapers, etc.

But, as a matter of fact, they are usually detained in the same prison as the rest of the criminal population, except that the premises are separated; they are treated by the guards in the same manner, as if they were already convicted; their correspondence is surveilled by the judge in charge of their case's investigation; and, finally, the stigma inevitably attaches because, precisely as Beccaria noticed in 1764, the general public sees them as if

[7] R.M. Unger

[8] Beccaria at 19.

they were in prison. Thus, even if they are later acquitted, presumed by law to be innocent, the public, which has previously considered them guilty, now assumes the position of absolutio ab instantia (supra, note …), which only confirms again the discrepancy between legal fiction and intention and factual reality. The reality of the presumption of innocence, which, insofar as it is indeed built into the system of criminal procedure, may be procedurally operative in relation to the non-application of the sanction because of insufficient proof and the consequent coming into play of the presumption of innocence, yet the general public deals with this question in a non-legal and non-reflective way the psychology of prejudice being more important than the law.

The separate question here is the reporting by the press even though the press will write its story in terms of "an accusation of this or that", "charges that have been brought because of this or that", "the investigation that was opened because of this or that", a content analysis of press reports will often disclose that what is indeed operative is a presumption of guilt, which, by means of the mass media, is transformed into general public opinion, creating a stigma which will be very difficult to remove. "Infamy … like all popular sentiments, is more attached to the manner than to the thing itself".[9]

[9] Id. at 20.

VI. Evidences, Judgements and Witnesses

Criminal procedure is a retrospective, monocentric decision making: the legally relevant dimensions of a past event are explored as to their existence and their nature. They are perceived in anticipation of their being subsumed under a particular abstraction in the criminal code. A combination of them will determine the combination of abstractions in criminal law and the abstractions will determine the outcome of the case; i.e. acquittal or punishment.

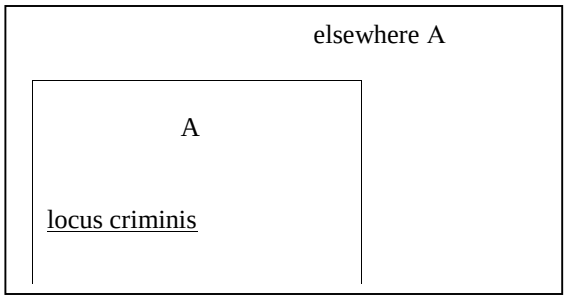
Only the legally relevant characteristics of a past event are explored and thus the truth – the correspondence between the event as it actually occurred and our knowledge of it – is not just any truth, but only the legally relevant one. Consequently, when it is said that something has been established in the criminal process to be true, this necessarily implies that many other issues have been left out, because they are unessential according to the legal model through which this particular aspect of life is observed and interpreted.

It is essential to keep in mind that this legal model, into which actual events are fitted, has a particular purpose which determines the nature of the perspective taken of a particular event. The arrière pensée here is always punishment. But since punishment is of necessity a consequence imposed today, because (quia peccatur) of the event which occurred yesterday, it follows that the consequence today is determined by a past event. (the discussion here is in terms of punishment as atonement or as a pay-off – i.e. in terms of the transactional theory of justice as it existed in Beccaria's time. The ideas of prevention were just emerging at that time.)

Thus the search for legally relevant dimensions of a past event is the central preoccupation of the criminal process. But because a past event is by definition an event which cannot be directly observed and intuitively understood, it has to be reconstructed in terms of its consequences. These consequences may be the witness's memories, or material changes in consequence of the event. The legally relevant dimensions of the

event are considered – in terms of their (non)existence – through a series of intuitive models which were in fact worked out in mathematics.

Take for example, the question of alibi. It presupposes the physical law (of Newtonian physics) that the same body cannot be in two places at the same time. The mathematical theory of sets deals with this question as follows. The set denoted a A consisting of all elements not in A is called the complement of the set A. And since, according to the laws of logic $A \neq A$ or $A \eta B = \emptyset$ if the defendant was in A tempore criminis it follows that he was not in A.

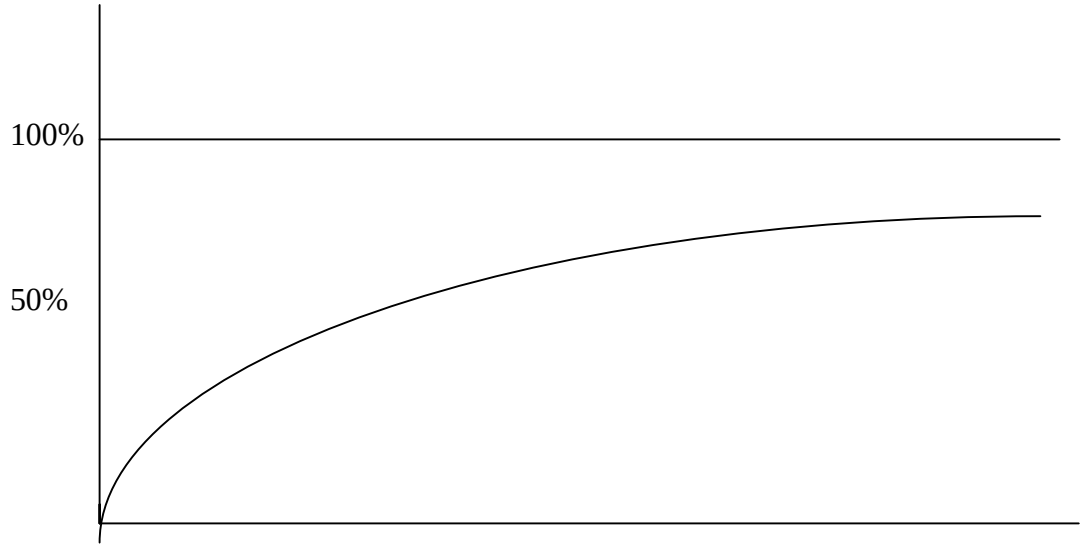


This and similar models are so simple that they are not even articulated in the criminal process: they are presupposed.

Generally, it can be said that deterministic models are presupposed, whereas the (nondeterministic, stochastic) models of probability represent the real problem: wile it is perfectly clear that the defendant was not in A if he was in A tempore criminis the real question is whether we believe him, his witnesses, his material and circumstantial evidence that he really was in A tempore criminis.

While in the previous question certainty was established (if in A, then not in A) in this question certainty is excluded. What matters there is probability.

But probability is by definition never certainty even if it may approximate it (100 % probability) asymptotically.



Thus the question really becomes one of the degree of probability. And then the probability theory is helpful. Again it is helpful not so much in terms of a greater understanding of the nature of the proof, but especially in terms of eliminating such logical nonsense as “half-proof” and other misleading medieval notions.

II.

Beccaria intuitively understood that to introduce “reason” into those matters one must make logically unacceptable inferences of the sort mentioned above forever obsolete:

> “There is a general theorem that is very useful in calculating the certainty of a fact, as, for example the weight of evidences of a crime. When proofs of a fact are dependent on another, that is when evidences depend on themselves for proof, the more proofs adduced, the less probable the fact, because the circumstances that might make the first proofs defective. When all the proofs of a fact depend equally on a single one, the number of proofs neither decreases of increases the probability of the fact, for their entire force resolves itself into the force of that single one on which they depend”.

This was Beccaria's theory of the 'fruits of the poisoned tree" as derived from the probability theory. To put it in mathematical terms: if the probability of an event A is 30/100 and if the event could have occurred, if and only if the events B and C did in fact occur, then the computation of the event A depends on the probability of events B and C. If the probability of event B is also 30/100 and the probability of C is 80/100, then we compute the probability of A as follows:

$$P(A) = P(A) \cdot P(B) \cdot (P)C = \frac{30.30.80}{100.100.100} =$$

$$= \frac{72000}{1.000.000} = \frac{72}{1.000} = \frac{7.2}{100}$$

Thus the original probability of 30/100 was arrived at "adding the additional proofs". It was then reduced to 7.2/100, or in Beccaria's words "the more proofs adduced, the less probable the fact". The reason for this is the dependency of the probabilities upon one another.

For example, if we had a case of murder in which the defendant is suspected of having intentionally killed the victim, we infer the probability that he actually intended to kill from the testimonies of witnesses and we assess this probability as 50/100. But he could have had this intent only if he loaded the gun immediately before actual shooting, the probability of which we assess as 30/100 on the basis of the testimonies of witnesses and other actual data. But let us assume that he could in fact have loaded the gun immediately before the shooting only if he stopped behind the house in front of which the fatal shooting occurred, and that the independently assessed probability of this is not very high, let us say 20/100. In fact, apart from the rest of the evidence, he could have stopped there if and only if it was not raining at the time. There is no available meteorological report for that area but nine witnesses assert that it was not raining, whereas one equally credible witness says that it was (90/100).

Because all these probabilities depend on one another and, therefore, represent independent events the final probability is reduced from 50/100 to

$$\frac{90 \cdot 20 \cdot 30 \cdot 50}{100.100.100.100} = \frac{2.7}{100}$$

This, of course is a significant decrease in the probability of the event, a decrease that is much more evident when elaborated mathematically.

In Beccaria's time the application of mathematical models was not totally alien to legal adjudication. And while it is clear today that fat too many probabilities in criminal procedure are unquantifiable for the probabilistic calculus to have any practical application, the introduction of the stochastic model most certainly served to dissipate the previous half-proof and quarter-proof theories, especially because they were themselves based on a more primitive and more inadequate deterministic model.

But the reverse of the above "fruit of the poisonous tree" probability theory is also true:

> "When the proofs are independent of each other, that is, when the evidences are proved otherwise than through themselves, the more proofs adduced, the greater the certainty of the fact, for the falsity of one proof will not affect the other". (Beccaria at 21)

Even though he did this for political economy, it would be wrong to assume that Beccaria attempted to introduce the use of mathematical models into the criminal process. This, as an idea, will have to wait for another 200 years.[2]

Such an attempt to introduce rationalistic analysis into judicial fact-finding is typical of the influence of the enlightened writers in this period. The negative rather than the

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positive influence of "reason" affirmed itself. Beccaria, of course, did not introduce "geometric precision" into the legal process. His influence was rather one of the negation of negation: to introduce rationalistic reasoning into criminal procedure, which hitherto had been either theological or in the nature of ordeal, and mostly a mixture of both, had been a negation of a specific negation of reason. If calculative and contextual ideals before the enlightened writers were in the form of ritual, a ritual which relied on supranatural forces and logical deductions derived from the existence of these forces, then Beccaria introduced new, more functional calculative and contextual ideals – those which suited the already developed social consciousness of a time when the feudal order was at the beginning of its end.

Modern judges and juries calculate the probabilities of event, of a crime and its legal elements, in just as intuitive a manner, as it was done before Beccaria's time. This intuition has perhaps become more informed since then, but not considerably more. The basic difference resulting from Beccaria's writing in this respect was the principle of "material truth" in continental theory, as opposed to the mechanics of "formal truth", and this in fact means not that adjudication has come closer to the application of mathematical models, but that it has abolished the only previously applicable model and released the judge and the jury in terms of "intime conviction".[3]

The principle of "intime conviction", coupled with the fact that juries do not have to articulate the reasons for their verdict – practically speaking, this last provision is quite sufficient – adds the specific difference to "moral certainty" as opposed to "mathematical probability". We cannot enter here into a full discussion of the social significance of this fact, which undoubtedly promotes the normative-integrative influence of the criminal process. The nature of the process is always a reflection of the prevailing modes of reasoning in a particular society. Insofar as these may change, the institution of the jury transmits the modifications into the jury deliberation room automatically. Thus, insofar as the nature of the assessment of probabilities in the criminal process has in fact changed

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since Beccaria, this is not so much due to him; rather it is due to the general changes of social consciousness since the enlightenment.

Beccaria realized this specific nature of the criminal process and the fact that it can never become "scientific" because its primary social role is not the establishment of some abstract and objective "truth", but the specific truth in a perspective of reproach and blame that anticipates the punishment of evil-doers.

> "Moral certainty is never more than a probability, but a probability that is called certainty, because every man of good sense naturally gives his assent to it by force of a habit which arises from the necessity to act and is anterior to all speculation. The certainty required to prove a man guilty, therefore, is that which determines every man in the most important transactions of his life."

Beccaria distinguished between "perfect proofs" and "imperfect" ones, the difference essentially being the same as that between direct and circumstantial evidence. He realized that imperfect proofs together may suffice as, and have the power of, one perfect one, given that one perfect proof is sufficient to convict because it excludes doubt. "[I]mperfect proofs of which the accused could clear himself, but does not, become perfect".[5] Here, of course "perfect" and "imperfect" are implicitly defined in terms of their direct or indirect bearing upon the probability of the crime and of guilt, and are meant to introduce the idea of the burden of proof, an issue which has not yet been resolved in theory.[5a]

It is not clear, then, how to reconcile the idea of the shift of the burden of proof to the defendant if every doubt is to be interpreted in his favor (in dubio pro reo) as an expression of the presumption of innocence: if the prosecution raises prima facie evidence of a pertinent fact, then, of necessity, the burden shifts to the defendant to disprove either the truth of the prosecution's evidence or its pertinence to the case at bar;

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otherwise an actual presumption arises in the minds of the judges and jurors that the defendant is not capable of proving the opposite. However, this presumption of guilt ought not to have arisen, and if the doubt is created by the prosecution, it ought to be interpreted in favorem defensionis. But since this de facto does not happen, and since it would be impossible to require that the doubt be interpreted in favor of the defense if what matters is intime conviction, the result is a logical contradiction between the principle of "material truth" and the principle of the presumption of innocence.

If the presumption of innocence were indeed operative in the criminal process, then every doubt ought to be interpreted in favor of the defendant, or, in Beccaria's language, only perfect proofs would count. The idea underlying the presumption of innocence is that the defendant ought to be able to remain totally passive throughout the process and still get a fair trial, an idea which is essentially incompatible with the structure of an adversary criminal process.

There is only one way out of this, and that is to assign a secondary priority to the presumption of innocence, because it is logically incompatible with parts of the process, although it may be logically compatible with the process as a whole, that is, with its policies and intentions and with the postulate that it is better to acquit ten guilty defendants than to convict one innocent one.

Since the presumption of innocence is indeed relevant only insofar as it is a part of the general social atmosphere, the jury again represents that safety valve which mediates between the social atmosphere and the court-room: "That is why I consider an excellent law that which assigns popular jurors, taken by lot, to assist the chief judge, for in this case ignorance judging on feeling is more reliable than science judging on opinion."[6]

Beccaria also refers to the probllem of the professional deformation of judges, who "long used to finding men guilty … always seek to reduce things to an artificial system borrowed from their studies. Happy the nation where the laws need not to be a science!"

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The legal profession has been in ascendance ever since the formation of the law faculties in Bologna, Paris and Oxford in the 11th century. In Beccaria's time it had obviously already gained the reputation it still enjoys, namely that it tends "to reduce things to an artificial system". It is highly informative, and that was also already true in 1764. When we realize that this is at the same time a cross-temporal and cross-cultural experience, of which the institution of the jury and lay assessors are the direct result and attempted neutralization, then we should indeed ask ourselves what is so repulsive about legal reasoning to the non-lawyer.

Without attempting to answer this question we may hypothesize that it is precisely the phenomenon of detachment and self-immolation, because of the overdevelopment of legal concepts and their interconnections, which produce the differences in what seems essential to the legal, as opposed to the non-legal, mind. The preoccupation with rules and their interrelations raises to the status of essentiality questions which, to common sense, remain immaterial, artificial, and even frivolous. If that process of self-immolation goes too far, it will even alienate the practice of adjudication from the very policies of the very rules which were intended to promote them. Once this has been sufficiently overdeveloped, it becomes manipulable in any direction and subvertible for any reason whatsoever. Obviously lawyers, even in Beccaria's time had already attained this capacity for the subversion of the common sense either by the rules themselves or in general. To the extent, however, that a mechanical system of the preservation of order is bound to rely on rules, rather than on flexible decision-making based on trust – trust being excluded because of the implicit conflict of interests – this negative side of adjudication is the price that has to be paid.

The jury ass an independent body of adjudication, as it exists in the Anglo-Saxon system, and insofar as it is indeed independent of the judge, is a good solution. But in most of the Continental procedures juries have either been abolished and replaced with a system of assessorship, or else they deliberate in the presence of the judge. If, however, they deliberate in secrecy and without the presence of the judge, they are a solution to the above problem only insofar as they are not procedurally bound by the judge's instruction.

Beccaria, however, contradicts himself when he says that "the proofs of guilt should be made public".[7] It the jury is to reason out its verdict and to articulate those reasons, then it ceases to be autonomous and becomes open to attack and to an outside search for logical inconsistencies in its reasoning. It is difficult enough for a lawyer to decide the factual determinants of a verdict, and even he will not be able to articulate all the impressions which add to his intime conviction, and even if he could, they would appear flimsy when verbalized. Yet there are no doubt many more impressions which produce a guilty verdict than a judge is able or willing to articulate. Every defense lawyer knows how important it is to have the defendant out on bail, if for no other reason than because it makes a very bad impression on the judge and on the jury if he is brought to court in shackles by the police. Statistically speaking, however, it is not irrelevant whether the defendant has been incarcerated pending trial, since he probably made certain impressions before which resulted in the preventive detention.

Anyone who has ever had to explicate the factual inductions and deductions upon which his judgment was based knows that only logically formal reasoning is acceptable for deciding a verdict; which in turn brings us closer to the application of artificial models of probability. If the court of Appeals has the power to reverse on the basis of factual considerations, and if this court never sees the defendant, then adjudication is dangerously close to the formal reasoning which reduces fact finding to something which is less than a reflection of life itself.

The real effect of such a provision in criminal procedure, of the requirement that a judgment be reasoned out as to the facts, however, is not that the case would be judged on a level of formal logic. Appellate judges are all too aware of the impossibility of this to articulate the real basis of the judgment, since most of them have previously served as trial judges. The real effect of this requirement is that the prosecution and the defense have an illusion that they can appeal on the basis of a wrong assessment and presentation of the facts; further that judges tend to write as short an opinion as possible because

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extensive discussion of the factual basis of a verdict makes the judgment less appeal-proof and more verbalization offers many more possibilities for formal errors; further that the defendant, who is – if anybody is – certainly able to detect all the logical inconsistencies in the judgment, feels that he ought not to be convicted on the basis of the particular logical reasoning of the court, although he may in fact be guilty; further that the judge sits with the record and reasons out his judgment ex post facto, thereby producing another fiction that the judgment is based on the actual proceedings during the oral (in Continental criminal procedure) phase of the trial, a fiction which diminishes the trust in the judge, in all lawyers acquainted with the nature of such a procedure, and ultimately in the defendant himself, who may find discrepancies between the oral explication of the verdict received at the trial and the written reasoning which he receives afterwards.

The whole procedure of making the "proofs of guilt public" then becomes something other than itself: it becomes a ritualization of the myth that the judgment is based on pure reason, whereas all the participants know that this is not entirely true, that much of the decision is intuitive, based on private value judgments, etc. The same holds true, mutatis mutandis for the writing of the protocols in the investigative period of the process – in the systems which have such a period – since the investigating judge who dictates the protocol tries to explicate the legally relevant dimensions of the defendant's and witnesses' testimonies, whereas his actual hypotheses about the case are formed by many more factors than those reducible to logical verbalization filtered into the protocol. What typically happens it that the judge forms an opinion about what occurred, about the personality of the defendant and, therefore, about the probability that he actually committed the offense, about the victim's behavior, etc. If he has a feeling that the defendant is guilty, he tends to emphasize in his questioning and writing those elements which burden the defendant, and vice versa.

The impression, however, is not arrived at by a logical path, or not solely by it, yet it has to be reduced to that. Thus there are essentially two levels in such a procedure: one intuitive and comprehensive, the other formally logical and incomplete. Only the latter counts formally and de facto; however, the covert level is also important.

The problem essentially lies in the fact that experiences are not communicable[8]. It is exacerbated because the language of everyday life is reduced to a false rationalism, as if everything that is not defensible on purely formal logical grounds is not defensible at all. The general consequence is not that life becomes more rational, but quintessentially that other elements are coverted or reduced, by false intellectualizations and rationalizations, " to an artificial system". The irrationalities themselves are, as a result, all the more powerful because they appear to be rational.

In criminal procedure, which plays that very same game, the process is essentially dishonest, even though the final verdict may be the same as it would be were the procedure based on a non-reasoned verdict of an independent jury. The effect of the requirement to articulate the reasons for the verdict will not make the process more rational, because all the participants and the appellate court judges know perfectly well that a double standard is operative: by pretending to be rational and not in the least arbitrary, a procedure requiring explication of the reasons for the verdict in fact becomes much more irrational and arbitrary. The real reasons which led to the particular verdict remain latent in both processes since it is practically impossible to "make them public" and thus they ought to remain in the souls of those who judge, they ought to remain intime. But if some Continental processes follow Beccaria in this respect what actually happens is that the focus shifts from the fairness of the procedure, the question of admissibility of certain proofs, etc. to the formally important but actually much less important logical determinants of the verdict. The result is that anything can be done in the procedure itself insofar as it preserves the image of logical consistency with itself and with its rules. And since the participants in the process themselves are at least partly aware of this double nature of the criminal process, their trust is diminished considerably and cynicism may arise, to that, when the situation becomes extreme as it does in certain cases, all the participants know the real nature of the procedure, but feel as if they are playing a game and pretending to believe in it: an essentially surreal kafkaesque situation.

[8] See, R. LAING, POLITICS OF EXPERIENCE ( )

The only way around that is to cut into the very intuitive nature of criminal adjudication, something which the Anglo-Saxon procedure approximates through its institutions of the independent jury whose verdict need not to be reasoned out as to its factual basis: all deliberation is based on what actually occurred in front of the jury, i.e. no written communication bears upon the question of fact. to be fair to the Continental system, one has to make it clear that it, too, knows the principle of orality, that the final verdict cannot be based on anything but the actual proceedings before the trial court. the written investigative procedure preceding the trial is intended to be of a negative selective nature in the sense that it ought to make it clear what is essential in the case and what is not in order to shorten the oral procedure during the trial. But as a matter of fact the turning point of most cases is in the investigative period of the procedure, because it is there that the first legally relevant impressions are formed by investigating judge, transcribed into a logical hypothesis about the case, confirmed by selective perception based on the formed hypothesis, transmitted to the prosecutor and ultimately to the trial judge who most often accepts the hypothesis implicit in the direction of the exploration done by the investigating judge, because this is the first information the trial judge receives about the case, which in turn influences him to probe for confirming impressions which the actual oral trial is developing in front of him. The trial judge in fact alternates in his impression-receiving: he starts with the formally logical one received from the dossier, is then exposed to the “real” one, and then decides the case.

Thus, in terms of timing, the more inadequate impression is in fact less influential than the more adequate one: the impression received from the case’s dossier decides the criteria according to which the psychological selective processes will filter impressions once the defendant and the witnesses and the material evidence actually appear before the judge.

All this is to a greater or lesser extent due to the myth that it is possible to verbalize and articulate the reasons for reaching a verdict, or the hypothesis concerning the verdict (in the case of an investigating judge), or any other factual element of the case. In the last analysis this myth is traceable back to the introduction of “reason” into criminal

procedure – to the period of enlightenment and especially to Beccaria – which has made the criminal process at least less honest, if not more irrational.

This hypertrophied rationalization of the criminal process, however, is not to be attributed solely to Beccaria. In an age where rationalization has become the principal mode of false reasoning, it is only logical that it should have happened.

III.

In Chapter VIII[9] Beccaria touches upon the question of formalities and pomp in legal procedure. His opinion is that they are necessary for three reasons:

1) they force a determination of all the relevant issues in advance and thus force upon all the participants in them to deliberate through predetermined stages and in a given direction: "They leave nothing to be determined arbitrarily by the administrator";[10]
2) they inspire trust in the people who see that they cannot be easily and peremptorily deprived of their rights: "That the judgment is not rash and partisan, but stable and regular";[11]
3) "things that impress senses make a more lasting impression than rational arguments".[12]

Here, again, the difference between deontological and pragmatic reasoning becomes obvious. A deontological writer would never have reduced the reasons for legal formalities to these essentially manipulative goals. rather, he would have ascribed to them

9 Beccaria's chapter entitled "Witnesses".

10 Beccaria, 23.

11 Id. at 23.

12 Id. at 23.

a symbolic value much as the value a liturgy has in the celebration of Mass: the form is not there to achieve some general preventive, trust inspiring, and other pragmatic goals; it is an expression of the value placed upon the subject dealt with, it is a ritual, but not because of the ritual's influence upon normative integration, although this may be its by-product. The form is there a priori only because of the importance of the transaction itself, of which it is a mere manifestation. In Hegel we often detect this disgust with simplistic reductio, not ad absurdum, but ad rationem.

Indeed, the ritualistic nature of the criminal trial, although it undoubtedly has the utilities ascribed to it by Beccaria, would never have come into being solely for these reasons, not does it remain in existence for them. In this respect one would rather follow Freud ("Totem and Taboo") and his emphasis on the question of guilt throughout civilization, the preterrational preoccupation derived from the Oedipus situation, than believe Beccaria, who seems to confound the questions of utility and origin: no matter what the present utilities of the criminal trial reutilization might be, the origins of it and the reasons for its existence are not reducible to them.

This seems to be the problem with much of Beccaria's writing and with most of modern criminal theory. Questions of guilt and punishment are not reducible to instrumental rationality, to general and special prevention, and insofar as this reductio ad rationem is indeed there it is an expression of the same anomie of which the rising crime rate is a manifestation. The Cartesian separation into reason and passion, body and mind, collapses actuality into the realms of ideas and thus reduces it to only one dimension of human existence. Insofar as this is true in the modern sociology of law and in modern jurisprudence, it cannot be attributed solely or even primarily to individual writers such as Beccaria, Bentham, and others. They were the avant garde of a fundamental change in the social consciousness which occurred in their time and which brought about modern technological progress. the price, however, had to be paid in terms of this reductio ad rationem, the lessening of the force of values and their integration, or, in other words in terms of anomie.

Later Kant emphasized the belief that it is inherently impossible for man to know things as they are. Nietzsche reacted with his distinction between causes and origins of social phenomena on the one hand and the utilities on the other; and Hegel, as we shall see, rejects the whole utilitarian way of thinking. Beccaria, however, was striking a balance on the other side, too, since he (over)emphasized the practical element of criminal adjudication, the element which before him was paid too little attention, and after him too much.

Beccaria's exposition of the utilities of the criminal trial's pomp and ceremony is very useful, but it does not represent the whole truth; a presumption runs throughout his writing that reason exhausts the meaning of reality. This is perhaps the main objection one is tempted to raise against him.

He also discusses the famous formula in atrocissimis leviores coneicturae sufficiunt, et licet judici jura transgredi. This formula was in fact not used as extensively as one would presume from Beccaria's writing. it was a part of the theory of legal proofs, the same theory that articulated the distinctions between complete proofs, proximate presumptions, and remote presumptions, the doctrine that prevailed, for example, in France between 1500 and 1789 as an implied part of the Ordinance of 1670. Du Pare says that this absurd idea has never been entertained in France: "The more atrocious the crime, the more terrible the accused should be so much the clearer in proportions to the atrocity of the crime chargedd".[13]

ATTENTION……..MISSING TEXT/MISSING FOOTNOTES 1-6

…..any less "logical"; if anything, it makes it more logical.

Berman's example in the above quotation, while it does not support his assertion, is nevertheless a proof of the complexity of the legal subject matter. The fact that a person who would be liable for battery, is not liable because of self-defense, defense of property,

[13] Du Pare, XI Principes du droit français 110, cited in A. ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 252, 260, 261 (1882, trans. 1913).

parental privilege, etc., simply shows that there is an interaction between the legal rules, between "major premises". This interaction between the concepts such as "battery", "self-defense", "defense of property", etc., is one of specificity versus generality. The logical rule for a solution of such "modification" is very simple. The rule is that a more specific law derogates the more general law. if I say "Students are generally good" and "Peter is a bad student", that simply means that I take peter as an instance that does not fit the general statement, but fits under the more specific one. In fact, this is why I had to make this extra statement in the first place. Similarly, if I say that "people are generally liable for battery except in cases of self-defense, or defense of property, etc.," what I mean is that the rule on "battery", interacts with another rule on "self-defense", or "defense of property", in order to combine into a proper combination to serve as a hypothetical legal major premise. Logically, then, we are dealing with the following major premise: "a battery in conjunction with self-defense".

VII. Torture[1]

[1] Torture represents an excess of investigation. This is why in this section we shall deal more with its structural causes than with the actual use of torture and Beccaria's analysis.

Characteristically, Beccaria resorted to a rationalistic argument and to emphasis on the pragmatic dysfunctionalities of torture, whereas it is quite clear that the inquisitorial procedure, without some kind of power to force the defendant to confess – is a torso. But intuitively Beccaria knew that what mattered was not so much the defensibility of the rationalistic argument – pragmatical thinking was in its cradle in this period – but rather the tone of rationalistic condemnation, i.e. rationalization in the opposite direction of that which prevailed until his time, the kind of rationalization that was ready to be changed.

He could not couch his argument in purely humanistic terms, because the Church had a monopoly over this kind of argument. This also explains why Beccaria's rationalism always has this undertone of humanitarianism: an attitude perhaps typical of that of the enlightened despots.

The imposition of suffering with the purpose of extracting a confession or other information is traditionally regarded as an issue in itself, a problem with its own nature and causes. If at all, then the writers tend to explain its origins in terms of the formal evidentiary standards, i.e. how much in advance defined proof is required for conviction.[2]

However, the structural source of torture as a procedural device does not lie in this or that partial evidentiary requirement. After all, what is the cause of the formal proof rules in Continental Europe? Why has torture never flourished in an adversary system? Why do we intuitively connect it with the inquisitorial system? All these questions are left unanswered, the student instead is bombarded with irrelevant legalisms.

Torture is a structural by-product of criminal procedure, where the power of hypothesis-formation and testing is paired with the direct physical power over the defendant.

Criminal procedure, that much is clear, is a process in which a decision about guilt or innocence is reached and legal consequences are imposed. For a decision to be made, no matter what the rhetoric, the relevant legal facts must be ascertained and subsumed under the rule of substantive criminal law. Its corpora delicti in combination with its general rules are like molds into which typical factual patterns fit, and if they actually do fit, then some sort of final decision is reached. One could say that substantive criminal law provides a series of hypotheses against which suspected factual patterns are tested for possible incrimination. (Sophisticated arguments pro and contra legal formalism, mechanical jurisprudence and Begriffsjurisprudenz notwithstanding, this is what usually happens in reality.)

Even though the principle of legality actually plays an ambivalent role, since it decrees what is criminal, and by the same token what is not, it still remains true that a well

[2] See J.H. Langbein, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN REGIME (1977°; M. Damaska, The Death of Legal Torture, 87 Yale Law Journal 860 (1978).

organized criminal code does offer a fairly clear rainbow of anticipated factual syndromes called “crimes”.

It is according to these “crimes” then that a lawyer perceives a suspectedly criminal fact situation. It is according to the rules of substantive criminal law that he distinguishes what is essential from what is otiose. Before his seeing, hearing, etc. of the facts starts “making sense”, it must spring into his mind that the situation may be a robbery, a conspiracy, a murder, etc. Once this happens the facts are then tentatively separated into those that matter (are legally relevant) and those that do not (legally irrelevant). The hypothesis, in other words, as to what is the legal definition of the situation changes the perception of the factual situation: thinking is the negation of what is immediately before us. In this sense knowledge of law influences the perception of reality. It makes mere perception by the senses an interpretive apperception.

The legal hypothesis is then tested, i.e. the lawyer looks at the case and thinks whether it will fit into the mold of the corpus delicti. If this experiment confirms the hypothesis the lawyer acts according to his procedural role.

It is essential for our discussion here that without this hypothesis formation and testing there can be no purposeful legal activity. There are no facts per se; there are legally relevant and legally irrelevant facts. Yet, whether they are relevant or not, depends on the hypothesis that exists in the lawyer” mind. Without it, the killing is just that, i.e. not a murder, not a manslaughter.

On the other hand, once the hypothesis as to the legal denotation of a situation is fully formed in one’s head, then his seeing, hearing, touching … of the facts is never the same any more. The hypothesis changes a rather open perception and observation into a less open, less flexible, less uninvolved apperception. Certain channels of information are shut off as irrelevant, certain others are seen as less important, and others are accorded full attention and appreciation. It is like an impressionist painting: if one is told what the painting represents, one begins to see it.

I think there can be no doubt that this hypothesis-formation and testing distorts the reality to some extent: it puts reality of the Procrustean bed of the hypothesis. The extent of distortion depends on the intensity of commitment to any particular hypothesis, nevertheless a minimum of intellectual commitment is given by the very authorship of a particular hypothesis.

An obvious response to the above argument could be that indeed all our experience of reality is apperceptive, that we always interpret and consequently distort what we see, hear, feel, etc. Pushed to the extreme such an argument would assert that the reality and facts do not exist, merely the anthropocentric projections of purposes. Nietzsche defined "truth" as a "life-supporting lie", Schopenhauer saw reality as "representation" and Wittgenstein approached the same age old philosophical theme in his book "On Certainty". Even in this philosophical domain the argument really does not change: the purpose determines the interpretation.

If purpose determines the interpretation, this then means that a prosecutor will actually see the case in a punitive perspective, whereas the reverse would be true of the defense lawyer. An adversary proceeding is a battle of these two diametrically opposed interpretations. But while a trial can be adversary, because there already exist two fully developed antithetical hypotheses, an investigation cannot be adversary.

An investigation is the process in which one tries to find out enough "facts" so that one can 1) form a hypothesis and 2) test this hypothesis. Investigation is of necessity a unilateral process – if for no other reason, then because before a hypothesis is formed, it cannot be opposed in an adversary and bilateral interaction. There can, of course, be two or more unilateral investigations. This is plausible because e.g. the police in most cases investigate with intent to show guilt, whereas the defense – if it investigates at all – investigates to show innocence.

If investigation is hypothesis-formation, then adjudication is its antithesis, because adjudication is impartial decision-making and impartiality requires an absence of a preconceptions (hypothesis). Schematically one could say that in the investigatory phase two hypotheses are formed so that they could neutralize one another in the adversary-adjudicative phase of the process.

An investigation not only is partial and biased – this is its whole purpose: to create a plausible hypothesis about the facts in order to later on persuade the adjudicator. The balance of two biases in adjudication makes impartiality more probable, but that means that these two biases, these two hypotheses had to be formed in respective investigations before-hand.

Investigation – in terms of impartiality – is diametrically opposed to adjudication, but one polar opposite requires the other: without extreme bias in investigation, there can be no absence of bias in adjudication.

An investigator is not merely required to find out what happened. To do this means to do more than just record the facts, because all facts are not relevant and among those which are relevant, some are less relevant than others. A detective who would merely photograph the scene of crime and record the accounts of witnesses (assuming the witnesses themselves would have no knowledge themselves of what is legally relevant) would not be an effective investigator. Even the simplest burglary requires that the investigator decide that entering with felonious intent is important, whereas the actor's red tie is not. But to do that, the investigator must think of the situation as a "burglary", not just an object-event to be described. And that is already a biased position to hold. An adjudicator may never start with this hypothesis. The fact that he starts with the hypothesis of no crime – presumption of innocence – is in fact an attempt to institutionalize a certain kind of benevolent bias, but that is a recognition that a zero-hypothesis mental conditions is very difficult to sustain for any period of time. In this respect presumption of innocence is the choice of the lesser evil.

This brings us to the question of impartiality. What is impartiality? Impartiality is openness to any kind of information that comes into consideration; it is a suspension by the adjudicator of his judgment, not only about the case, but also about what is essential, and what not, for as long as possible. Clearly there have to be some preconceived criteria of what is essential, and what not, but it is important whether these criteria are operative in the head of the adjudicator himself, or in the heads of the parties.

But if the adjudicator investigates the matter himself, he is forced to be active in his search for facts and, consequently, he must have a criterion of what is essential and what not. This brings us to the essence of our argument: the timing of the operative hypothesis-formation.

The active investigator must form his hypothesis early in his search for the facts, otherwise his search cannot be meaningful. Even research in science cannot be meaningful without a hypothesis: every research in science is in fact hypoithesis-formation and hypothesis-verification. Thus the crucial step, the creative step, is in the formation of the hypothesis. A scientist, for example, must be sufficiently flexible, almost sublime, in articulating his hypothesis. If he is to be successful, he has to be willing to change it throughout the process of his research, in other words his commitment to a preconceived reality must not be too definite. The problem, of course, is whether research in the direction of a preconceived hypothesis will not be too limited, too predetermined to allow for the formation of an alternative hypothesis. The longer the research in one direction, the greater presumably the psychological commitment to the underlying hypothesis and the greater the feeling of frustration if it turns out that the hypothesis was inadequate. Conversely, the shorter the research, the lesser the commitment – and the lesser the probability that the scientist will tend to put the facts on a Procrustean bed of his hypothesis. It is essential, therefore, that the hypothesis not be formed and articulated too soon, because once it is formed, it strikes the order of essentiality, it determines the criteria of selective perception and selective fact-finding. In the adversary phase of criminal process, the delay in hypothesis-formation as far as the judge is concerned is not only desirable but mandatory for impartiality.

In investigation this delay is contrary to the purpose of finding out what happened and why. The investigator must be active and cannot be hypothesis-free.

Since the investigator is never hypothesis-free, there is an ever-present (prejudicial) tendency to look for facts that support the (prosecution's) hypothesis. This introduces selective (and the only possible) fact-finding which tends to put all the facts on the Procrustean bed of the prosecution's hypothesis. We shall call this a Procrustean tendency.

It is essential, in terms of our argument, to realize that it is impossible to be hypothesis-free if one is to be an active fact-finder. What is possible, though, is to be more or less flexible in changing the hypotheses and to explore in different directions, i.e. to have more than one hypothesis at the same time, to have many irons in the fire. But it is impossible to have no hypothesis if one is to be an active fact-finder.

But while the above two possibilities of having more than one hypothesis at the same time, or of switching flexibly from one hypothesis to another, are theoretically possible, it is quite another problem whether they are probable or not. The path of least resistance, the line of the least possible effort – which it is very human to seek, especially in the administration of criminal justice where one cannot expect a deep intellectual commitment to fact-finding - is to stick to one hypothesis and to change the direction of the search for facts as little as possible.

If investigation and adjudication are incompatible, because investigation is hypothesis-formation whereas adjudication is hypothesis-evasion and delay, what then is our reaction to the Continental institution of an investigating judge. Is he impartial because he is a lawyer and is called "judge", or does he succumb to his investigatory function?

An investigating judge does not prosecute – that would be khadi-justice. Superficially speaking it is all the same to him whether the defendant is convicted or acquitted – he is

merely expected to find out the truth, to form and test the hypothesis to make the case ready for the trial judge.

But even apart from the above discussion, the investigation as performed by the investigator-adjudicator, can never be a pure search for truth in the same sense as it is e.g. in science. There is always an element of indignation, a special relationship between the investigator and the defendant, and many other factors which cloud the search for truth. The investigator's initial attitude is influenced by the accusation brought forward by the prosecution: the more atrocious the crime charged, the less the chance that the investigator's initial attitude will be impartial. This explains the logic of the maxim in attrocissimis leviores coniecturae sufficiunt et judici jura transgredi licet: the more atrocious the crime the less proof needed to convict. As for the psychology of investigating, the initial moral indignation raised by the prosecution's hypothesis also raises the investigator's eagerness to find the supporting facts in the absence of which he is willing to be satisfied with leviores coniecturae:

> An intellectual function is us demands unification, coherence and comprehensibility of everything perceived and thought of, and does not hesitate to construct a false connexion if, as a result of special circumstances, it cannot grasp the right one.[3]

When the investigator tries to corroborate his adopted hypothesis about what happened, he is likely to have problems, even if the hypothesis is correct, because a past event is explorable only in terms of probabilities, and the defendant is not likely to admit his act. Such a defendant thus represents a challenge and a frustration at the same time, because objective evidence can be tested against his personal recalcitrance as it were, and a frustration, because he is not likely to give in. This tends to make the defendant the battleground of the contradictions of the compiled evidence even in the best possible cases. He is the most available and the most manipulable "piece of evidence". Where the situation is less clear, where there are internal contradictions in the evidence itself (apart

[3] S. FREUD, TOTEM AND TABOO, 1918, Vintage Books Ed., 127.

from the defendant's testimony), he is that much more a desirable object of exploration. The longer the investigation, the thicker the file, the more frustration caused by the recalcitrant defendant. If the crime is such that it engenders indignation, he is even more likely to become a scapegoat for this frustration and this introduces a perverse Kafkaesque psychology, a vicious circle in which suspicion produces "evidence", "evidence produces reinforced moral indignation looking for a scapegoat, etc. We must not forget that an important difference between the impartial scientific investigation and the investigation in a judicial procedure is the power the investigator has over his "object of investigation". The scientist cannot force his data to say anything besides what they do (he can falsify them, however). The investigator has the power to force the defendant to speak, even to lie against his own best interests. Thus we are not talking just in terms of the usual Procrustean tendency, i.e. the tendency to "modify" the data to fit the hypothesis. We speak of the pairing of the Procrustean tendency inherent in any hypothesis-verification with the power inherent only in the investigator, the power to literally force the defendant on the Procrustean bed so that he will supply information against himself. This obviously tends toward abuse, toward some form of torture. We can say that there will always be a tendency to abuse the defendant if the investigator is given power over him, because by definition he represents the major challenge to the Procrustean tendency implied in every investigation. This holds true for the investigator in the ideal type of inquisitorial process, it holds true for the police, sometimes even for a psychiatrist or a social worker. Always when we have a marriage of power with an active investigation concerning a human being there will be a tendency toward abuse. The tendency is built into the structure of action and all the buffering procedural attempts as the Miranda ruling for example, will be subverted by this implicit contradiction.

The Anglo-Saxon adversary process has intuitively evaded the problem by simply keeping the adjudicator uninvolved for as long as possible. There the adjudicator has no need to form an hypothesis in order to investigate, because the parties themselves incarnate the respective hypotheses about the past event. The adjudicator's passiveness enables him, at least theoretically, to remain impartial considerably longer, whereas the inquisitorial process directly forces the investigator to be biased. Being free to remain

passive in the pursuit of truth preserves the possibility of alternation of juxtaposed hypotheses for much longer. But the price to be paid in this system is the relativity of its pursuit of truth and its consequent focusing on the resolution of the conflict, which makes strategic simplifications such as plea-bargaining possible.

In terms of the presumption of innocence, on the other hand, we can say that the juxtaposition of the parties in the ideal type of adversary process presupposes it. If the legal problem is to be dealt with in terms of a simulated conflict of the two juxtaposed parties, this presupposes equal procedural powers of the parties. If the parties are to be equal, this automatically eliminates the possibility of the prosecution having a special power over the defendant and thus it eliminates the possibility for the above pairing of power with the Procrustean tendency. Besides it is the prosecution who instigates the conflict and thus has the obligation to prove its case: ei incubit probatio, qui dicit non qui negat. The prosecution has to present its case and if it does not have sufficient evidence to make its case stand, why has it initiated the procedure at all? Thus, if the prosecution has to prove its case (and it does because it is the party who put forward the incriminating hypothesis) then the presumption of innocence is merely the other side of the coin… In other words, the fact that the adjudicator himself is hypothesis-free results in the requirement that the prosecution itself present sufficient evidence to support its allegations, its hypothesis about the act and about the defendant's participation in it. This means theoretically, and sometimes even practically, that the defendant does not have to do anything to oppose the prosecution's hypothesis, because there is sufficient distance between the prosecution's hypothesis and the hypothesis-free adjudicator. This is an operative presumption of innocence in the original sense of the term.

In the pure type of inquisitorial system the adjudicator himself in fact cooperates with the prosecution: he investigates its hypothesis, he verifies it, because an active investigator must have an hypothesis. This implies that the defendant must try to convince the adjudicator that the operative hypothesis (formally the prosecution's one, but in fact adopted by the adjudicator) is incorrect. Thus the defense is not raised against the prosecution, it is raised against the adjudicator (khadi-justice). Whereas the hypothesis of

the defendant's guilt is, in the adversary process, merely an "allegation", because it is advanced by one of the two parties in the conflict, and not by the inactive adjudicator, in the inquisitorial system this same allegation becomes an hypothesis adopted by the adjudicator himself (supra) and thus it deserves the name of "the presumption of guilt".

In other words, even though there will in any criminal process be an incriminating hypothesis (because that is what the process is all about) it matters in whose hands it becomes operative. The inquisitorial system puts it in the hands of the adjudicator himself and thus the defendant is in a position where he defends himself not against the prosecution, but against the investigating judge.

In the pure adversary system the natural by-product of the system is the presumption of innocence (stricto-sensu). In the pure inquisitorial system the presumption of guilt is the basis of the process and a natural outgrowth of the division of labor in the process; the presumption of innocence will be illogical and idealistic, a never attainable postulate, an ever alien body in the process.

Torture, as we have seen, is to a large extent a natural concomitant of the presumption of guilt. By virtue of the tendency to put the facts on the Procrustean bed of the investigator's hypothesis, it is the defendant who ends up on the real Procrustan bed: "The laws torture you because you are guilty, because you may be guilty, because I insist that you are guilty".[4] Presumption of guilt is a direct consequence of the demand for an active investigator, because this results in the fatal pairing of power over the defendant with the Procrustean tendency. The question of torture then becomes a question of degree, because the moment the defendant is made an object of investigation, he is already under the Damocles' sword of potential abuse, because to the investigator he also represents a frustration and the temptation to force a confession out of him.

This can be proved by observing the police in the Anglo-Saxon system, where the search for facts and power over the defendant are paired. The general rule that the evidence

[4] C. BECCARIA, ON CRIMES AND PUNISHMENTS, Paollucci trans. 1963, 34.

gathered by the police, where this tendency is even more present, should be deprived of its legal relevance is present in all European criminal procedures, but there the difference between what the police do and the role of the investigating judge is just one of degree. The investigating judge may be more conscious of the fact that after all he is acting as a judge and not as an agent of the prosecution, and that awareness does alleviate the problem; further, the fact that the actual adjudication in the trial phase of the European criminal procedure is separated from the investigatory period is intended to produce the same beneficial results as the separation of the police's work from the actual adjudication in the Anglo-Saxon system. In fact, Continental criminal procedure could be even more adversary than the Anglo-Saxon process, were it not for the fact that the file goes not to the prosecution but to the trial judge, who is further empowered to conduct the trial in a non-adversary fashion. But this would lead us into a detailed comparison of the two procedures, whereas our intent here was only to show the structural naturalness of the use of torture in the inquisitorial system.

The underlying question is, why the pursuit of truth in the ideal type of inquisitorial system is considered so essential as to be made more important than the resolution of the conflict.[5] In other words, why, on the Continent, was the relativity of the pursuit of truth through the resolution of the conflict not deemed sufficient, whereas in the Anglo-Saxon system the pursuit of truth was never deemed such an absolute postulate as to make the adjudicator pursue it himself? Is this due to the Inquisitorial persecution of heretics in 1252 after Pope Innocent ordered the mandatory use of torture? Is it due to the fact that the Church in this persecution thought conviction too important to relegate the authority of adjudicating to somebody else's hands and thereby degrade itself into the role of a mere party to the conflict? Is it possible that the transcendental importance of the issue of

[5] Again, this is not to say that the inquisitorial system has a better chance to find out what the truth is. In fact in such terms it would probably be difficult to discover what kind of correlation exists between the verdicts in the inquisitorial and in the adversary system, because the event the procedures are intended to unveil is a past event and, therefore, impossible to ascertain otherwise but in terms of probability. Consequently it is impossible to say which of the two systems has a better chance to discover the truth.

heresy was seen as too essential to be reduced to the question of mere resolution of a conflict between the accusing Church and the defendant? There is a reflection of this distinction between the relative and absolute pursuit of truth in this matter, but the question has to be answered by an historian. We may nevertheless add here that the official stand of the Catholic Church before 1252 was against torture. In Pseudo-Isidor's Decretals that were later incorporated into Decretum Magistri Gratiani (ca. 1140) c.1, C.15, qu.6 the maxim was: omnis enim confessio, quae fit ex necessitatae, fides non est. Also, Pope Nicholas I in a letter to the Bulgarian ruler deplored the fact that the Bulgarian authorities tortures thieves. But when heresy spread like a plague all over Europe, the Church, whose secular power was derived from its monopoly over the spiritual sphere, felt threatened, which prompted the mandatory use of torture against heretics in 1252. The use of torture then persisted together with the pure inquisitorial nature of the procedure so that the shift back to an adversary procedure seemed to be irrational in terms of efficiency.

The inquisitorial system as opposed to the accusatorial one, is characterized by an emphasis on investigation. But any modern criminal procedure must consist of both investigation and adjudication, of its inquisitorial and its accusatorial phase. Impartiality in the latter is possible precisely because it is absent in the former. The differences, therefore, are a matter of degree and are due perhaps to one's attitude towards "truth".

In an ideal type of the adversary process the pursuit of truth is relative; in an ideal type of inquisitorial process the pursuit of truth is absolute. Of course, there is a continuum of actual procedures between these two extremes, between these two ideal types, but for the purposes of the present analysis we shall use this schematic separation in order to demonstrate the existence of dynamic tendencies toward either the presumption of innocence or the presumption of guilt, and consequently of tendencies toward a greater or lesser probability of the use of torture.

The structure of an ideal type of adversary process is predicted upon two opposing parties arguing the case on their own initiative. The information which constitutes the legal case

is known to the adjudicator (the judge or jury) only insofar as the parties are willing or able to produce it. The adjudicator, therefore, basses his decision on what is presented to him by the parties. He does not, in other words, try of his own accord to find out the facts. In a very real sense he does not decide upon the truth of the matter. Rather he is limited to the evidence presented by the parties: the emphasis is not so much on the truth as upon the resolution of the conflict.

The emphasis here is on the subjective attitude toward the ascertainability of a past event. This attitude can be more or less ambitious. It may realize to a greater or lesser extent the limitations on the ascertainability which are reflected in criminal procedure. In other words, it may be more practical and define the pursuit of "truth" in terms of the purpose of criminal procedure (punishment), or it may be more ambitious, transcendental and dogmatic, less aware of the practical limitations, less constrained by the purpose of criminal procedure, and therefore more prone to believe that there is a final, ultimate, discernible and ascertainable "truth" in every matter.

In the ideal type of adversary procedure the adjudicator limits himself to the evidence introduced by the parties. He does not find out, in other words, whether there was a murder; he only decides whether he has been persuaded by the evidence that there was a murder. The adjudicator in the ideal type of the adversary procedure has no direct stake in finding out what happened, he does not inquire into the event. Instead, he allows himself to be exposed to the evidentiary reflection of the life-event. (Note that we are not talking about the separate and different question of whether he in fact finds out what happened and whether this adversary system in fact produces better chances to discover what happened and whether this adversary system in fact produces better changes to discover what happened precisely because it limits the pursuit of truth to what is practical.)

If the adjudicator does not have the means to investigate the matter himself, it he has to be satisfied solely with the evidence introduces by the parties – da mihi factum, dabo tibi jus – then it follows that ultimately he will have to decide the case one way or the other according to whatever information the parties are willing and able to disclose. And since

he does not have the alternative of non liquet, absolution ab instantia, or, not proven, he has to decide. In this respect he is helped by presumptions, such as the presumption of innocence. Presumptions at the same time enable the adjudicator to resolve the conflict even though he is presented with less than a sufficient amount of information and effectuate the stimulus of the burden of proof because the parties are aware in advance in which direction the decision will go if they do not present sufficient information. The adjudicator is not a fact-finder and his passive role is built into the very structure of an adversary process. Conversely, the process is adversary only insofar as the adjudicator remains passive.

There are two extreme possibilities for comparison of an ideal type of adversary process on the one hand and the inquisitorial process on the other: the adjudicator is either entirely passive and consequently entirely limited to the information produced by the parties, or else he takes it upon himself to conduct the investigation. The adjudicator in an adversary process must not engage in his own fact-finding; he is therefore necessarily and inevitably limited to the resolution of the conflict in terms of the limitations on factual informational input.

If the adjudicator nevertheless decides to find out himself what happened, if he refuses to be subject merely to the filtered information produced by the parties, then the informational input of the parties is of necessity degraded because it is only natural that the adjudicator should trust more “his own eyes” than the biases informational input of the parties. Even if his own fact-finding is perhaps not the only source of information, it will definitely – in his own opinion – be the most trustworthy source. (But of course there is no reason to believe that in reality his own informational input is better, more extensive and rigorous than that of the combined parties who have a definite stake in having the adjudicator decide one way or the other.)

Pushed to the extreme this situation reduces the parties to a minor role in the procedure, reduces the importance of the conflict itself and of its resolution, lessens the motivations

of the parties to engage in their own search for evidence, and in this sense makes the procedure less adversary.

There is an important distinction between the adjudicator who perceives the truth through the parties and engages in his own fact–finding. Naturally, both "try to find out what happened", both are bound "to search for truth", both are under the impression that thy are dealing with real life, not just with evidence, yet the adversary process in fact limits the adjudicator to filtered information and so he in fact primarily decides on the resolution of the conflict. This is well illustrated by the method of plea-bargaining in Anglo-Saxon criminal procedure. A plea-bargain may be a lie where the defendant admits to something other than whatever he has in fact perpetrated. The bargain is reached on the totally extrinsic ground of the balancing of evidentiary advantages and the judge accepts the bargain and imposes the sentence. But clearly the principle of truth-seeking has been violated. This violation is possible only because the primary emphasis in Anglo-Saxon procedure is on the resolution of conflict.[6] Continental procedure by comparison is simply not able to tolerate a plea bargain, because it is contrary to the whole psychology of investigation there and contrary to the "principle of material truth".

In the ideal type of an inquisitorial procedure the pursuit of truth is more absolute, it is a value placed above the resolution of the conflict. The procedure and the investigation is instigated by the prosecution, but thereafter the investigator is guided by the so-called

[6] Cf. L. Fuller, The Adversary System, Talks on American Law, (1971). Fuller has previously published this same text in Report on the Joint Conference of Professional Responsibility, 44 American Bar Journal 1159 (Dec. 1958). I am grateful to Professor Berman, who pointed out to me that Fuller's argument drives home the same thesis as our section here, namely that the Procrustean tendency (Fuller calls it a "natural human tendency to judge too swiftly in terms of the familiar that which is not yet known"), is a product of the direct active involvement of the adjudicator searching for the evidence in the case before him. However, Fuller's argument also stops there. He does not see that the adversary system does pay a price for that in terms of its emphasis on the resolution of conflict, which then leads to such shortcuts as plea-bargaining.

Instruktionsmaxime, i.e. he is supposed to seek the truth of his own initiative, he is not limited by the initiative of the parties.

This pursuit of absolute truth – quite illusory in fact, but potent as an ambition – actively involves the adjudicator in the truth-finding process and gives him a stake in finding out what happened.

Freud's "intellectual function" (supra, p.) is in fact a compulsion towards some sort of intellectual security where the parameters of one's existence are stable and defined – even on account of reality.

I believe that the cultural differences in the intensity of this "intellectual compulsion" account for the differences in the emphasis on either investigation or impartial adjudication.

In practice the two systems are very similar – after all they serve the same function, but it is important to realize that they developed from two diametrically opposed starting points. The Anglo-Saxon point is perhaps epitomized in the exclusionary rule, the Continental on in torture.

Furthermore, Fuller stops short of examining the question beyond the general procedural strategy to procure impartiality. See infra.

VIII. Mildness of Punishments

I.

There are three major types of justification of punishment. First, (chronologically at least) there is the talionic justification. It may be concrete (blood-revenge, retaliation) and limited in its use to crimes with specified victims and therefore inapplicable in cases where the victim is either nonexistent or too abstract to be pointed out. It may be an abstract extension of the basic retaliatory attitude, as for example in Roman law's crimen laesae majestatis, or, the canon law doctrine of atonement as applied to criminal law where the victim is God and the crime is contempt of God. Characteristic of the talionic doctrine is the proximity of the victim to punishment. Its formula is retrospective: quia peccatur.

Second is the pragmatic justification. It emphasizes deterrence, reformation, resocialization and treatment, rather than retribution. It is not retrospective, it is turned toward the future: ne peccetur. This doctrine was not introduced by Beccaria, because it is a necessary compound of every organized State where punishment represents a means of social control. In fact, Roman criminal law (although it was not devoid of talionic principle) was primarily concerned with the policy of punishing.

Third, the categorical (denial of the need for) justification includes not merely the explicit philosophies to that effect (Kant, Hegel), but overlaps on the one hand with the doctrine of atonement where the transcendental reference to the offended God means that the sin (crime) must be punished with no respect to social utility, and on the other hand with the more sophisticated kind of pragmatism such as that of Durkheim's emphasis on the role of punishment as a support to the collective sentiments, i.e., it extends the pragmatic notion of general prevention into the area of the anti-anomic (supportive of normative integration) function of punishment and thereby comes close to asserting that punishment must exist because value deprivation should be vindicated a priori.

A common denominator to all three doctrines is the assumption that (1) crime is unavoidable and that therefore (2) punishment is likewise unavoidable. The idea that crime and punishment are a necessary by-product of the social order's being predicated upon the built-in structural conflict of interests resulting from the perpetuation of the Sisyphus circle (the differential between subjective and objective scarcity, see supra) and therefore the perpetuation of the basic need-scarcity dialectic and further economic development paid for with the price of progressive dehumanization and alienation (and crime and punishment), that idea is incompatible with all three of the above theories. The only possible borderline case is that of Durkheim, but even he declares that the state is authorized to proclaim those collective sentiments which ought to be vindicated in terms of punishment.

The essence of all three doctrines is the same: they represent the elements of the rationalizations of what is happening anyway and offer no alternative because they cannot see beyond the limits of the social order. Since they cannot say that crime as a social phenomenon is wholly reducible to social contradictions, they cannot say that punishment is just another of those contradictions: punishment as an attempt to solve the problem with a tool which is an outgrowth of the very same problem.

Thus the differences between the three modes of justifications are really not that important: they are only differences in ex post facto explanations of the utilities of punishment and do not go deep enough to do away with the question why we punish in the first place. In other words, punishment would be here whether or not Gratian, Beccaria, Kant and Hegel and others have rationalized it. They are not in any serious sense explanatory, because they do not offer an alternative beyond punishment. All three of those theories are merely supportive legitimization of this particular social practice. And every legislator, Roman, medieval, or modern, will use components of all three of them, but not because they have been explicated by philosophers. He will use them, because they are a natural concomitant of the inherent need to punish in every particular social order itself.

There are, however, a few differences between the talionic and categorical doctrines on the one hand, and the pragmatic doctrine on the other. The talionic and the categorical doctrines block the reasoning at a certain point either by asserting simply that right is might, or by saying that the a priori non-questionable and axiomatic nature of the imerative precludes rational attack. The pragmatic doctrine, although still only a justification, at least opens the possibility of discussing the functionality of the different forms of punishment for different acts, and in different social contexts.

The pragmatic doctrine operates on the assumption of the inevitableness of punishment, but it allows for rationally explicable gradations of punishments, modifications of general principles such as those related to the balancing of interests (self-defense, necessity, duress) in view of a reasonably differentiated and articulated set of general principles. Being relative the pragmatic doctrine is more flexible and affords more differentiated and articulable criteria of what is useful, and what not, whereas the categorical and talionic doctrines operate with absolutes which make a detailed analysis impossible and therefore not articulable, and that in turn gives more place for pure arbitrariness.

The pragmatic doctrine finally establishes why punishment is inevitable (in the given social order) and thus it offers explicit criteria for the measurement of the appropriateness of punishments, the principle being that everything which goes beyond the necessary utilitarian minimum is simple cruelty. The doctrine of talion is predicated upon emotion, the doctrine categorical imperative is predicated on absolute principles, and while both are capable of giving a justification and a general “yes” to the question of punishment, they cannot say why a thief must be punished by x+n years in prison, if a murderer is punished by x years of imprisonment.

In Roman law as well as in the 19th-century English law the offences were grouped at the highest level of cruelty. In 1825 England was still punishing nearly 200 offences by capital punishment, one reason for this being the lack of rational policy and the prevalence of simple talionic and categorical reasoning.

The pragmatic doctrine introduces the principles of calculability and contextuality, it articulates the strategic goals of general and special prevention. It matters little if the criteria offered by Beccaria and Bentham were inaccurate, even false and misleading, as, for example, in the simplistic notion of balancing out the motivations leading to crime. What really matters is that for the first time in history punishment was seen as an instrument of social control, which it really is, except in a sense much wider than Beccaria imagined. The pragmatic doctrine affords a language which, because it at least pretends to be rational, is useful for communication, whereas categorical imperative and simple talion are based on essentially incommunicable inner intuitions.

For Beccaria "the purpose [of punishment] can only be to prevent the criminal from inflicting new injuries on [other] citizens and to deter others from similar acts".[1]

Modern criminology has not yet transcended this simple and clear statement of goals of general and special prevention.[2] Yet we know that punishment as a social practice is not really reducible to such a simple goal; we know that the origin and persistence of punishment have little to do with this simple policy statement about its utility. We also know that the general preventive effect of punishment would be severely hampered if morality could indeed be reduced to utility. One simple proof of that is that people would commit many more crimes if they abstained from them only for the reason of fear of punishment.

This is one of the most basic antinomies of the pragmatic doctrine. Beccaria reduces morality to utility, yet he explains how the masses should be manipulated to believe (their

[1] Cf. Yugoslav criminal code, art. 3: "The purpose of punishment is to prevent socially dangerous behavior, to prevent the offender from committing criminal acts and to better him, to influence others so that they will not commit criminal acts and to influence the development of the social morality and social discipline of the citizens".

[2] See, for example, Andenaes, The General Preventive Effects of Punishment, 114 U. PA.. L. REV. 949 ( ), at 949-983.

"senses must be impressed"), that morality is something else than just utility. Pragmatic doctrine is a double standard: one for the initiated philosophers, and the other for the masses who can be led to believe that something is a priori good or bad.

The utilitarian rebuttal of the transcendental reference in justifying punishment is perhaps the beginning of the end of criminal law. In fact if sheer instrumental rationality prevailed today, punishment would be abolished, since it is impossible to make a case for it on purely rationalistic grounds.

The utilitarian justification of punishment, insofar as it has been accepted, is a symptom indicating that punishment in all its medieval cruelty is no more taken for granted and that it therefore needs more than an a priori justification. The talionic and the categorical justifications are in fact not justifications at all, because they simply say: "Fiat poena!" They refuse to explain why so and they can afford that because, and insofar as, punishment is taken for granted.

Beccaria's utilitarian justification of punishment relaters its employment to reason and it does that because it became difficult to take it – in all its cruelty – for granted. And even if subjectively Beccaria was a humanitarian attacking cruelty and arbitrariness, objectively he in fact provided a formidable support for the continuation of punishment practices because he had shown that it is - after all – defensible on rational grounds. But it would be, of course, illusionary to imagine that Rationalism would forget to rationalize criminal law and punishment. Thus it was Beccaria who provided the answer for the question an enlightened despot of the 18th-century Europe was likely to ask himself: "Should we punish at all since we do not know why?"

The answer came in the form of a powerful rationalization and this in part explains why Beccaria was so enthusiastically received by many rulers, from Leopold of Tuscany to Catherine the Great of Russia. His pragmatic justification of oppression provided a solution to the crisis of conscience that was beginning to see itself as barbaric because it did not know why it was so cruel.

The fact that Beccaria advocated milder punishments, while telling the despot why should they be used at all, does not mean that his role was objectively progressive, at least not in the long run. And even in the short run, who knows whether the reaction formation against cruelty would not have been stronger had it not been for the "obvious" rationalistic reasons that supported punishment and were offered by Beccaria.

II.

Beccaria applied to the area of crime and punishment what later became the motto of economics, i.e., the greatest profit with the least possible sacrifice: "the strongest and the most lasting impression on the minds of men … with the least torment on the body of the criminal". (Id.)

Bentham said later that if the fine of one shilling were sufficient to deter murderers, anything beyond this one shilling would be unnecessary and cruel. Carried to this extreme, utilitarianism conflicts with our intuitive notion of why we punish, but this is prattle due to the ongoing harsher social practice which conditions us to believe that this is a natural and unavoidable process.

Bentham's proposal is unacceptable, but not because the capital punishment of murderers in fact helps to reduce the number of murders. The issue should not be seen as isolated: if the whole society is predicated on the mechanical and repressive "solidarity", while the structured conflicts prevent organic solidarity from asserting itself, then the release of the grip of punishment will result in an immediate upsurge of violence and anarchy.

But, on the other hand, it is also true that this very grip of punishment prevents the establishment of a different solidarity because it perpetuates the existence of the structural conflict of interests which may not be functional (economically) any more. And this solidarity by oppression in turn perpetuates the circularity of the Sysyphus principle (the socially induced differential between the objective and the perceived scarcity) and

property-based human relationships (reification) with all the concomitant social pathology such as anomie, alienation, crime, etc.

We have said before that this is a positive feedback spiral. The only way to break out of it is to eliminate oppression altogether and to induce such social practices as will change the values producing social pathology in the first place: a friendly attitude to replace the hostile one.

In this context it becomes clear that Beccaria only intensified the grip of the above vicious circle, while his humanitarianism contributed and still contributes to the legitimate appearance of his rationalizations.

Moderation of cruelty is in fact a concession the structure of power hat to make, although direct oppression would often seem to be a more adequate expression of the distribution of power (e.g. Fashism and Nazism). On the other hand the survival of the system depends on its flexibility, i.e., on its ability to accommodate elements which work against its very intentions and goals. Partial changes in the system postpone the necessity of total and structural change. In a sense Beccaria has done this for the system of criminal punishment, because his utilitarianism transcended the all-or-nothing alternative in punishment by advocating the policy of moderation.

Beccaria never reacts against the State as such, although it is quite obvious from his writing that he had an aversion against oppression. It is difficult to speculate whether he was aware of the essential characteristic of any State, i.e. its oppressiveness, but if he was, he would have not made this known, because he, too, was its subject.

“To the extent that spirits are softened in the social state, sensibility increases and, as it increases, the force of punishment must diminish if the relation between object and sensory impression is to be kept constant”. In another context he said: “[F]rom the lap of

luxury and softness have sprung the most pleasing virtues, humanity, benevolence, and toleration of human errors". (p.18)[3]

But, of course, there is a minimum of oppression which at the same time keeps the particular social order together and betrays that it otherwise would not stay together. When this minimum is reached it ceases to be a question of moderation of oppression (threat of punishment) and it again becomes the aut-aut problem: the choices are again polarized, i.e., either the minimum oppression and the State, or, no oppression and therefore no State and (at a lower level of development), perhaps no society either.

After this lower limit of "mildness" is reached this means that the system, without falling apart and reconstructing itself into a new system, cannot afford further concessions. Its flexibility has reached the limits of preservation of the identity of the system, there, the defense of the State again becomes more oppressive, because the system realizes that no further concessions are possible and that the prolongation of its life now depends on not making further concessions. This then leads to the final and decisive polarization of the social consciousness, the ultimate confrontation of the juxtaposed sides of the conflict of interest and the eventual breakdown of the system as a whole, followed by the immediate resurrection of the new social system which incorporates certain elements of the old, but rearranges them into a different structure.

Thus, the question of the mildness of punishment has a very important political connotation. Beccaria's concluding statement here "that the scale of punishment should be relative to the state of the nation itself" is sufficiently abstract that it can be interpreted even in the above mode of reasoning. Beccaria only meant to say that "strong and sensible impressions are needed for the callous spirit of a people that has just emerged from the savage state", and vice versa.

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[3] Cf., B.F. Skinners' theory of "automatic goodness". See his "Beyond Freedom and Dignity". Needless to say, Skinner does not refer to the one necessary condition for this: the absence of conflict of interests, i.e. the absence of (perceived) scarcity. BEYOND FREEDOM AND DIGNITY (1971).

Generally speaking, the important thing is to realize that what we are talking about here is not the "mildness of punishments" but rather the intensity of the physical threat the social order is forced to maintain in order to survive. The further removed from the people in terms of interests, the stronger the threat it has to make in order to survive. The fact for example that political dissent in many of modern states already represents a threat worthy of the State's reaction is in itself significant, but one should keep in mind that organized dissent coupled with a planned action is included under the label of crime in all countries. To speak of the "mildness of punishment" in such a context is clearly misleading.

III.

It is not difficult to show that Beccaria articulated the kind of reasoning which was there to stay even after 1764. A modern reader recognizes in his "Essay" the conventional wisdom which rules criminology today.

Lasswell, just one of many possible examples, talks of society, which learns "to play it cool". He mentions the ideals of "contextuality", "disciplined calculation", and "expediency".[4] Another example is Walker's "Sentencing in a Rational Society" (1972, a clear proof of the instrumentally rational mode of thinking prevalent in modern penology.

There is no doubt that the mode of analysis, whether in criminal law, criminology, penology, or the sociology of law has divorced itself from the teleological and deontological mode of reasoning. Instead, however, it has introduced a different mythology which is much more dangerous, because it pretends not to be one. Moreover, it is not so clear that we can indeed divorce criminal law and punishment from morality, moral indignation, teleology, etc., because, first, the existence of punishment cannot be reduced to its utilities, and second because it is clear that utilitarianism is not less teleological than teleology itself and insofar as this is true, the utilities covering up latent value judgments can indeed function as a "valid" rationalization.

[4] Lasswell, introduction to S. RANULF, Supra, at xiii.

The initial break with punitur quia peccatur was achieved by Beccaria, and the modern instrumental rationality is but a logical extrapolation from his utilitarianism. Walker, in the above cited work, for example, proposes a series of strategies for sentencing decisionmaking, but the underlying premise is the same as with Beccaria, viz., how to achieve the maximum preventive effect with the minimal loss of "happiness".

In other words, the conscious philosophy of criminal law has not qualitatively changed since 1764. It has been developed and differentiated, made more "calculative " and more "contextual" than it was in Beccaria's "Essay"; it has been more widely accepted, it permeates modern criminal legislation, but the underlying myth is exactly the same: 1) there is a "rational basis" for punishment and 2) this rational basis can be examined, discussed, widened, etc., and on it we can base the administration of criminal justice. It is our intention here and throughout this paper, to show how irrational this "rationality" in fact is.

This pragmatic, utilitarian philosophy metamorphosed itself into some superb pieces of codification. Feuerbach, the famous Continental theorist of criminal law, wrote the Criminal Code of Bavaria, which was promulgated in 1813. He insisted on strict separation of criminal law from morality: a perfect symptomatic illusion. Further development led to a criminology whose initiator was Cezare Lombrose (1835 – 1909) with his "L'uomo delinquente" (1876). From Lombroso's antropologia criminale there emerged the positivist school of criminal law and criminology, whose protagonists were Ferri (1856 – 1929), Garofalo (1852 – 1934), Phillipo Gramatica, and the school called La défense sociale nouvelle which presently influences the theory of criminal law in many parts of Europe.[5]

[5] In the Anglo-Saxon cultural sphere much the same development can be traced, except that here because of the Common Law system, the transformation was more gradual and there are no clear jumps from theory to codification.

The red thread traceable throughout this development is the combination of superficial rationalism and resigned humanitarianism.

Yet throughout this development the power of utilitarianism in all of its more or less developed variation was strong enough to brush aside potential deviations. Kant, in 1797, wrote (in "Metaphysische Angangsgrunde der Rechtslehre): "Even if civil society should dissolve with the consent of its members … the last murderer found in prison must first be executed, so that each may receive what his deeds are worth." (at 199). Von Bar, commenting on this passage, says that Kant's categorical imperative "is nothing other than an appeal to pure sentiment".[6] He overlooks the fact that this "pure sentiment" represents part and parcel of punishment, its origin, and the reason for its persistence.

Hegel wrote in 1820 ("Philosophy of Right") that "punishment [contains] … the criminal's right and hence by being punished he is honored as rational being. He does not receive this due of honor unless the concept and measure of his punishment are derived from his own act. Still less does he receive it if he is treated either as a harmful animal who has to be made harmless, or with view to deterring and reforming him" (par. 100).

It was not before it became clear that "difesa sociale" lead to totalitarianism (in Italy), or, that for example the state acting as parens patriae in the United States tends to bring together the "worst of both worlds" upon the juvenile delinquent (Kent v. U.S., 383 US 541, 1966) that the trend was partly reversed from the emphasis on the offender and his dangerousness, to the act itself. Hegel saw this danger 150 years before it emerged as real.

[6] VON BAR, Supra, Part II par. 85: But a few pages afterwards he approvingly cites Thibant: "No criminall legislation is more successful in attaining its ultimate purpose that that which takes as its criterion the ordinary conceptions of moral retribution…" Thibant, Beiträge für Kritik der Feuerbachschen Theorie über die Grundbegriffe des peinischen Rechts 98, in VON BAR Supra, at …

Nietzsche in "Beyond Good and Evil" wrote about the "necessity of false values". He saw clearly that the logical superficiality of utilitarian thinking does not in itself invalidate it even though the values on which it elaborates are false. In sec. 4 of "Beyond Good and Evil" he expressly supports false values insofar as they are "life promoting, even life-cultivating". In the Second Essay of his "Genealogy" he builds up the theory of punishment on the distinction between its origin and utility.

Even Bentham himself, as we have seen, was aware of the fictitious nature of his felicific calculus.[7] The whole structure of utilitarianism, however, collapses the moment the underlying axiomatic nature of the values upon which it builds ceases to be real.

These are the notable exceptions to the largely prevalent and confident acceptance of pragmatism in punishment. The confidence and the persistence of this fiction of rationality may well be explained by Hegel's saying: "If you look at the world rationally, the world looks rationally back at you". The confidence inspired by this mirroring of the world and consciousness, however, is now breaking down.

IV.

It is breaking down not because rationalism per se is false, but simply because this rationalism is far too limited to encompass the world of tomorrow and the possibility for a radical change of values. It flourished in an epoch in which the stability of the social structure was so much taken for granted that no radical change was envisaged. The pragmatistic philosophy of criminal law, just a reflection of the general instrumental nationalism, is far too simple either to explain or to change anything. In retrospect it is false because it ignores the essentially nonutilitarian origin of punishment. In terms of the present (its own present) it is false because in its assertion that society ought to be defended from crime and criminals it forgets that it deals with a fiction of a monolithic society (as if society were a palpable victim much as corpus delicti is in a homicide). In terms of the future, and this is what interest us here, it is false because it does not have

[7] See C. OGDEN, BENTHAM'S THEORY OF FICTIONS (1932) supra; cf. P. MINI, PHILOSOPHY OF ECONOMICS, supra

sufficient imagination to see that the values of today will be different tomorrow, indeed that many of the values we cherish today are perhaps already obsolete because they have ceased to be historically functional.

Utilitarianism refuses to understand that even punishment is nothing but one of those vicious circles in which human society reproduces – or tries to reproduce – its particular morality, circles which are functional insofar as the values they reproduce are functional, rational only insofar as the values reproduced therein are rational. Unfortunately the gap of the whole structure of values behind the actual, economic development of society is always present, and thus much of rationalism boils down to a stabilizing rationalization confirming the validity of an obsolete past and present.

Thus the main reproach which applies to Beccaria's rationalism of 1764 likewise applies to all the fruits of this tree. The essence of this reproach is that the rationality of rationalism is in itself a valid method but applied to circular notions of utilities, pleasures, and pains.

Unger writes: "The morality of desires [i.e. the hedonistic utilitarian philosophy] destroys the basis for understanding the continuity and shared humanity of the self. Consider first the problem of temporal unity. … [I]t is a necessary consequence of the morality of desire not to permit the creation of an order among our purposes either at a single moment, or, with better reason, over time. The identity of the self is defined by the ends it holds. If over time these ends are truly arbitrary and do not form a system a reason can grasp, there will be no rational connection among the selves that exists at different moments". [8] Unger hits the center of the problem of utilitarian philosophy but from a mistaken position that the values are necessarily arbitrary over time unless supplied by transcendental authority. Unger's argument is a product of the time in which the sharing of values is indeed reduced to such a low level of intensity that they appear arbitrary. From this anomic situation Unger, who refuses to find himself "on the side of the history" sees no exit and falls back upon the idealism of a krypto-Hegelian nature. He refuses to

[8] R.UNGER, KNOWLEDGE AND POLITICS, 56 (1975)

see that his own anomic self looking for temporal unity is a result of the fact that the social order enforces social practices intended to support obsolete values. That this is not an effective procedure anymore can only be explained in terms of the lag of social consciousness, but this, of course, implies a presupposition that there is in society a variable less dependent than others, i.e., economic development. It is unacceptable to Unger to indulge in this "economic reductionism" and thus of necessity he ends in a metaphysical position: a further regression with a face of progressive critique.

It is unacceptable to a metaphysician to explore values by reason. He refuses to see them as social functions, dependent psychological variables of an operative social order. Consequently, he cannot say that values will be less powerful, i.e., that the operation of law will have less of an influence upon normative integration, if the social practices (punishment among them) grow out of a social structure which is no longer historically justifiable.

Thus a metaphysician cannot come to terms with the fact that the sharing of values will be minimal when the social order is on the verge of structural change. It annoys him that all values seem to be arbitrary because the basic position of metaphysical thinking is idealistic, i.e. values and ideas are perceived a axiomatic, God-given, and absolute.

Nevertheless, Unger is correct in saying that the "identity of the self is defined by the ends it holds". The identity of a particular society is likewise defined by the ends it promulgates, promotes and enforces. The dominant social consciousness' hegemony over the individual psychology of society's members, however, decreases while the historical justifiability of the powerstructure standing behind and reinforcing the dominant social consciousness sinks into obsoleteness. The identity of society itself and of all its members, insofar as defined by its goals, becomes a problem. This problem presents itself as an absence of something, as a lack of morality of aspiration, as a social and individual anomie.

Yet, in reality, the problem is not one of values – something a metaphysician is incapable of accepting – but of the simple fact that those social practices which would be capable of creating new values to fill the anomic vacuum cannot emerge from a social order which has reached the limits of its adaptability. The social order then simply persist in its old practices, negative, such as punishment, and positive, such as active mutual indoctrination. One wonders whether this situation can in fact reach the stage where verbal persistence in emphasizing the de facto non-existent values which de facto do not have a grip over behavior any more but are mere intellectualizations (ritualization as a response to anomie) would amount to a veritable folie à million, a situation in which society walks naked on the streets while its members applaud and lionize the beautiful new garments it "wears".

In Beccaria's time, his reason and geometric precision seemed to be an absolute establishment of truth, but through time it became clear that such rationalism can serve any set of value choices, that it is truly a dependent function of value choices of different historical stages.

Value choices, however, do not depend on reason, not in the fashion a scholar would understand this. They depend on interests of individuals, groups, classes and they are relevant to the extent they are coupled with power. Power in society is not distributed in terms of justice, reason, ideals, etc. and so values, in the last analysis, have little to do with these precepts.

"Reason" which refuses to understand this, which refuses to question the origin and social nature of values themselves ceases to be rational the moment the values it builds upon become inadequate, i.e. socially dysfunctional. Then "reason" becomes irrational.

But to question values themselves means, first, to disentangle oneself from the tyranny of the dominant social consciousness and this requires moral and political courage. It means to introduce "ideological rhetoric" into the sacrosanct temple of serious scholarly discourse and ritualization. Reason expanded into the realm of saying that there are no

values per se represents a clear and imminent danger to the social order which struggles to preserve the last reliquiae reliquiarum of morality. It is an apogee of anomie, but more dangerous than the usual absence of values, because it asserts the possibility of new values if only the old power structure could be replaced by a new, more functional one – or dissolved altogether. And, second, such reason and rationalism collides with the ritualistic scholarly reasoning of all those who have a vested and perhaps unconscious interest in preserving the old social structure, which holds true for most of the salaried middle classes, with the rationalism of all those who, unaware of the origins of their own anomic despair, persist in the inertia of legitimization of the old social practices, all those who are afraid to admit even to themselves that the Emperor walks with his clothes on.

But to break out of this vicious circle, what is required is not more rationalism based on obsolete value axioms, not a more simplistic ideology off "social defense", but the painful and risky questioning of the values underlying the social order, of which the threat of criminal sanction is an inherent part.

Legal scholars especially are prone to assume far too much to make a valid and meaningful analysis. They rarely ask themselves where their hypotheses come from, because the legal mind is trained for ex post facto rationalizations. Thus reason is often used to conceal the real origins of the hypotheses these scholars cherish: people too, not just ideas, are engulfed in the vicious circle of values producing practices and vice versa. Because social sciences at the same time reflect and project the image, i. e. the goals, of the society and the social order, goals which are preeminent to the sciences themselves, in this process of mirroring they reinforce those very idiosyncrasies of society and social order which at some point of development represent the essence of the problem. Thus, in fact, they simply legitimize them, they help the social order to persist in the face of its own obsoleteness and to this process they lend the appearance of legitimacy.

But if we are talking in terms of power and utility, then in the last analysis we must ask ourselves: "Utility for whom?" and not "Utility in order to achieve what?" It is

detrimental to limit the analysis of any social issue to parameters of immediate utility. Such a model usually assumes far too much to be valid.

To say, for example, that "value deprivations in society must be vindicated" assumes 1) that values are constant, adequate and socially functional; 2) that deprivations are likewise definable in terms of these values; 3) that society is a monolithic phenomenon with no internal conflict of interest bifurcating every social issue into at least two possible perspectives; 4) that vindication itself (A) is performed by agencies representing the best interest of the above "society, (b) is necessary because it reinforces adequate values and indeed (c) (from Latin vindicare, to defend, to avenge) is in itself a proper mode of reaction.

Not a single one of these assumptions is correct, yet as a network of mutually supporting fictions it appears quite valid – especially if one is to limit himself to "practical" issues. But to try to break out of this circular fiction often means to confront the established conventional wisdom which feels threatened by this attack on its assumptions. It brings forth the bifurcation of ratio and rationalism, the juxtaposition of the past and the future, of legitimation and the challenge to legitimacy. The languages of ratio and rationalism become disparate to the extent that communication is prevented, all the more so if the past rationalism, so for example Beccaria's, is especially convincing. In this there are the beginnings of the polarization of social consciousness.

In this sense Beccaria's excellence is – in the long run – his worst quality.

IX. Promptness and Certainty of Punishment

I.

Throughout Beccaria's Essay there concatenate variations on a main theme of a sort of psychological doctrine "of the senses". Since Helvetius' philosophy was based on "passions" (rather than "reason"), Beccaria, too, following Helvetius, was inclined to

seek way in which these passions could be employed and manipulated to coincide with his happiness principle.

Beccaria's social philosophy is a psychology of passions. "To impress the senses of the crude and vulgar people," was for him the most important aim of punishment. In this respect he was not a rationalist at all, since his kind of policy seeks to manipulate the passions – although by means determined by reason – rather than to enlighten the reason. The presupposition, of course, was (and still is) that the non-vulgar (enlightened) mind is capable of taking advantage of reason in order to play with the passions of those hitherto unenlightened.

Consequently, Beccaria's philosophy is not only manipulative, but also elitist, aristocratic and, therefore, undemocratic. And while the traditional aristocratic prerogatives were acquired by birth, Beccaria's are grounded on the power of the intellect. The tacit assumption is that the allocation of talent in society is limited to the few, the masses being inherently stupid and consequently subject only to the passions and "senses".

Such an attitude is also inherent in the modern professional elitism of lawyers, physicians, and of course, those who brandish more than mere professional power. Others, subject to these powers, are assumed to be incapable of recognizing their own best interests and are, therefore, to be "reformed", "resocialised", "treated", etc. Much of this is derived from the unnatural split between physical and mental labor. Modern aristocracy is defined in terms of I.Q., but the beginnings of this were already quite apparent in Beccaria's writing. Those in possession of knowledge and intelligence are, according to him, not only more powerful than the unreflective common man, but are in possession of Truth and are thus essentially superior to the rabble. since some are capable of being more enlightened than others, they ought to wield power, too. It is then only logical that criminal law should be interpreted as a tool in the hands of the "enlightened ones". Reason is reason for the legitimate use of power. This explains why the Rationalists lionized Reason as an objective principle, a preeminent and given common

denominator of all humanity, as if it were the independent standard, i.e. not a mere tool for promoting particular interest.

Such an attitude differs from both the more honest doctrine of pure vengeance and from teleological atonement. The first split between crime and sin – already evident in Hobbes[1] – thereby comes to be taken seriously. Later writers such as Liszt, for example, advocated a total separation of criminal law and morality under the illusion that it is possible to establish social values (not values and interest of particular classes) by pure ratiocination. In the beginning the discrepancy was between criminal law and religion (Frederic the Great); thereafter the splat between morality and criminal law followed as a natural extension. This trend culminated in the Italian positivist school (Ferri) which postulated only one rational goal, i.e. the "protection" of society. Reliquiae reliquiarum of this movement are now represented in the so-called Mouvement de la défense sociale (Ancel, Kingberg[2] et alii), but the idea originated with Beccaria.

Modern criminology, whether that of Barbara Wooton[3], of the rational moralists such as Hart[4], or Alf Ross[5], whether that the modern sociologists of deviance, is faced with the realization that, after all, reason can only move within the manoeuvre space allowed for it

[1] "A punishment is an evil inflicted by public authority on him that has done or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience". T.Hobbs, Leviathan. This is clearly a purely formal definition in which it is the power to impose punishment which also determines the parameters of justice in the substantive sense.

[2] See, for example, M. Ancel, L'évolution de la notion de la défense sociale (1949); O. Kingberg, Basic Problems of Criminology (1930).

[3] P.Wootton, Crime and Criminal Law (1963); Social Science and Social Pathology (1959).

[4] H.L.A. Hart, Punishment and Responsibility: Law, Liberty and Morality.

[5] A.Ross, On Guilt, Responsibility and Punishment (1975).

by given values; that reason makes sense only as an instrument for the promotion of given values, but that by itself it is essentially incapable of creating values.

Criminal law is by definition moralistic and it cannot acquiesce to any kind of anomie. If, however, the society is in a state of anomie, it becomes more difficult for criminal law to preserve its moralistic status. In a word: if there is no morality, criminal law (and its theorists) will invent one, because it cannot do without it.

What was obvious to Kant, that morality cannot be based on ratiocination but must be an end in itself (because Man is an end in himself[6]), is only now dawning upon slower minds. Criminal law finds itself in the anticlimactic phase in which the belief in reason initiated by Beccaria is being shattered to pieces while there really is nothing to replace it.*

[6] I. Kant, Groundwork of the Metaphysic of Morals, H.J. Paton transl., (1976).

* Kant's metaphysical position is, of course, just as much a cul-de-sac as everything else. The time has come to take the difference in interests seriously and to take human values less seriously; to realize that it is the correlation between interests and power that matters, and not the correlation between reason and power; to realize the simple fact that values change with those in power, who enforce their own interests, and that apart from a few mala in se there is little natural law and that is due to the simple reason that people live together and cannot afford to kill one another; to depart from the timid and vacillating position in which one is afraid to recognized the absence of any objective standards, of any given morality, and therefore afraid to shape one's own values. This, however, is the most important realization, viz. if values are dependent variables, they are not really values any more, because they are not objectively given. One is finally free, but one is afraid of that. The freedom from the crippling effects of Superego, the no longer compulsive morality are only possible in a society where the conflict of interests is eliminated to the degree that the moral and rational correlate more or less perfectly. As long as morality works as a counterforce to (egoistic) reason, it must be taken as a given force over and above individuals and societies.

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It is paradoxical that the rationalists have started the process which makes morality legitimate through Reason, because the essence of morality is always its conflict with reason. If all that is rational from the individual point of view were at the same time morally advisable, there would be no need for morality. But, as it is, morality figures as sort of a cheap policeman. The society must, therefore, play upon the powers of the individual Superego. It is pathetic to try to legitimize (i.e. not just to explain) morality in terms of reason, even if rationality is then expanded to encompass the society as a whole, as Durkheim tried to do.

All morality, except for the few moral constants is undoubtedly due to reason, but the real question is, whose reason. (Historically, it is no accident that some interests – and therefore some types of "reason" – have predominated over other interests – and "reasons" – in particular periods of history: "particular" in that a particular stage represents the optimal of the "whole". In fact, that is what history is all about, viz. the negation of the present in light of an individual's particular vision of the future. Every action, i.e. every atom of history, is a negation of the present in favor of a possible future. Thus, the contradictions between different "reasons", different interests, different visions of the future [values] are the main engines of history.)

Beccaria and Bentham simply imposed their own well-determined "Reason" on the rest of society. Since this particular interpretation of reality happened to coincide with the ideology of the rising bourgeoisie, the ideology which was itself expressive of the collective interests of that particular class, it gained enormous acclaim and influence. That influence was in turn again attributed to Reason, although its effects on the readers and followers were actually due to social and objective factors which had little or nothing to do with the purportedly rationalistic arguments of Beccaria.

In his Groundwork of the Metaphysic of Morals, Kant assumes that the intrinsic freedom underlying the need for a categorical imperative is shared by all humanity: the freedom from extrinsic causalities, the freedom that cannot be empirically demonstrated. Beccaria, however, starts from a reversed standpoint, from the very absence of freedom. He seeks

to employ those extrinsic causalities against which Kant was battling. Kant regarded the human being as an end in himself, but Beccaria and Bentham reduced him to a market commodity, to a means toward an end outside the Man himself. Beccaria could not have been serious when he attributed the determination of the means to the sovereign, yet he uses the sovereign as a kind of Rorschach inkblot into which rationality is projected and he, therefore, unites reason with power.

Thus, in the last analysis, only Reason is self-sufficient and an end in itself, i.e. Reason becomes God. Beccaria does not push his analysis that far, but he does speak of "revelation". In God, of course, the differences between values and reason vanish and thus we end up in the idealistic cul-de-sac against which the Rationalists, notably Voltaire, were purportedly battling under the slogan "Ecrasez l'infame!"

II.

Beccaria's rationalistic rebellion was not directed against idealism and God; it was a rebellion against the authority of organized religion, the Catholic Church. His amoral hedonism was just a different kind of morality. This latent ideology later reappeared in the very same field. In the form of sheer arbitrariness behaviorist psychology apparently concentrates only on the processes of manipulation (form), but latently it assumes that the goals underlying the manipulation itself make the odious procedures legitimate (substance). Again we are struck with the same incredible simplicity which assumes that the future will be just like the present. Skinner, however, who tried to transcend this in Beyond Freedom and Dignity, exposed himself to criticism. He reached the outer limits of his science where it clashes with liberal illusions; he postulated "automatic goodness", i.e. the goodness which does not derive from proclamations but from the absence of conflicts over scarcity, but there he encountered an adverse reaction precisely because he proclaimed jurisdiction over the area of values (or rather the absence of them). This testifies to the fact that even Reason (in scientific garments) cannot afford to touch sacrosanct fictions and is acceptable only insofar as it legitimizes illusory beliefs. Only a profound social crisis will bring about the change.

The employment of this fictitiously value-free rationalism stretches throughout the development of criminal law. It can be detected in Beccaria just as well as in the modern writings of rational moralists.[7] Insofar as this influence prevailed, criminal law was reduces (and remains reduced) to mere "sensory impressions". In this process the ends (which are taken for granted) justify the means, even if today much less so than before.

This modern manipulative definition of punishment – necessarily eclectic without a firm moralistic basis of either Reason, or atonement – is natural outgrowth of the degrading effects of pragmatism. It must be contrasted to Kant's and Hegel's much more elevating and humane, although solipsistic, postulate of criminal law.

It should, therefore, come as no surprise that there are some striking similarities between Beccaria and behaviorist psychologists.

III.

In the sections we are referring to here, Beccaria deals with two assertions. First, he says, the time lag between the perpetration of the crime and the imposition of punishment ought to be as short as possible; second, the high probability of punishment is more important than its harshness.

In a very real sense punishment is conditioning. Its purpose is not to explain – perhaps by moral reprobation – that what the offender has done was wrong. The offender knew that it was wrong, or else he could not have been punished in the first place (insanity). Punishment is not an appeal to reason; it is an appeal to "passions". Conditioning, directed towards the modification of these "passions", is a sort of alignment of two sensations within the proximity of time and space. It is an association of two stimuli.

Time, therefore, matters. Deliberate punishment presupposes a sequence of, first, the act, and only then the punishment. Such a sequence is natural, but in law it also represents a safeguard (as opposed to, e.g., preventive detention and civil commitment of dangerous

[7] Ross, supra note 5; W. Kaufmann, Without Guilt and Justice (1973).

individuals). The sequence is both natural and legal, although in the deliberate legal imposition of punishment it derives from the fact that legal impingement on private interests robs the process of the trust concomitant to situations in which there is a concurrence (instead of a conflict) of interests. In this sense it is the distrust that godfathers the birth and perpetuation of the need for legal safeguards.

In most natural situations involving the processes of learning through positive and negative reinforcement ("trial and error") there is an intimate connection between the act and the pain. The act always comes first and, ideally, the pain immediately follows. The child touches a hot oven and experiences the pain of burning. For the pain to have a modifying effect upon the behavior of the subject it must be "connected" in his mind with the act that caused it.

The closer the connection, the more reflexive the modification of the behavior. A looser connection, i.e. where the pain follows only after a time lag and is not prima facie connectable to the act, demands a more intellectual understanding of the connection. But the same intellect also provides ways and means to commit the act and yet avoid the pain. Typically, the offenders see punishment as a consequence of their being caught, not of their act. It follows, that it is much easier to condition animals, where there is little understanding involved and where responses are tied up with the neurovegetative system (Pavlov's dogs), than it is to condition adult human beings.

On one end of the spectrum we have pure reflexive responses. There, conditioning is "pure" and, therefore, effective. On the other end we have the attempt to condition intelligent and thinking human beings, where the very sequence of the act followed with a pain represents a challenge to the intellect. Thus it would be easy to conduct the aversive conditioning of alcoholics with the so-called "Antabus tablets", an emetic which induces vomiting upon the synergetic effect of alcohol and the drug mixing in the alcoholic's system, if alcoholics did not think. Their thinking, however, soon unveils the "problem" and instead of stopping to consume alcohol they simply stop taking the tablets.

it is easy to condition the child who, in terms of intelligence and experience, is at the mercy of the adult.

Beccaria's underestimation of the "vulgar masses" induced him, as well as most of his followers, to overestimate the possibility of deterring by means of punishment. Society, for Beccaria, is a giant circus, where the "enlightened ones" are the tamers, and the "rabble" the beast to be tamed. Of course, it is absurd to reduce either society or individuals to such a crude analogy which is neither rational (because simplistic), nor rationalistic (because idealistic).

The real motors of human existence are the attitudes formed in early childhood. Some of them are a result of deliberate conditioning by parents, but most of them are a product of the trial-and-error interaction with the environment, social and natural. The child grows and develops his moral attitudes (aspirations and inhibitions) not by rational persuasion, but by natural and deliberate rewards and punishments. It is important for our discussion here, however, that the child models his Superego not on the actual behavior of the parents, but on their own Superego, irrespective of the extent to which they live up to it.[8]

Beccaria's rather retrogressive application of the model of punishment (= negative reinforcement of undesirable behavior-conditioning), as if adults, like children, were to be spanked for their misdeeds, presupposes an essential and actually nonexistent similarity between the child and the adult. It is clear without further discussion that the child's mind is not only receptive to environmental stimuli, but that it is in fact constituted by them, whereas the already articulated adult mind will be less receptive, i.e. the same stimuli will have at best a modificatory influence on it. The constitutive natural

[8] "The Superego of the chilld is not really built on the model of the parents, but on that of the parents Superego; it takes over the same content, it becomes the vehicle of tradition and of all the age long values which have been handed down in this way from generation to generation". S. Freud, The anatomy of the Mental Personality, Lecture 31 in New Introductory Lectures on Psychoanalysis (1933). Cf. F. Nietzsche, The Will to Power, sec. 262 (1888).

conditioning of the formative years of growth can never be undone by subsequent impositions of punishment qua conditioning. It is on such reasoning that Skinner based his theory of “automatic goodness”: if the complex and natural conditioning of the formative years reinforces only socially desirable behavior patterns, there will be no undesirable behavior once the child becomes an adult.

Beccaria’s intuitive understanding was that it should be possible to cause the formation of new aspirations and new inhibitions in an adult psyche if only the whip of punishment is applied wisely. In light of his pragmatic philosophy and given that he saw society as a mere association of individuals, it is obvious that he really did not have much of a choice. This retrogressive model was the only pragmatic goal he could offer in exchange for the atonement and moral indignation of the previous stages. Later developments in criminal law and criminology, linked with names such as Lombroso, Ferri, Liszt, Gramatica, Garofalo, Ancel, Kingbert, etc.,[9] testify clearly to the hopelessness of the attempt to transform ("reform", “resocialize”, “treat”) the basis of the human personality and character by means of punishment.

Now that we have at least sketched the parameters of behaviorism relevant here and the underlying assumptions, we can return to the more particular point Beccaria is trying to make here.

IV.

> “I have said that the promptness of punishment is more useful because when the length of time that passes between the punishment and the misdeed is less, so much the stronger and more lasting in the human mind is the association of these two ideas, crime and punishment; they then come insensibly to be considered, one as a cause, the other as the necessary inevitable effect”. (Beccaria, at 56)

This can be compared to a text written ca. 200 years later:

[9] Perhaps the only thing all lthese authors seem to have in common is the illusion about the possibility of the separation of criminal law from morality.

> "In addition to the fact that delayed punishment may affect the wrong behavior, delay is also ineffective because it increases the possibility of the undesirable response to be reinforced in some way. We can see this fact too, in the criminal case. If capture is not immediate, then there is indeed a good chance that the act of breaking law will be immediately reinforced. No matter what the long range consequences turn out to be, from the criminal's point of view the fact may still remain that sticking a gun in someone's face was followed by the acquisition of money; ergo, armed robbery obviously works, the problem being not to get caught later". [10]

Beccaria, however, goes further than that. He extrapolates this idea into the realm of general prevention:

> "Of utmost importance is it, therefore, that the crime and the punishment be intimately linked together, if it be desirable that, in crude vulgar minds, the seductive picture of a particularly advantageous crime should immediately call up the associated idea of punishment. Long delay always produces the effect of further separating these two ideas; thus, though punishment of a crime may make an impression, it will be felt only after the horror of the particular crime, which should serve to reinforce the feeling of punishment, has been much weakened in the hearts of the spectators". (Beccaria, at 57)

Needless to say, whether the spectators will indeed be conditioned in a manner analogous to that of the offender who is actually punished is quite a separate problem since it involves a paring of two much less palpable stimuli. The criminal de facto commits a crime. He is de facto punished. The spectator only comes to know that X has committed a crime and was punished for that. It simply is not possible to say that this process involves learning in the behaviorist sense, because no immediate experience (stimulus) is involved.

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[10] R. Lawson, Learning and Behavior, 281-282 (1960).

However, the subjective identification which underlies the process (and is quite apparent in the popularity of criminal films and stories), is in itself instructive. The spectator here is often offered a hero-criminal model for identification, and yet in the end, when the hero is punished, the spectator is satisfied that this has happened. Psychologically this temporary identification with the criminal annunciates the impulses of the Id, whereas the subsequent punishment imposed induces the spectator to shift his identification to the Superego, i.e. Justice. Of course, to say generally that such artistic creations either increase or decrease the crime rate is impossible, because every spectator projects his own personality into the story and thus the very same film is in fact as many different films as the number of different spectators. Those with a strong Superego will place emphasis on the Justice of the happening; those with lesser inhibitions will tend to perceive the less moralistic elements in the story. The same film, for example, will make the criminal more criminal and the moralist more righteous.[11]

It is possible to argue that, as far as spectators are concerned, the film about the criminal and his punishment, represents a direct artistic experience and is emotionally charged, in contrast to the dry news report, for example. but, if it is impossible to say that artistic creations do not have an influence upon the crime rate, how, then, it is possible to say that general prevention can be derived from the punishment of criminals whom most people will never hear about?

V.

In terms of aversive conditioning the consistency of punishment is a sine qua non. Skinner and others have empirically shown (through animal experiments) that the ration

[11] As to the general theory of information where the main objection to behaviorist psychology seems to be that it takes the stimulus (qua information) as an objective fact, the stand of the informational theory is that the piece of information does not have an objective reality but becomes what it is intended to become only after it has been incorporated by a particular substystem (i.e. mind), see W. Buckley, Sociology and Modern systems Theory, (1967). Cf. A. Schopenhauer, World as Will and Representation.

of undesirable responses will not decrease unless every instance of undesirable behavior is consistently punished. “certainty of punishment” therefore, is essential.

Here again we distinguish between automatic (natural) punishment and deliberate punishment. If we drank too much the previous evening, we will have a headache the morning after. This negatively reinforces the behavior of drinking and it represents an automatic and inevitable aversive conditioning. However, where punishment depends on a deliberate human reaction to undesirable behavior, it is less probable that a similar consistency will lever be achieved. The social success of punishment, therefore, cannot be explained only by the negatively reinforcing impact it is intended to have.

> “The certainty of punishment, even if it be moderate, will always make a stronger impression that the fear of another which is more terrible but combined with the hope of impunity; even the least evils, when they are certain, always terrify men’s minds, and hope, that heavenly gift which is often our sole recompense for everything, tends to keep the thought of greater evils remote from us, especially when its strength is increased by the idea of impunity which avarice and weakness only too often afford”. (at 58)

The idea is Montesquieu’s and its essence lies in the deterrent effect punishment was presumed to have.

But let us imagine that every breaking of the rules of criminal law would indeed be consistently and inevitably followed by the “deserved” punishment. Would that make for a lower crime rate and a society with a greater respect for the precepts of criminal law?

The answer must be on two levels, because the subject matter here is bifocal. On the <u>first</u> level, it is clear that the direct countermotivation supplied by the certainty of punishment would prevent many a crime, but then again it would not prevent many others, although the perpetrators would be caught. Here we are in perfect accord with Beccaria and

Bentham and their counter-motivation tariff-theory of deterrence. But the currents of criminal law run deeper than that.

On the second level, the certainty of punishment would cause a total breakdown of the delicate fabric of normative integration based on a negative identification with the punished offender. Before we attempt to show this let us just emphasize again that law-abiding attitudes in society depend on the powers of introjected morality (Superego) rather than on a policeman at everyone's elbow. That should be clear to everyone who has wondered why people respect the law, instead of asking why they break it. It is the physiology of law-abiding behavior that matters here, rather than the patophysiology of the criminal violations of the law.

1. It has been established that real learning processes are always a result of positive reinforcements (rewards) and never of negative reinforcements (punishments). In simple English, if one wants to change the attitudes of a dog, child, or adult, one is only successful if one rewards many single instances of desirable behavior. If undesirable behavior is insupportable one can punish it, but thereby one has achieved nothing but a temporary suppression (i.e. not elimination) of this behavior. Thus, punishment is useful only insofar as it "makes a place" for a positive reinforcement of desirable behavior which may temporarily replace the undesirable one.[12] We cannot discuss the parameters of this theory here, but it seems to be confirmed by simple human introspection and everyday experience.
2. Criminological studies have shown that there are very few individuals who could claim that they have never committed a crime. In everyone's life there are at least a few instances in which he has engaged in something which could be labeled criminal – were he indeed caught, prosecuted, and convicted.[12a]
3. Only the apparent and superficial effect of criminal law lies in the practice of direct punishment.

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[12] Zupančič, B., Behavior Modification and Punishment, unpublished paper for Prof. Vorenberg's Criminal Law Seminar, where these issues are discussed more extensively (1974).

[12a] See 1 Crime and Justice, 121-242 (Radzinowicz & Wolfgang eds. 1971)

4. If punishment were certain, most people would sooner or later be labeled criminal and be punished. In the long run, this would probably result in a significant decrease of some crimes (those which do not depend on introjected morality, but only on sheer deterrence).
5. Can punishment be seen as a reward? If it can, that would explain its modificatory impact on the behavior of people. In our opinion the real effect of punishment lies in the positive reinforcement of the righteous self-perception of the law-abiding citizen (cf. supra, section on "Moral Indignation").

The idea of both justice and guilt is derived from the fact that everyone of us has been punished as a child for mischiefs he has done at that time. One therefore expects that others "deserve" the same if they do what we have been punished for. This is retributive justice and it is based on nothing but the idea of equality: if we have been punished for doing this, why should somebody else get away with it? The elements of vengeance and indignation are scarcely concealed in this psychology, but the point lies in the fact that the practice of punishment exists in the first place. If it did not, there would be no need for this vengeful equality and therefore not notion of retributive justice. The question here is not whether it is inherently just to punish; the question is that if A was punished (justly, or not), why should B get away with it. Pure form, no substance. Thus, all the discussions as to the problem of proportionality of punishments to crimes are sterile, because the proportion of punishment is an arbitrary decision and the logic of justice becomes a question only after we have made the first decision to punish. Only after we have decided to punish theft is the question raised why the murderer should not be punished. Only after a mother has punished one of her children will others call it "unjust" if her favorite is not punished for the same act. Like cases should be treated alike – this maxim becomes useful only after the first case has established the first precedent. The real question is, however, raised with the first case of punishment. All the rest is comparison. Therefore, retributive justice (as well as distributive) is always a comparative justice. It is inherent in this notion of comparison that the substantive questions are not raised,

because of the noise of comparison. Most often the really relevant first case is never discussed, because it is taken for granted.

This points to a very important inference. Just as children cannot argue with their mother about whether she should punish at all, so citizens cannot argue with the State about whether it should punish or not. This primordial fact is simply given. But once the practice is established, there is plenty of room for comparative arguments, i.e. why would this be punishable, if that is not punishable, or vice versa.

It is perfectly clear that this psychology is intimately connected with authority, i.e. with power. There is little one can do – if one is subordinated – with the question whether the power should be used or not. This is not a place for argument, because power cannot be eliminated by intellectualization. but if the authority proclaims certain criteria of power, then the subordinated ones can request that the authority comply to these criteria consistently, that it treat like cases alike. The argument about justice is ab initio a purely formal one.

Likewise guilt, as a reflection of punishment practices, is a purely "formal" feeling. There is no inherent connection whatsoever between particular acts and guilt. Murder, incest, and all the most repulsive crimes are perfectly legitimate in "certain social conditions", i.e. when they are not punished. The question of right and wrong has nothing to do with the inherent goodness or badness of a particular behavior. It is possible to condition an animal or a human being to feel guilty about a perfectly commendable act if only this behavior is consistently punished. Skinner has shown that a dog will demonstrate all the symptoms of "guilt" if he does something for which he has been previously punished. Guilt is nothing but the anticipation of punishment. In fact, guilt feelings are punishment because that is how the Superego steers the behavior of a personality.[13]

[13] See generally B.F. Skinner, Beyond Freedom and Dignity, (191); W. Kaufmann, supra note 7.

The notions of both justice and guilt are derived from power and its use for punishment. Our personal perceptions of these ideas are a product of upbringing, and the adult and "real" punishment is nothing but a reflection of this. And the reverse: if the society at large did not engage in punishment practices for the breaking of rules, parents would be less inclined to punish their children.

Such an argument already borders on anthropology since it is obviously tied up with cultural attitudes, especially with attitude towards authority, in a particular culture. The Authoritarian personality is an outgrowth of authoritarian conditioning. The authoritarian society in turn is an interaction and perpetuation of many authoritarian personalities and their idiosyncrasies. In such a society, obviously, notions such as justice, guilt, punishment, responsibility, etc. will be taken very seriously, but that has little to do with the intrinsic relevance of these concepts (which is null). All interaction will be compulsively connected with such attitudes and more aggression is accumulated in this manner, more resentment and moral indignation the closer a society is to an outbreak of scapegoating in which the society picks a particular group, such as the Jews in Nazi Germany, in order to abreact the accumulated aggression. When a lesser degree of this is present, the dominant consciousness translates all the authoritarian attitudes into criminal law. That there is then little substance to all the arguments about morality and justice is obvious. It is an illness and a fiction. An illness, but to paraphrase Nietzsche, an illness as pregnancy is an illness: it is productive under certain conditions.

In this context it becomes clear that the righteous and self-congratulating citizen, although most surely not less immoral than the average criminal who is in fact stigmatized as such, will define his own identity in contradistinction to that of a "common criminal". This negative identification, by the very contrast it provides, allows for enhanced self-image and greater self-respect. The process, diffused throughout the society as it is, accounts for the enormous positive reinforcement "law-abiding" citizens derive from their comparisons with punished offenders. Stigmatization is just the opposite side of this coin.

The substance of this process is precisely the same as in the psychology of prejudice. The poorest and most frustrated white person will derive a special satisfaction from his comparison with a black. The very frustration at the same time makes him inclined to abreact his aggression and blacks are a perfect scapegoat. Thus prejudices have at least a double healing effect: first, they cure inferiority complexes and, second, they provide a handy target for aggression.

If the same fashion a criminal relieves people of the burden of their guilt, because it is clearly demonstrated that one is not guilty unless one is punished. At the same time, this process reinforces the powers of the Superego of the law-abiding citizen, since he must be relatively consistent in his contrasted self-perception. He says: "I will not do something like this. After all, I am not a criminal". But the condemned man also becomes a target for all those aggressive tendencies the Superego of the law-abiding citizen imposes on his Ego. By being aggressive against the punished offender, by demanding his punishment, he (the law-abiding citizen) is in fact aggressive against his own repressed aggressive tendencies.

This can be seen as pathological, but its by-products are the positively reinforced righteous attitudes and the greater probability of obeyance to authority (i.e. law). By the same token the probability of criminal behavior is reduced.

This continuous social process in which punishment gives a rubberstamp of reality to the notions of justice, responsibility, guilt, morality[13a] cumulates its effects through generations until a homeostasis is achieved, i.e. a balance between the structural conflict of interests and the inhibitions necessary to keep the society together. Anomie is the negative side of this process and can be seen as a discrepancy between the system's need for compliance and the actual non-obeyance of the rules.

[13a] Ross, "Tu-Tu", 70 Harvard Law Review 813, expounds on a similar "projective thesis.

The actual punishment of criminals, whose selection for punishment has little to do with justice, is nevertheless a powerful catalyst of these processes and without it the tender fabric of the social Superego would be destroyed.

6. The whole system, as we have seen, is closely tied up with individual patterns of self-definition. Because law enforcement agencies pick a criminal here and there and stigmatize him and moreover precisely because they do not punish every transgression, it is possible for the large majority of people to define themselves as "law-abiding". It makes – psychologically speaking – little difference that this is an illusory process, because the fact that people have a one point in their lives committed a crime is irrelevant so long as they were not pronounced guilty and punished.

   In a word, what matters is not whether somebody committed a crime; what matters is only whether one was punished. People's respect for the law, especially criminal law; depends very much on their being able to see themselves as being on the side of the law.

   This guilt-relieving and morality-reinforcing function of criminal law[14] represents the positive side of the conditioning impact of criminal punishment. This positive reinforcement is, in our opinion, immensely more important than its rather ineffective deterrence. There need be no elaborate argument about that, since it is obvious that, in

[14] "Function of law is also protecting the people from feelings of unconscious or unexplained guilt. It does so by allowing those who are innocent to reassure themselves. They can say something like this: 'We are God-fearing law-abiding citizens. If we were guilty, we would be apprehended, prosecuted and punished. Since this has not happened, we need not feel guilty.' This aspect of the law highlights its psychologically defensive, ego-protective functions and the same thing happens in court where judge, jury, etc. are afraid of being guilty for sentencing somebody – and so they transfer the responsibility on the shoulder of psychiatrists. And that is why they almost always find the defendant mentally ill and irresponsible … If we wish to have more rational and human jurisprudence we must experience, contain, and tame guilt, not deflect and vent it in substitute action".

a society based exclusively on deterrence, there would be as much crime as if all the people were psychopaths. (It is characteristic for them that they have not internalized the usual moral precepts.) The very fact of human association presupposes certain rules of interaction (moral constants), much as the game of chess cannot be played without rules. But these rules written on paper and even enforced by physical force are meaningless so long as they do not become part and parcel of the individual's Superego. It is absurd to say that in the short run the introjection of moral precepts is based on deterrence, although it is equally clear that in the long run the internationalization of moral norms is based exclusively on precisely that. Yet in between there are generations of people who transmit their attitudes to their children so that eventually these attitudes are taken for granted insofar as they are not affected by selective tradition. And, of course, it is no accident, that these, and not other, moral precepts have evolved. Their root may superficially seem arbitrary, but in fact the natural law theory is quite correct – to the extent that basic precepts are a product of societal living but, of course, there are many less basic precepts which have no basis in the real social needs of a society in a particular stage of development.

Criminal law's general preventive function is based on this positive self-identity people derive from their differentiation from a criminal. The simplistic utilitarian tariff-theory of counter-motivation affects only those behavior patterns (such as traffic rules) where the internalization of morality is still very weak.

If punishment is highly selective and random to the extent that only a minority comes under its hammer, the distinction between the "common criminal" and the "law-abiding citizen" is thereby preserved; if the majority is being punished, the stigma turns into its opposite, and the previous "criminal" now becomes a hero with the power of attracting positive identification.

<u>It is the criminal justice system itself that literally creates crime and criminals. But by producing them, the byproduct is the law-abiding identity.</u>

Now it is precisely the discrepancy between the criminal minority and the law-abiding majority that enables the latter to impose stigmata. A stigma is an instrument of outlawing, of ostracism, of expungement. But of necessity it is always the majority which expunges a minority and thus if too many are stigmatized, the stigma turns into its opposite. When plebeians left Rome en masse in order to force upon the patricians the recognition of their political status, they clearly demonstrated that a patrician is patrician only by virtue of being the opposite of a plebeian. And just as with positive identification it is the minority that attracts the majority, so with negative identification it is the minority that repulses the majority. In both cases it is the minority that offers a model for (positive or negative) identification.

An exodus out of the fiction of legality and morality destroys the subjective essence of such phenomena. Likewise, if criminals were to vanish into the thin air, we would have to invent new ones just to remain more law abiding than they. In a society where there is an inherent contradiction between sheer instrumental reason and the historical interests of the whole, there has to be crime. If there is none, it has to be invented. [15]

Thus, it is precisely the uncertainty of punishment that supports the useful distinction between right and wrong. The very inefficiency of the enforcement of the rules of criminal law is a necessary condition of its less palpable, but more real, efficacy in terms of normative integration.

[15] Such was in fact Durkheim's theory of crime as a normal phenomenon. See the work cited supra 12a, at 392 of Vol. I. But this, of course, presupposes that such psychological processes are immutable – which is by no means true. This is just an aspect of alienation and as such a dependent variable. It is one thing to describe these processes as they exist today, and another to say that they will never change.

CONCLUSION

200 Years Later: Have we lived up to Beccaria's Postulates?

Rather extensively we have discussed most of Beccaria's proposals. The motive behind this discussion was primarily to show that we have not sisnce 1764 moved further along this line of development. His surprisingly modern, realistic, calculative – in one word "enlightened" – work still evokes admiration. This show his genius – or our backwardness, probably both. Without a doubt, criminal law, being both a symptom and barometer of social damage in several different senses, fails today to reveal a philosophy more enlightened that that of Beccaria.

On the contrary, a detailed analysis reveals that while the form of his reasoning, the nature of his argument, and the thrust of his philosophy became – with ample help from Jeremy Bentham – part of the social consciousness of our time, the humanistic postulates – his case almost yearnings – are far from achieved. But this is understandable. The form of Beccaria's argument, as is true of most writing of the Enlightenment, was an outgrowth of tremendous social restructuring. Not only was his own thinking a consequence of that, but he too, like every writer, more or less unconsciously adjusted to the probable reactions of those, he wished to persuade. This refined sensitivity made his work a powerful catalyst of the processes already well under way. The power of this form has little to do with reason in the strict meaning of the word. It was the particular reasoning of the rising bourgeoisie that he focused on the neglected area of crime – without really modifying it significantly. The (happy) coincidence of his intellectual sensitivity with the currents of Enlightened thought and the fact of the previous neglect of the problem of crime resulted in the veritable explosion of his ideas and their influence.

But apart from this form, the postulates he advanced, the ideal of formal justice, abolition of arbitrariness, mildness of punishments, abolition of the death penalty promptness and certainty of punishments, remained largely unattained. While his

maxim became the guide to social policy – the happiness of course being bourgeois "happiness" – the criminal justice today is not less arbitrary, not more certain and prompt and mild, and the death penalty is not abolished.

How do we explain this discrepancy between the success of form and the defeat of substance?

There are several reasons for it. First, many of Beccaria's ideals carried death in their heart from their very conception. For example, his pragmatic concept off "justice" involuted the previously compact notion of justice into a vacillation between retribution (previous transcendental atonement for the sake of God's revenge) and future reformation and rehabilitation. And while even today the latter remains secondary to retribution, the split caused by Beccaria engendered the growing ambivalence of society – eager to take revenge on criminals it pretends to reform, and vice versa, eager to pretend through fictitiously long sentences that it revenges whereas in fact it soon releases criminals into the hands of the meek probation and parole officials. Steering between this Scylla of revenge and moralization and this Charybdis of moral indolence with the ambition to prevent crime, the ship of criminal law has in the last two centuries been rolling and pitching in dangerous straits. If, after all this time, there is today especially in the U.S. a revival of the attempt at retribution, this proves that the suffering the state imposes upon disobedient citizens is incompatible with the wish to be benevolent, apart from the fact that the offenders themselves flatly reject being subject to the privilegium odiosum of being "reformed".

Criminal justice can never go beyond the rather simplistic and mechanical analogy of a pair of scales. This is determined by the fact of punishment, which invites comparison and is limited to "if you do this, then we punish you with this". While other branches of law make ample use of subtle positive reinforcements of different kinds of behavior (consider e.g. tax law), criminal law is quintessentially an impotent

paper tiger and its threatening right finger isn't really taken for more than an improbable nuisance.

It would, of course, be unfair to burden Beccaria with this failure – or to burden criminal law, for that matter. It was no accident that the moral involution of criminal law occurred, and in simple English this means that the state lost its moral appeal. But the fatal split is present in Beccaria already. To put it crudely, he projected into the criminal justice such ideals as could within its domain never be attained. No matter what explicit utilities and justifications we proclaim for criminal law, they can never erase the implicit crude and hostile philosophy of punishment. In this respect one should not compare what is said to what is written, what is said to what is said. One should compare what is to what was. There we have not attained much progress.

Second, the Enlightenment definitely demystified the transcendental retaliation of common criminal law, but its purport to have replaced it with Reason is not convincing. It merely replaced one god with another and the fact that the latter was less irrational still doesn't make it rational. Rather, one should say that theology was the Reason of feudal Europe, and Reason was the reason for emerging capitalism. There is an acute need today for a new Beccaria – to invent the new Reason in the realm of criminal law.

Third, the possibility of quantitative, as opposed to qualitative change in criminal law is relatively limited. There is only so much that can be done in the realm of crime control – and still retain punishment. This punishment may come to be called "treatment", "reformation", "rehabilitation", and "resocialization". It may involve all kinds of more active concern with the fate of those thus treated, reformed, etc. Yet basically there is still the inevitable deprivation of freedom. No matter what the proclaimed, or even realized, intentions behind it, for the convicted man and not only for him, this is nevertheless simple punishment. So long as this at least objectively hostile reaction against the deprivation of values is retained, the scope of progressive modification is limited.

The answer to this is not, as G.H. Mead thought in 1918, simply to change from the hostile to the friendly attitude. A qualitative change here requires a new social restructuring akin to the one which Beccaria lived.

Fourth, the layers of justifications of punishment – theological, utilitarian, political, etc. – tend to obscure the real and quite simple nature of the social practice of punishment. Given that the latter is patently incompatible with whatever idealistic philosophy a particular society may substitute to, elaborate justifications were needed to cover up the rather barbaric reality. The fact that today we witness, at least in the United States, a revival of the straightforward Kantian sort of retribution, should be attributed to the collapse of ideology, rather than to some new found calculative attitude.

The utility of the rationalizations themselves, be it Beccaria's or anybody else's, is extremely doubtful. Like any self-deceptive attitude it prevents the social consciousness permeated by these "philosophies" from seeing reality, crude as it is from changing when the reality changes and from reacting accordingly where the reaction of the system of philosophy does not correspond to the realistic reaction.

But this of course is no peculiar peccatum of criminal law. It holds true for most of social theory. The answer to this question involves the answer to the question of human existence and perception of reality. The subject-object relationship dispute is, of course, an unsolved, albeit age old, problem whose resolution will not be found in philosophy because no amount of intellectualization can ever surmount the disparity between reality as it is and "reality" as it is desired to be. And while philosophers can afford despairs, social reformers, and activists à la Beccaria cannot.

This ideontological self-deception is part and parcel of criminal law. A society which does not need to deceive itself as to the social utility and moral necessity of punishment, will not have criminal law, although it will have punishment. Self-

deception, thus, may be quite functional. “The question is to what extent it is life-promoting, life-preserving, species-preserving, perhaps even species-cultivating”, to again quote that pregnant Section 4 from Nietzsche’s “Beyond Good and Evil”. or, to turn this upside down – truth may be destructive.

As a general rule the truth is recognized, the reality perceived as it is only after it has become acceptable. This acceptability presupposes either the change in the perceiver, or in the nature of the object perceived, usually both. The question is, whether the deontogical self-deception helps the society reach that stage. Beccaria and the Enlightenment in general with its emphasis on humanitarianism, leniency, and limitation of judicial arbitrariness have had a definitely positive influence upon the social perception of deviant behavior. The rationalistic argument reduced socially dysfunctional cruelty as epitomized in 19t^{h} century English criminal law. The taming of Zoon Politikon was reduced to the lowest socially possible level of cruelty. It counterbalanced such socially dysfunctional processes as excessive moral indignation, scapegoating, and prejudice. On the other hand, of course, this by no means implies that the deontological self-deception, functional in 18th, 19th and the early 20th century Europe, will be equally beneficial today or tomorrow.

Last, but by no means least, we ought again to emphasize as strongly as possible, that the philosophy of criminal law has not changed since 1764. The usual textbook on criminal law or criminology espouses values professed first by Beccaria. This does not mean that nothing happened in the last two hundred years. On the contrary, the whole codification of criminal law evolved and the whole attitude toward the administration of criminal justice changed. In 1764 Beccaria’s Essay was a rara avis philosophy, today it is more of less commonplace. In between there is a veritable explosion of concern, legislation, experimentation, etc.

We shall not enter into a discussion of these stages of development. Not that they would only be of historical interest, but in the light of this study they appear as attempts at a realization of the program succinctly postulated by Beccaria. The

perception of the social function of punishment and criminal law has not changed – it was merely brought into closer accordance with Beccaria's postulates. The nature of this process, interesting as it is from the point of view of comparative legal history, can be clearly extrapolated from Beccaria's program. Although diversified, today's discrepancy between the criminology and penology of La défense sociale nouvelle on the one hand and the repressive mechanistic philosophy of e.g. Professor Wagner on the other is not as great as to warrant an assertion of qualitative difference. A really pertinent question today is not to what extent the state should take advantage of its power to punish and with what goals in mind it should be doing that. The real question is – whether the idea of institutionalized punishment should be preserved at all.

CHAPTER TWO
ADJUDICATION AND ITS DISCONTENTS

I.

The essence of criminal procedure is in adjudication.[1] Even if we do not, as I do not, conceive of criminal procedure as a mere means towards the goals defined by the substantive criminal law, it is still true that adjudication, i.e. impartial decisionmaking as to the question of guilt or innocence is its central feature. At this point it therefore becomes central to define the nature and purpose of the criminal process.

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[1] See Esmein, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE, 1968 p. 3ss.

Esmein distinguishes three different systems of criminal procedure: accusatory system, the inquisitorial system, and the mixed system. He explicitly proclaims the inquisitorial system to be "more scientific and more complex than the accusatory system." The reasons for that according to Esmein are, first, "The detection and prosecution of the culprit are no longer left to the initiative of private parties"; second the judge is now "an officer of justice" and his rulings are superimposed on the parties and their conflict; third, "the judge's investigation is not limited to the evidence brought before him". After that Esmein enumerates three other reasons which are not so interesting to us in the present context. It is, however, interesting that Esmein, too, notes from the very beginning of his History the fact that the judges' passivity-activity in the decision making process of criminal procedure bears upon the scientific-unscientific nature of the procedure.

The accusatory system is described by Esmein as originating from "a sham fight between two combatants, to which the judge puts an end by deciding against one or other of the parties". It is important to note at this point that Esmein too believes that adjudication, be it civil or individual, is a replacement ("sham fight") of the resolution of the conflict by means of force. That means that even in most primitive contexts the resort to adjudication is in its social function essentially a replacement of actual use of force in order to preserve social peace.

See Berman, "The Background of the Western Legal Tradition in the Folklore of the Peoples of Europe" 45 Univ. Chic. L. Rev. 3 (Spring 1978).

In 1532 when Constitutio Criminalis Carolina was enacted in Germany, criminal procedure was seen as a set of instructions to judges as to how to arrive at a proper conclusion in criminal cases. The role of procedure at this stage of development, i.e. before the bourgeois revolution, is clearly ancillary to the ascertainment of the truth by the substantive criminal law.

But clearly judgment as a process existed before there were any instructions as to how to conduct it. These instructions are not even necessary for the process of judgment as such. If it were merely the question of instructing the judges on the matter of proper bureaucratic handling of criminal cases, there would be no need for criminal procedure as we now know it.

One can compare this conclusion to the one we made in the substantive criminal law: in order to punish the criminals one really does not need criminal law at all. Criminal law becomes necessary when the central question becomes – after Beccaria for example – whom not to punish. In criminal procedure one can say that the truth could be arrived at without any procedure at all. Just as a scientist does not need any protocol of regulations to proceed from the formation of a hypothesis to its final testing and conclusion,[2] so the

[2] See Popper, THE LOGIC OFF SCIENTIFIC DISCOVERY, 1965 at 27.

"A scientist, whether theorist or experimentor, puts forward statements, or systems of statements, and tests them step by step. In the field of the empirical sciences, most particularly, he constructs hypothesis, or systems of theories, and tests them against experience by observation and experiment. I suggest that it is the task of the logic of scientific discovery, or the logic of knowledge, to give a logical analysis of these procedures; that is to analyze the method of the empirical sciences".

It can be observed in this statement that the scientific method comes first – it can be seen as intuitive – its description and logical analysis is really ex post facto.

investigator in criminal cases could find out the truth without any procedural barrier. As a matter of fact, it would be much easier for him that way.

Criminal procedure comes into existence once the question arises as to what the State is not allowed to do in order to discover the truth in criminal cases. Thus both criminal law and criminal procedure are in essence inhibitions of the Government's power. Politically they are a product of the reaction of the bourgeoisie against the arbitrary use of the power of the aristocratic state.

Of course, one may say that this is an overstatement, because is criminal procedure after all not about catching and punishing the criminals? It is obvious, one could say, that the courts punish the criminals, rather than "inhibit" the State.[3] To this there are two answers.

[3] This basic dilemma, namely, whether criminal law and criminal procedure are supposed to further the punishment policies or instead inhibit the government's exercise of power and authority run as a basic theme through most recent and less recent Supreme Court cases in the United States. It is instructive and illustrative to see the essentially antithetical attitudes of the Warren Court and the present Burger Court. It is almost amusing to see how the present Burger Court tries to effectuate a policy which is antithetical to the previous Warren Court policy – and all that by means of reinterpretations of the cases – precedents handed down by the Warren majority. An excellent example of such incompatibility can be obtained by comparing the case of Chimel v. California, 398 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1965) with United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427. Both cases concern searches incident to arrest and yet in Chimmel the Court relied on Terry v. Ohio, 88 S. Ct. at 1879, where the Court said that "[T]he scope of a search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible, whereas that precise link between the reason for arrest and the scope of the search incident to arrest is simply severed in Robinson where Justice Rehnquist declares by judicial fiat that "a search incident to the arrest requires no additional justification".

However, our concern here is not the scope of the search incident to arrest but rather the two antithetical philosophies concerning the rule of criminal law and criminal procedure. For illustrations, however, one can regress to such cases as Wolf v. Colorado, 338 U.S. 25, 69 S. Ct.

First, it is true that criminal law is about punishment and criminal procedure about handling of criminal cases, but as we said above, this is possible even without either criminal law or procedure. Second, it is true that the central dialectic in both criminal law and procedure is the oscillation of the power of the State as against the power of the citizen, and individual against an organization. This includes the power of the state, of course, but by the same token it includes a limitation on it.

Applied to criminal process this simply means that adjudication is not merely about truth-finding , or not even primarily about truth-finding . The fact that the relevant truth is pursued by the state implies that this pursuit will be checked upon by the Courts and will therefore be inhibited simply because it is a powerful state that has to be checked in its power.

As we shall see, the impartiality of adjudication carries the notion to its full flowering in criminal adjudication.

II.

1359, 93 L. Ed. 1782 (1949) where Justice Frankfurter discusses the conflict between the idea of excluding evidence for the purpose of procedural sanctioning and the primary truth-finding intention of criminal procedure. “The question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically irrelevant evidence obtained by an unreasonable search and seizure”. The exclusionary rule, of course, epitomizes that same conflict because by adopting exclusionary rule as a form of procedural sanctioning, one implicitly admits that the truth finding function of criminal procedure is secondary to the procedural propriety. Were criminal procedure a mere ancilla to the goals of substantive criminal law and it is obvious that the goals of substantive criminal law are defined in terms of truth about a past criminal event, then exclusionary rule would not be possible. On the other hand, however, a proper balance of forces and, therefore, strict obedience to the procedural rules is necessary in criminal procedure, not only because of the substantive constitutional rights of the defendants involved, but also because criminal procedure (see infra) must necessarily be adversarial and monocentricaly organized, if there is to be proper impartial adjudication.

Adjudication is a form of conflict resolution. Criminal adjudication is not the best example of this, because the conflict there is somewhat contrived and artificial. In its origin, the idea of judging implies a standing in between two quarreling parties. Without quarrel, one might say, there is no judge.[4]

[4] See supra note 1. It cannot be overemphasized that the very concept of adjudication of a conflict implies a very definite philosophy about society. In a hypothetical Hobbesian society, where war of everybody against everybody is the rule (presupposing that every society implies structured conflicts of interest), there is no adjudication. Adjudication of a conflict is a replacement of the actual physical fight between the parties. If both parties submit themselves to the process of adjudication, they have implicitly admitted that there exist criteria and systems of reference for deciding the conflict between the, that are superior to the use of force. This is sometimes called "justice". This implicit admission that the very submission to adjudication is a replacement of the use of force or any other form of power, is essential for our whole argument here. It is essential, because it implies that within the structure of normative impartial adjudication, there can be no exercise of power of force. In other words, if the conflict is submitted to adjudication, the fact that one party is physically, economically or in any other sense more powerful than the other party, is simply extrinsic to the issue to be decided in that adjudication. If the fact that that party is more powerful does influence the resolution of the conflict, then this particular adjudication has not actually played its intended role. In that sense it was redundant, because the more powerful party would have won the conflict without any adjudication in the first place. In a society where being just would be perfectly correlated to being powerful – there would be no need for adjudication because the more just would of necessity always win any conflict in anyway. The principle that the exercise of power and force is incompatible with the idea of adjudication we shall call the principle of disjunction. I call it the principle of disjunction for the simple reason that the parties in adjudication must be disjoined in the sense that any conflict between them, and this is especially true in criminal procedure, will imply this subversion of the idea of adjudication.

In that sense, see Brewer v. Williams – U.S. – 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977). In Brewer, the suspect in a murder case was transported incommunicado by the police. Even though he was perfectly aware of his Miranda rights and he, in that sense, "voluntarily" gave the self-incriminating information to the police, the Court rules that the evidence so obtained against the defendant must be excluded, because the police have used psychological manipulation to achieve the confession by the defendant. What is interesting for us in that case, however, is not the

Not all conflicts are brought before a third party to be adjudicated. Some are peacefully resolved between the parties themselves, some are fought by direct and empirical matching of power, and some are resolved through a compromise. A compromise (from com – promittere, Latin to promise to one another) is a result either of approximal equality of forces or of the lack of will on the part of the potential combatants to actually "fight it out". A compromise in Roman law meant that both parties were willing to back down a little – thereby actually relinquishing their absolute and principled positions for the sake of ending the conflict to which one of the two foresaw a clear-cut outcome. A compromise then as a solution is essentially incompatible with the idea first of right-or-wrong monocentric substantive distinctions and second with the idea of adjudication.[5]

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explicit rationale for the Court's decision. It is interesting to observe, that there was absolutely no coercion, physical or psychological of any other kind in this particular case, the worst possible interpretation being one of persuasion or psychological manipulation. Nevertheless, the Court found it intuitively unacceptable to allow the defendant to incriminate himself in such a situation. Apropos, it could be said that the very privilege against self-incrimination, irrespective of its foundation in the 5th Amendment to the Constitution of the United States, is a structural necessity in what aspires to be an impartial adversarial adjudication. Self incrimination of course, is not forbidden when volunteered; it is forbidden when obtained against the consent of the defendant. That means that we are really talking about the violation of the defendant's will – by force or by guile – rather than the principled unacceptability of testimonial self-incriminating information. Thus the principle of disjunction is intimately connected with the privilege against self-incrimination; it could be said that they both derive from adjudication being a replacement off "sham fight".

[5] For an extensive explication on the distinction between monocentric and polycentric decision making, see Fuller, ADJUDICATION AND THE RULE OF LAW, PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LWA 54:1, 1960, pp. 1 – 8. Fuller argues that in the adjudication-proper the issues have to be monocentrically organized. That means that the decision-maker –adjudicator must not be required to provide his own solution to the problem (he is not asked "What shall we do?"), rather he is asked merely to decide that one or the other party winds. Thus, there is one center to the problem as presented to the adjudicator. The adjudicator

It is incompatible with substantive justice because in the compromise the conflict is not decided by reference to legally relevant substantive criteria, e.g., "He was mistaken and is therefore not responsible". The conflict is rather resolved on non-principled and extrinsic grounds, e.g., "Is it possible that I may win this case and what may I gain if I negotiate?"

It is incompatible with the idea of adjudication, because adjudication is an alternative to the power matching, whereas a compromise is usually the result of a simulated combat where parties negotiate on the grounds of their estimate of their would-be positions if a combat (or adjudication) were to actually take place. Negotiations practically always involve simulation of (bargaining) power. Consequently the difference between the de facto matching of forces and negotiation is the difference between the actual and the simulated use of force. In both cases force is the essential ingredient in deciding which party will win.

Adjudication, as a form of conflict resolution, is an attempt at decisionmaking by reference to criteria other than force: non sub hominem sed sub deo et lege. If in a society

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merely says Yes or No. In polycentric decision-making (such as juvenile proceedings, sentencing proceedings, civil commitment proceedings, etc.) the decision-maker is required to be creative, to find his own solutions to the problem? This is not proper adjudication anymore for the simple reason than in such polycentric situations in the decision-maker-adjudicator is required to become actively involved with the problem and can, therefore, not be impartial anymore.

This, of course, implies that active involvement with the problem to be decided is incompatible with impartiality, whereas passive-monocentric decision-making can implicitly be impartial. Incidentally, this also implies that no investigation, where the investigator must actively find out what happened and therefore get actively involved with the problem solving in what is essentially a polycentric problem solving situation, can ever be impartial. If in principle every investigation is partial and biased – and we shall later show why this is so – then the idea of "investigating magistrate" or "a judicial investigator" is essentially a contradiction in terms. A person is either impartial – or he investigates, never both. Contra Weinreb, DENIAL OF JUSTICE, 1977, especially pp. 14 – 43 and 117 – 146.

people were "just" in exact proportion to their economic, physical, organizational, institutional etc. power, there would be no need for adjudication. Might would de facto and de jure be the Right. Every outcome of every conflict would be just.

The very fact that in legal adjudication the more powerful party may end up as a loser proves that there is a plane of reference other than power. It is usually called justice. This other plane of reference is the subject matter of the substantive law. Here it suffices to say that this plane of reference is something else than power.

In a Nietzschean society hypothesized above where the more powerful superman is necessarily more just, and where the powerless underdog's reference to justice is labeled as mere "resentment", there need be no judge and no judging. Adjudication, thus, is an alternative to the use of force between the people.

Incidentally, force itself is not totally alien to the idea of adjudication: first, to make adjudication a general and viable alternative to force, it must be its mandatory surrogate[6]; second, to make the result of adjudicatory decisionmaking meaningful, it must be sanctioned, otherwise it is a mere recommendation. Consequently, adjudication is a forceful alternative to the general use of force: it presupposes the concentrated organized force of the State.

Nevertheless, the very reference to "justice" (whatever that means) makes the use or showing of force extrinsic to the proposed mode of the conflict resolution. This can be

[6] The first command of the Roman Code of Twelve Tables (451 – 449 AC) was, according to Cicero: "Si in jus vocat, ito!" ("If you are called before the judge, go!") Thus, if a Roman citizen wanted to begin an action against another Roman citizen he called him to follow hi inius, i.e., before a council and later praetor. According to the Laws of Twelve Tables, the person against whom the action was begun had to follow the plaintiff. The sanction was that the plaintiff was allowed to use force against the inobedient defendant. Korosec, Rimsko Pravo, 1967, page 11. See also Berman, THE BACKGROUND OF THE WESTERN LEGAL TRADITION IN THE FOLKLORE OF THE PEOPLE OF EUROPE, 45 U. CHI L. REV. 3 (Spring 1978) p. 559.

proven purely on procedural grounds, without reference to any definition of the substantive justice. Namely, it follows inexorably from the very institution of adjudication that it is a force surrogate, because if conflicts were allowed to be fought out, the reference to a third party judging would simply be otiose.

In a sense adjudication of conflicts is the essence of civilization and organized society: the only other alternative is a Hobbesian bellum omnium contra omnes.

IV.

In adjudication the potential use of force is transferred to the adjudicator. Adjudication may be submitted to voluntarily, however, most of the conflict resolution is usurped by the State, i.e. adjudication is mandatory and "self-help" prohibited.[7] The State takes over the adjudication in order to prevent the use of force between its citizens. Paradoxically, this is achieved by the threat of force even in private (civil) disputes: the State threatens to punish criminally those who are not willing to submit to its civil adjudication. Substantive law would make little sense, if the State did not have the monopoly over adjudication. All this is postulated on the premise that the use of force is prohibited between the citizens. Therefore, the threat of greater force (by the State) prevents the use of smaller force (between citizens).

In order to imbue this usurpation of adjudication with some legitimate purpose, the State refers to justice, or procedurally speaking, "impartiality". The case is not decided, purportedly, by the arbitrary use of power. It is decided by reference to law (principle of legality), not power, and the law is promulgated in advance by a body that is representative of the populace (and therefore entitled to be arbitrary).

The parties present their conflict on whatever grounds they believe to be relevant.

[7] In such cases, however, no mandatory sanction can be applied by the adjudicator. Since without a sanction every substantive disposition in any rule remains mere recommendation the modern system of law cannot possibly rely on voluntary submission to adjudication.

If force between the parties themselves were the criterion, they could simply fight it out themselves. By asking the matter to be adjudicated, therefore, they refer to a plane of reference other than force. However, except in purely spiritual matters where the sanction itself is spiritual, every adjudication must be backed by actual or potential power. The claims of the parties in conflict must be so structured that one is necessarily a winner and the other necessarily a loser. There is a good reason for such a monocentric organization of issues. Monocentric organization of issues, as we shall see, makes the passive ambivalence and therefore impartiality of the adjudication more probable.

V.

Impartiality is the central question of adjudication.[8] Impartiality is a quality that the adjudicator must have in order to be an adjudicator. It refers not only to the absence of

8 Impartiality could be defined as such an attitude of the adjudicator that guarantees that the conflict is going to be decided on intrinsic rather than on extrinsic considerations. This means that the case will be decided on the basis of the information presented by the parties – in formation that is legally relevant – and not on extrinsic considerations such as, for example, race, religion, political orientation, national origin or any other such extrinsic aspect of the case. Impartiality is, consequently, a question of a specific psychological attitude towards the problem confronting the adjudicator. This attitude could be seen on two levels. The first, namely, the willingness to decide the case on strictly intrinsic considerations can be seen as an absence of overt bias; the second is the ability of the decision-maker to take into consideration all the information presented by the parties. In the latter case, the requirement obviously is that the adjudicator remain undecided for as long as possible because to remain undecided is to remain receptive to all the information. In other words, since the decision can be defined as a refusal to consider any information contrary to the direction of the decision, the ability to continue to receive information is essentially the ability to remain undecided. That ability is definitely a part of what we call impartiality. Cf. Deutsch, THE NERVES OF GOVERNMENT, 1966 p. 105: " A fundamental problem of 'will' in any self-steering network seems to be that of carrying forward and translating into action various data from the net past, up to the instant that the 'rule' is formed [the determination becomes 'set' or the decision 'hardens'], while blocking all subsequent information that might modify the 'willed' decision. Rule resembles the 'deadline' in the newspaper: it could be called the internally labor preference for predecision messages over post decision ones. The 'moment of decision' might

then be seen as that threshold where the cumulative outcome of a combination of past information begins to inhibit effectively the transmission of contradictory data".

The concept of decision-making in criminal procedure could in fact be broken down into two constitutive elements: first, there is the process of actual formation of opinion in the head of the adjudicator and, second, there is the "will" to translate that "opinion" into a decision-proper, i.e., into a legal decision with definite legal consequences in terms of conviction and sentence.

Since it is obvious that the concepts of impartiality and decision are mutually exclusive and incompatible, it is also obvious that in the last analysis, impartiality will be exchanged for a legal decision in any meaningful adjudication process. Therefore, we are talking about the postponement of the "moment of decision" in order not to "inhibit the transmission of contradictory data".

Since the decision itself cannot be impartial (there can be no such thing as an impartial decision), we are then talking about an impartial way of arriving at decisions, i.e. , an impartial process of adjudication. In final analysis, the purpose of any adjudication is to end impartiality and to enable the adjudicator to attach his "will" (legal consequences) to the opinion reached on the basis of this process characterized by impartiality. Consequently one of the principal aspects of impartiality must be the willingness and indeed the ability of the adjudicator to postpone the final formation of his opinion until the parties have "had their day in court" and have presented all the information that they themselves consider to be relevant in the context of given adjudication of a given conflict. We have quoted Esmein (supra note 1) as saying that the inquisitorial system is more "scientific" because the judge's investigation is not limited to the evidence brought before him". The question, therefore, arises where the judge's active involvement in the finding of the truth relevant in the conflict he is presently adjudicating – whether this active involvement prevents his impartiality, or not.

I suggest there is a world of difference between passive adjudicator and active investigator. (Of course, it is implied in the idea that the judge "is not limited to the evidence presented by the parties" that he must insofar as he does not wish to be limited to that evidence of necessity become an active investigator". Active investigation is incompatible with postponement of opinion information for the simple reason, that one cannot investigate unless one has at least a

tentative opinion (a hypothesis) about what happened in the particular criminal case. True, this hypothesis is definitely not the same as the final decision reached after a full criminal trial, but it nevertheless – necessary as it is for an investigation because the investigator must distinguish between what is essential and what is not – "inhibits effectively the transmission of contradictory data".

What we are asserting here is that nobody committed to any hypothesis about anything can be impartial. By "committed to a hypothesis" we simply mean that he is willing to tentatively believe that the reality of alleged past criminal event was such as the hypothesis alleges it to be. (This hypothesis can be either a criminal complaint or any other institutionalized allegation of a past criminal event.) Even a scientist committed to his hypothesis about a natural event cannot, once he is committed to believing tentatively that such is the truth of the natural problem, be any more impartial he thereafter is tentatively decided. An experiment in this context is a confirmation or a disconfirmation of a tentatively reached hypothetical decision. However, for a scientist to lose his impartiality in the process of an active investigation of a natural event is not tragic. He may count on the fact that in the final analysis the feedback received from the objective reality itself will clearly prove and show his hypothetical partiality to be either correct or incorrect. The experiment in this sense essentially differs from a criminal trial whereas a human mind itself provides the far less objective and far more arbitrary and subjective "feedback" to the initial hypothesis of guilt. Thus, while loss of impartiality on the part of a natural scientist is, in fact, the process of investigation by trial and error, the loss of impartiality in criminal adjudication may never be corrected because there the processes of hypothesis formation and hypothesis testing are fused into one process of adjudication where no final definitive and objective feedback is available.

Consequently, we would distinguish here between impartiality and scientific objectivity. The latter concept simply implies the willingness to accept the data contradictory to the scientific hypothesis when the latter is tested in an experiment. Judicial impartiality, however, serves a process where no definitive feedback of an experiment is really available, whereas the issue must nevertheless be finally decided on the basis of information made available during the process of adjudication. Since this is the only information that will ever be available – unlike in natural sciences where such information suppllies only the beginning of the hypothesis-formation process – it is essential that the opinion formation in the process of adjudication be postponed as long as

possible. This will then increase the chances that everything presented by the parties during the process of adjudication will, in fact, form the basis of the final opinion-decision by the adjudicator. And this, namely the taking into account everything presented by the parties, is an essential element of the idea of impartiality in an adversary structure of decision-making. In other words, the moment the adjudicator forms his opinion during an adjudication, the process has lost its meaning, because the contradictory data will no longer be fed into the decision. Of course, we are talking here not about absolute partiality and absolute impartiality, rather we are talking about the shades of gray between those two extremes. Nevertheless, the system of an adversary impartial decision-making must strive towards the situation that will make the postponement of decision-formation in adjudication more probable.

Since the difference between the decision and an opinion is merely one of degree, so is the difference between the final partiality of a conviction and the intermediate partiality of a hypothesis which an investigator must commit himself to in order to be able to investigate in the first place.

Why must an investigator be committed to a hypothesis? Can there be investigation without hypothesis? I suggest that the distinction between perception and apperception is of essence in proving this assertion. For example, if one sees a man with a gun in his hand running away from a body that lies on the street, one initially adopts the hypothesis of “murder”. This hypothesis is arrived at because, first, we assumed that the gun was the tool of the killing and, second, that the killing was by intent of the actor. should we, however, come closer to the man lying on the street and see that he, too, has a gun in his hand, a new hypothesis of “self defense” is added to our understanding of the situation. Thus, our primary perception of reality has changed into the secondary apperception of that same reality. It was Paul Valéry, who once said that thinking is the negation of what is immediately before us. Investigation is precisely that: to collect “facts” in order to first create and the negate the initial hypothesis. Thus, investigation can be seen as a cascade of different levels of apperception, a process in which the same basic and raw “facts” change their meaning. In our example, the person with a gun in his hand running away from the body on the street presented one “fact” before we saw the gun in the hand of the victim, and quite another “fact” after we saw the gun in the hand of the victim.

But imagine a person from a different planet who has never before heard of the concept of crime generally and especially murder, would he be able to investigate the present situation? He would not be able to investigate for the simple reason that he is unable to create the initial hypothesis about this being a murder. Indeed, for such a person even the need for investigation would never arise because criminal investigation is nothing but an attempt to squeeze the objective fact patterns into the pigeonholes of criminal law. A lawyer is not so much concerned with the blood and the guns and the whole drama of the situation in the above example, rather he tends to dissect the situation in terms of the concepts, rules, principles and doctrines that he learned in the law school. The policeman and the detective, too, must be given at least some legal education so that they, too, can create the initial hypothesis about life situations being either criminal or not – the initial hypothesis which is thereafter verified by the lawyers in different stages of accusation and adjudication.

It follows logically that a criminal investigator will, first, only investigate if he is committed to a hypothesis of guilt. If he thinks there is no crime in an objective situation, he will simply not investigate; second, the criteria of what is essential and what is not in his investigation will, of necessity, be determined by his hypothetical apperception of the life situation. And while that does not mean that the data contractory to his hypothesis are totally blocked – it definitely does mean that his receptivity for them is significantly reduced.

In contrast where a passive adjudicator observes the alternation of mutually incompatible hypotheses of prosecution and the defense, he may very well form one opinion during the presentation by the prosecution and the contrary opinion during the presentation by defense. And while his opinion goes one way burden of proof effectively goes the other way. Every litigation lawyer, therefore, must know whether the particular move by the opposing party was effective in creating a certain opinion in the head of the adjudicator and he must attempt to neutralize and overcome that opinion by presenting a strong counter-argument, counter-interpretation of counter-“fact”. It must be admitted that this process of creating a long term impartiality out of a series of mutually incompatible partialities, this process of a vacillating partiality, is also very close to the dialectical way of thinking by thesis and antithesis. In this sense, we must strongly disagree with Esmein’s opinion that the inquisitorial system is “more scientific” than the accusatory system. See supra note 1.

overt bias whereby the case would be decided in reference not to law but to criteria extrinsic to the legal definition of the issue to be adjudicated, e.g. in reference to the friendship between on of the litigants and the judge. Even assuming that the person deciding the case has the best possible intentions and intends to decide the case on purely intrinsic (substantive legal) ground, there is still a great danger that he or she will not be impartial due to the procedural distribution of functions.

The basic requirement of impartiality is passivity of adjudication. Why is this so essential? Passivity of adjudication means that the judge must not be required to actively go about and find out the truth about the case. He must sit still and be passively open to allegations and counter-allegations. This is so because the moment we require the judge to find out what happened, to find this out on his own, he is of necessity required to form a hypothesis. Without a hypothesis he cannot function as an investigation. An investigator must distinguish what is essential in a case from what is not and he must have some criteria for that.[9] These criteria are clearly related to substantive definition of

[9] In Spano v. New York, 360 U.S. 315, 79 S. Ct. 12, 3 L. Ed. 2d 1265 (1959) the Supreme Court tackled the distinction between investigation and adjudication. They talk about the situation where "police were not merely trying to solve a crime" or "absolve a suspect" as distinguished from those situations where the police were "concerned primarily with securing a statement from defendant on which they could convict him" (at 323 and 324). This latter situation where police are already convinced of the correctness of their hypothesis about the identity of the perpetrator, comes to be called a focused investigation in contradistinction to the situation where the police are not yet clear as to who is the definite suspect and which is called an unfocused investigation. The real difference, of course, between a focused and unfocused investigation is that in the latter situation the police are trying to inform themselves as to who is the prime suspect, whereas in the former situation, the police are already convinced that "they have the right man" and what remains is "merely" to convince the court that they were correct. In unfocused situations the police are therefore genuinely investigating, whereas in the focused investigation they are merely collecting evidence in order not to persuade themselves but to persuade the real decision-maker, the court. It is clear therefore that the focused investigation is really not an investigation in the strict sense of the word, rather it becomes an-investigation-in-anticipation-of-adjudication. In that sense, such an investigation really is already an adjudication. The court in Spano understood the

some crime of which the suspect in a criminal case is accused of.[10] An investigator thus cannot assume that the suspect is innocent:[11] if that were the case, he could not treat him

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problems and, in fact, ruled in consistence with the assumption that such investigation is a sub species of adjudication.

The "critical stage" doctrine of Powell v. Alabama, 287 U.S. 45, in fact also declares these critical stages of investigation to already be anticipatory adjudicatory stages. The formalistic approach to the question of distinction between investigation and adjudication is, in fact, enunciated in Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 where indictment is held to be the criterion for distinction between investigation and adjudication.

What matters is not the artificial distinction per se. What matters is the fact that even the courts are willing to at least make practical distinction between investigation and adjudication and that are, in fact, willing to allow certain things to happen in investigation that they are not willing to allow happen in adjudication. And while for them there is no theoretical explanation for this being so, it can be deduced from the theory or induced from the cases that one cannot expect from an investigator to be impartial, whereas impartiality is precisely what is expected of an adjudicator. In fact, we could go further and say that adjudication ca be impartial only insofar as investigation is partial because, as we saw supra, the impartiality of adjudication is achieved by alternation of the partialities of two incompatible hypotheses held by the two parties in an adversary process.

[10] There are numerous problems connected with the definiteness of these "criteria" and we shall deal with these problems in the chapter concerned with the principle of legality, infra.

11 This is rally an overstatement: as we emphasized before, the difference in (im)partiality between different levels of investigation and adjudication are really more one of the degree than in terms of absolutes. As to the distinction between monocentric and polycentric issues see Fuller, Adjudication and the Rule of Law, Proceedings of the American Society of International Law, 54:1 1960, pp. 1-8. Monocentric organization of the issues enables the adjudicator to remain passive because he is asked merely to choose one (mono) of the two hypothesis, whereas in polycentric situations he is asked not just to choose one of the hypothesis, rather he is asked to invent his own hypothesis about the situation. Consequently, one would say that investigation is a

as a suspect. The very fact that a suspect is a suspect implies that there is a hypothesis as to the probability of his guilt. This hypothesis is then tested as against the suspect and the circumstances.

If the investigator has power over the defendant, this necessarily leads to torturelike situations of abuse, because the suspect is always the best source of information as to what happened, and the investigator is tempted to test and confirm his hypothesis on him. This is the natural line of the least resistance.

Whoever is charged with finding out the truth through his own investigation is in criminal cases contaminated with the hypothesis he must create in order to be able to investigate at all. If, however, he is allowed to remain a passive receptor of two opposing hypotheses (monocentricity)[12] as to the defendant's guilt or innocence respectively, then he does not have to be committed to any hypothesis. This helps to delay the hypothesis formation on

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polycentric process where one is asked: "What happened?" as is for example the process of sentencing where one is asked: "What shall we do with this defendant?" Similar polycentric procedures are found in international law where certain committees and commissions are charged with solving a certain situation, in civil commitment cases where the question is what to do with that particular mentally ill person (rather than just decide whether he or she is mentally ill, or not), in almost all administrative proceedings where the decision-maker is asked to solve the problem rather than just to focus on one single solution as opposed to the other single solution proposed by the parties. Contra Weinreb, The Denial of Justice 1977, pp. 117-146.

[12] See Lon L. Fuller, THE ADVERSARY SYSTEM, in TALKS ON AMERICAN LAW, edited by Harold J. Berman, p.44:

> An adversary presentation seems the only effective means for combating this human natural tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, they stand to explore all its peculiarities and nuances.

his part and it essentially improves the chances that he will see the case from at least two different sides. This is perhaps an analogy to the dialectical form of reasoning.

Impartiality, consequently, is an attitude of conceptual non-committal, of hypothesis-aloofness. Such an attitude can only be preserved in a procedural situation where two parties alternate before an inactive adjudicator, each one pressing its own hypothesis and by the same token trying to neutralize the opponent's one. The adjudicator's attention shifts from one side to another – the courtroom architecture manifests this arrangement – and the very committal to one hypothesis at one moment becomes its own negation at the next one.

This is not to say that adversariness represents a sufficient condition for impartiality. It does mean that it is a necessary condition.

Some very important conclusions would follow, if we accept this doctrine. For one, the European investigating judge is a contradiction in terms: either he investigates, or he is a judge.[13] The idea of judicial investigation that finds adherents in this country is likewise

[13] We assume here that the essential quality of judging is impartiality, moreover that it is this impartiality that distinguished the judge from a bureaucrat. (See supra n. 12). In the inquisitorial system, the investigator (inquisitor) was precisely that, i.e. he was not presumed to be impartial and he was not a judge in terms of attaching the legal consequences to the decision of the case. This was done by a separate body of judges who were never involved in the actual investigation. See Esmein, HISTORY OF CONTINENTALL CRIMINAL PROCEDURE, pp. 78-179.

Of course, this decision-making by less involved persons was not precisely impartial either, because after all, it was still an ex parte proceeding. If these "judges" were at least less partial than the actual inquisitor, this was only because they had less stake in the hypothesis of guilt. Compare this situation to the one where a magistrate issues a search or arrest warrant in the United States. Such magistrate could not be seen as impartial since he, in fact, received the information only from the police.

unacceptable on theoretical grounds: it implies a wrong assumption that a judicially conducted investigation is any less partial because it is not conducted by police.

From a comparative procedural point of view the cultural differences between the Continental system and the Anglo-Saxon system are relevant insofar as they clearly godfather the differences in the perception of criminal procedure. If the pursuit of truth is central, as it is on the Continent, then investigation must necessarily become more central than adjudication. Investigation is definitely the more active and the more exhaustive approach to truth-finding in criminal procedure. Likewise in science: imagine a scientist who in his "investigation" proceeds in an "adversarial" manner. If he does it, this is done for dialectical reasons and only in his head.

If, however, adversarial adjudication is the prevalent mode in criminal procedure, it is clear that truth-finding is secondary to the ideals of impartiality and conflict resolution.[14]

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[14] See, Kamisar, A Reply to Critics of the Exclusionary Rule, 62 Judicature 2, pp. 55-84.

> A court which admits the evidence in such a case manifests a willingness to tolerate the unconstitutional conduct which produced it. How can the police and the citizenry be expected "to believe that the government meant to forbid the conduct in the first place?" (Paulson, The Exclusionary Rule and Misconduct by the Police, 52 J. CRIM. L.C. and P.S. 255, 258 [1969], in POLICE POWER AND INDIVIDUAL FREEDOM 87, 90. Chicago: Aldine, Sowle ed. 1962.) Why should the police or the public accept the argument that the availability of alternative remedies permits the court to admit the evidence without sanctioning the underlying misconduct when the greater possibility of alternative remedies in the "flagrant" or "willful" case does not allow the court to do so?
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> A court which admits the evidence in a case involving a "run of the mill" Fourth amendment violation demonstrates an insufficient commitment to the guarantee against unreasonable search and seizure. It demonstrates "the contrast between morality professed by society and immorality practiced on its behalf". [Frankfurter, J., dissenting in On Lee v. United States, 343 U.Z. 747, 759 (1952)]. It signifies that government officials need not always "be subjected to the same rules of conduct that are commands to

The secondary nature of the truth-finding function in American criminal procedure is apparent in its preference for the exclusionary rule, the consequence of which is that people truly found to be guilty will go unpunished in order that the ideals of impartiality and procedural fairness be preserved.

Such an attitude necessarily implies that the procedure is not a mere means to truth-finding [15] dictated by the substantive law. Procedure becomes a goal in itself in the sense

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> the citizens". [Brandeis, J., dissenting in Olmastead v. United States, 277 U.S. 438, 471 485 (1928)]….Once the court identifies the police action as unconstitutional that ought to be the end of the matter. There should be no "degrees" of "offensive" among different varieties of unconstitutional police conduct. A violation of the Constitution ought to be the "bottom line". This is where the Weeks and Mapp Courts drew the line. This is where it ought to stay.

Kamisar's article is in this respect perhaps typical. It deals with the question of exclusionary rule on the low conceptual level of the Supreme Court. The source and the "bottom line" of the exclusionary rule cannot be in the moral and value judgment whether something the police have done is right, or wrong, or even legal, or illegal. The source of exclusionary rule must be in the structural requirement of the adversary process of adjudication. If the exclusion of evidence in violation of the principle of disjunction cannot be proved inevitable and logically inescapable, then the exclusionary rule is in a very precarious position indeed. One of the purposes of this paper is precisely to show, that these need not be so.

[15] The very concept of "truth finding" implies that there is a certain "truth" that the substantive and procedural law – in various degrees – are concerned with here is not some philosophical or scientific concordance between reality and consciousness, between the essential idea and the accidental existence. The concordance we are talking about here is the simple syllogistic subsumption of the minor premise of the fact pattern under the major premise of the legal norm in substantive criminal law. It should not concern us here that this "truth" of legal syllogism has little to do either with the whole truth as opposed to merely legally relevant truth, or with any other more profound epistemological approach to reality. In essence, the problem we are tackling here manifests itself in law as the question of legality. As we shall see, the question of legality is really a question of the extent to which the words can guarantee certain actions.

that it protects different, procedural rights as independent entities and not merely supplements to the substantive questions of guilt and innocence.

This is a position one must agree with, because criminal procedure is the Magna Carta to citizens suspected of crime. In that sense the Due Process doctrine acquires substantive connotations.

If adversarial adjudication prefers limitations on the state power to the truth-finding function (as in exclusionary rule) this necessarily means that criminal procedure from the policeman's point of view will be seen as somewhat dysfunctional. If a criminal is acquitted on a "mere technicality" this is seen as abuse.

However, if we see criminal procedure to have an independent function the "technicality" becomes its main purpose. To the lay argument one can always retort that for mere punishment of the criminals, one really does not need criminal procedure at all.

VI.

If adjudication is to be an alternative to the use of power and force[16], it must of necessity be distinct in a very peculiar manner from the rest of the social processes. In almost all of them, power, force, prestige, etc., in other words manifestations of different conflicts of incompatible interests, are the prevalent modus vivendi. Insofar as adjudication pretends not to be part of the prevalent power game, it aspires to an almost transcendental status among social processes.[17]

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[16] This is essential. The very concept of adjudication of a conflict between two parties makes sense only as an alternative to the use of force, as we have explained above. If this assertion, namely, that adjudication makes sense only as an alternative to the use of force between the parties, this we call the principle of disjunction, is incorrect, then the rest of the conceptual structure elevated above in this collapses as well.

[17] This idea was perhaps best understood by Nietzsche.

As we have seen in our discussion of Beccaria's principe di legalita, substantive law's pretense of advance notice and guarantee really does not materialize because rules are not what governs application of criminal law – rather it is their combinations too numerous to be exhausted in advance. Aside from that, Unger's doctrine that formal justice is an antimony in itself because it mistakenly relies on the existence of intelligible essences of the words which could only exist in such conditions where complete value sharing were possible – conditions that in themselves deny the need for just adjudication – makes the further belief in the principle of legality somewhat improbable.

> "Just" and "unjust" exist, accordingly, only after the institution of the law (and not, as Dühring would have it, after the perpetration of the injury). To speak of just or unjust in itself is quite senseless; in itself, of course, no injury, assault, exploitation, destruction can be "unjust", since life operates essentially, that is in its basic functions, through injury, assault, exploitation, destruction and simply cannot be thought of at all without this character. One must indeed grant something even more unpalatable: that, from the highest biological standpoint, legal conditions can never be other than exceptional conditions, since they constitute a partial restriction of the will of life, which is bent upon power, and are subordinate to its total goal as a single means: namely, as a means of creating greater units of power. A legal order thought of as sovereign and universal, not as a means in the struggle between power-complexes but as a means of preventing all struggle in general – perhaps after the communistic cliché of Dühring, that every will must consider every other will its equal – would be a principle hostile to life, an agent of the dissolution and destruction of man, an attempt to assassinate the future of man, a sign of weariness, a secret path to nothingness. (Em. added)

F. NIETZSCHE, ON THE GENEALOGY OF MORALS, SECOND ESSAY, (1969) at 76. One, of course, does not need to go into deep philosophical waters to find out that rules – and consequently adjudication – must necessarily differ from life, indeed be contrary to it since for what is invariably and naturally done no rules need exist.

If the substantive law is not a fixed and almost transcendental series of precepts from which the purportedly impartial adjudicatory processes can derive their legitimacy, what then is the ground on which to build the belief that adjudication and its ritual nature are not mere form?

There are two levels of interpretation here. Sociologically ritualization is in fact a direct response to anomic tendencies: it is a form that figures as a surrogate of the real belief.[18]

[18] See Merton, Continuities in the Theory of Social Structure and Anomie, Social Theory and Social Structure, 1953, pp. 161-194, The Free Press of Glencove, a division of McMillan Co. Reprinted in Radzinowicz and Wolfgang, editors, CRIME AND JUSTICE, vol. 1, 1971 pp 442 - 473.

According to Merton, there are three basic responses to anomie in any particular society, whatever the reasons for which anomie itself develops. Normlessness can be attacked by rebellion whereby a particular group in society attacks the dominant social consciousness and its corresponding socio-political structure and tries to impose its own values on the rest of society. Such group will only succeed if its values are more functional, more appropriate and more adequate for that society at that particular stage of development. However, rebellion is not the prevalent mode of response to anomie simply because it is not the line of least resistance and besides, rebellion itself presupposes the model alternative of values which, in conditions of really acute anomie, it is impossible to have. The other two responses to an anomie are, on the one hand resignation, which is simply an escape mechanism whereby passivity prevails over active rebellion and the concomitant frustrations are rationalized and intellectualized in the best possible manner. The last response, the one that we actually mention in the above text, is the response called ritualization. Ritualization is a resort to ritual, to form, despite the belief that there is not underlying substance.

The individual or the society believes something is true, correct, adequate or appropriate, the more he iterates and reiterates the form that conceals that lack of substance. The rituals in religions often not only manifest the beliefs, but also conceal the disbelief. Ritualization could be called an over-compensation of the lack of substance by the surplus of form. An individual, for example, who does not believe in what he does for his living, will, in order to maintain his ability to perform what he does do it with compulsive punctuality. Anthropologist Dr. Grace Goodell

Legally and logically, however, the fact that impartial adjudication is a pretense rather than reality matters little because the very fact that it exists and is taken for granted by most and seriously by some, is indicative of the need and aspiration for transcendental reference diametrically opposed to the Hobbesian reality of the social processes.[19] Even though its existence is sociologically speaking – an institutionalized lie because it is far from doing what it pretends to do[20], that matters little because it gives basis for the deontological tension[21] between what is and what ought to be. A tension that could without a false transcendental reference not exists.

This deontological tension created by the postulated purpose of adjudication being a truly just alternative to the use of force and power is immanent in the very existence and nature of judging. If judging is mere imitation of real life power relationships, why bother having it? If, on the other hand, it is something different ("we are all equal before the Law" – "equal protection of the Laws") in the sense that before a judge, real life powers do not matter and a poor man is equal to the rich man, then adjudication embodies a promise of the heavenly kingdom on earth. Somehow it does not matter that these promises never materialize.

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once said that societies generally try to overcompensate in language and lip service what they lack in reality.

[19] From the point of view of social stability, it matters little whether the values of adjudication are "true" values, or not. What matters that those values be first socio-functional and second, appropriately reinforced by the process of adjudication. See Zupančič, Criminal Law and its Influence Upon Normative Integration, Acta Criminologica, January 1974.

[20] ….namely rendering "true" substantive justice ….

[21] The question of deontological tension will be discussed in the Chapter on legality, but here we may simply define the concept as the tension between what is and what ought to be.

VII.

It ineluctably follows that the use of force of any kind by either party is incompatible with the whole idea of adjudication. But how extensively can we interpret the phrase "use of force"?[22] The adjudicator figuratively stands between the two parties in conflict who cannot communicate directly with each other without vitiation the adjudicatory process. This we shall call the principle of disjunction of the parties in conflict. The parties are disjoined not only because the use of force is forbidden between them, but more generally because communication between the parties has broken down already (the definition of conflict): and the parties have referred to an impartial adjudicator in lieu of direct negotiation.

There is, however, one basic difference between civil and criminal law conflicts. In civil law both parties have an interest in resolving the conflict between them, and both are eager to have an impartial adjudicator make a final decision. In criminal law, however, the accused has no desire to have his case adjudicated and ordinarily must be apprehended and brought before the court. This difference is reflected in the quality (intensity) of the disjunction and the quantum of force that appear in both types of proceedings. Civil law conflicts are highly suitable for adjudication, the principle of disjunction can generally be adhered to, and there is virtually no use of force because the parties more or less freely agree to impartial adjudication. Criminal law conflicts necessarily involve some use of force and some infringements on the principle of disjunction since most defendants do not want to have their cases adjudicated at all.

Even civil law, however, must sometimes deal with situations where one party refuses to submit to adjudication. Roman law is a good example: *"Si in ius vocat ito!"* (If you are called into court, you must go!). Thus, if a Roman citizen initiated an action against another citizen, the latter had to come into court before the magistrate, consul or praetor. The Law of XII Tables (451 to 449 B.C.) gave the plaintiff the right to use force against

[22] A good example of this problem is presented in Brewer v. Williams – U.S. -, 97 S. Ct. 1232, L.Ed. 2nd 424 (1977). See supra note ___.

the defendant if the latter would not submit to the jurisdiction of the court. Thus, even when the parties did not freely come before the court, the principle of disjunction was inviolate and force was not used until unavoidable. In Roman law the court sent three notices, if the defendant refused to appear he was declared "contumax" (stubborn, disobedient). Until this declaration no force could be used between the parties. Even today, civil litigants are usually willing to submit to adjudication because they will lose their case automatically if they do not appear.[23]

[23] This raises the fundamental question whether the fact that adjudication itself is possible only because behind it there stands the threat of power of the state which even according to the Law of Twelve Tables in the ancient Roman society did compel the defendant to appear in the court. It could be asked how is it then still possible to assert that adjudication is a surrogate of power and force.

Of course, it is impossible to expect, no matter how elevated the ideal to which the process of adjudication refers as the relevant set of values that the use of power and force will be abstained from for the sake of spiritual values. From this realistic point of view it is inevitable that even prevention of the use of power and force has to be attained by the threat of power and force. The state for example attempting to prevent the use of power by the aggrieved party itself ["self-help"], will often have to do that by the threat of another power and force, namely its own. The question is, does this secondary power annul the validity of adjudication as a replacement of power and force in the first place. It could be said that one of the major purposes of the state qua organization of physical force is the prevention of use of force anyway. What is called "law and order" usually means the prevention of war of everybody against everybody by the threat of physical coercion against all. Thus, it is not too paradoxical to say that peace is maintained by war, that power and force are prevented by the use, or at least the threat of the use, of power and force.

What matters in adjudication is that there be no use of power and force between these two individual parties that have to be disjoined. If these two individual parties resolve their conflict by "self-help" or any other use of any other power, then there is no adjudication in terms of its being a reference to a higher and better set of criteria of justice. That this referring to a higher set of criteria of justice is made possible by the broader threat of power of the state by which one of the parties at least [the stronger one] and the other indirectly too [the weaker one] are compelled to

It is important to recognize that adjudication had developed in the civil law area and was transposed into criminal law later. In the transposition the principle of disjunction was weakened because the accuser in criminal law must literally bring the accused into court.[24] The accuser must exercise power directly over the accused in apprehending him

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submit to adjudication – sounds paradoxical, but does not disannul our basic premise namely that the adjudication between these two concrete parties in conflict is an alternative to the resolution of this conflict by means of power and force between these two individual parties. From the point of view of dialectical thinking the above paradox can be described as "mutual penetration of polar opposites".

> This unity of opposites – the fact that opposites cannot be understood in separation from one another, but only in their inseparable connection in every field of investigation, is strikingly exemplified in mathematics. Here the fundamental operations are two oppositions, addition and subtraction. And so far it is from being the case that addition and subtraction can be understood each apart from the other, that addition can be represented as subtraction and vice versa; thus the operation of subtraction [a - b] can be represented as an addition [-b + a]. Similarly a division [a/B] can be represented as a multiplication [a x(1/b)].
> Cornforth, Materialism and the Dialectical Method, 1971 p. 67.

[24] Practically the only partial solution to this is to shorten the time span during which the accuser (the police, the prosecution) exercises direct power over the defendant. In McNabb v. U.S., 318 U.S. 332 (1943) and in Mallory v. U.S., 354 U.S. 449 (1957) the Supreme Court developed the so-called McNabb-Mallory Rule under which exclusionary rule applies to all statements made by the person arrested while he is being detained "unnecessarily" before being taken to a magistrate for arraignment. A more mechanical rule was imposed by the Omnibus Crime Control and Safe Street Act of 1968 [18 U.S.C. §3501 (c)]:

> In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such

and bringing him before the court. Without first catching the criminal there can be no adjudication in criminal matters. The principle of disjunction is vitiated from the beginning, even before the adjudication is started. The police are allowed to catch criminals, and it is all too easy for them to force the suspects to give self-incriminating information that will be used against them at trial.

This is the basic problem of criminal procedure. The suspect has no interest in having his guilt adjudicated until he is captured. Therefore, he must be apprehended and some strictures placed on his freedom to assure his participation in the adjudicative process. He may be freed on bail, or he may be detained. Detention may be necessary even though it violates the principle of disjunction. The principle of disjunction of the parties serves the process of adjudication and it only makes sense in this ancillary function. When the

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> person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: provided, that the time limitation contained in this sub-section shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

Again what is interesting here is not so much the rule per se, but rather the intent it manifests, namely to maintain the initial contact between the accuser and the defendant, the contact that is in clear violation of the principle of disjunction, to the minimum.

In contradiction to civil cases where the accusing party never exercises the force over the defendant – if the force has to be exercised then this is done through the court (the adjudicator) – criminal procedure has not yet succeeded in getting rid of this original sin against the principle of disjunction.

choice between the subordinate principle of disjunction and the super-ordinate process of adjudication becomes inevitable, it is clear that adjudication will prevail over disjunction. That this is a crippled adjudication, however, is a separate question. Once an adjudicative situation exists, there is no reason whatever to allow the accuser to exercise any further control over the accused.[25]

The Framers of the United States Constitution probably intuited this basic principle and verbalized it in the Fifth Amendment. They recognized that it is inherent in the structure of adjudication that the parties be separated from each other as much as possible.[26] Indeed, the courtroom's architecture reflects the reality that the prosecution is entrenched on one side, the defence on the other, and the judge above and between them in the position of impartial adjudicator.

Justice Douglas' penumbral theory of law in Griswold v. Connecticut, 381 U.S. 479 (1965), reinforces the conclusion that the self-incrimination clause should be read broadly. Douglas says: "[The] specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance…". "Various guarantees create zones of privacy … The Fifth Amendment in its self-incrimination clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment". This is precisely what we have called the principle of disjunction, and Douglas' interpretation of the particulars in the Bill of

[25] Here it is good to keep in mind that the problem is not inherent in the adjudication itself. The problem occurs in the transposition of the adjudication from genuine private disputes to less genuine, if not artificial, conflicts as known in criminal procedure.

[26] The closest one can get to the principle of disjunction through constitutional interpretation of the Fifth Amendment is to interpret the word "compelled" as concerning physical and psychological coercion as well as general lack of informed consent on the part of the defendant. But while it is clear that "guileful behavior" can certainly violate the Fourth amendment, Gouled v. U.S., 255 U.S. 298, 41 S. Ct. 261, 65 L. Ed. 647, that has not been explicitly established for the purposes of the privilege against self incrimination.

Rights as merely a paratactic index to be used in a form more symbolic than exhaustive allows us to support our theoretical conclusions with judicial opinion.

The Constitutional provision that no person shall be compelled to be a witness against himself should be extended into a broad principle against self-incrimination, both in court and out. More fundamentally, though, it should be interpreted as a verbal formula for the principle of disjunction that mandates the accuser (the prosecutor and the police) to exercise as little control over the defendant as is structurally possible. Once the defendant is brought into the adjudicatory scheme, the use of inter-party force must be strictly proscribed. It is logically impossible to argue that the Framers did not see what was clear even in Roman law – force can be employed between the parties only where there is no adjudication; if force is used it negates the very principle of adjudication of conflicts. The provision that one need not be a witness against himself in a criminal trial symbolically reflects this basic idea. If the Fifth Amendment is read in isolation, apart from pre-trial proceedings and its theoretical underpinnings, the self-incrimination ban makes no sense. If it is read in conjunction with the requirement of due process of law as outlined in the "penumbral theory", and with the provision of the Ninths Amendment that enumerated rights shall not be construed to deny or disparage others retained by the People, then the principle of disjunction should delimit the fullest extension of the Fifth Amendment.

The Supreme Court held in Crooker v. State of California, 357 US 433 (1958), that the bare fact of police detention and incommunicado examination does not render a suspect's confession involuntary. This is precisely the theoretical question we want to address.

From our previous discussions of the Procrustean theory, it follows that a hypothesis of guilt is inherent in police investigatory work, (the police must presume guilt when they decide to contact or arrest a suspect) and it is clear that police hypothesization is directly antithetical to the presumption of innocence that ought to be the cornerstone of adjudication. Thus, from our principle of disjunction, the police cannot be allowed to extract evidence from the suspect without impairing the adjudicative process. The

Supreme Court has intuited the same theory and has declared repeatedly that the suspect cannot be the source of information for the police, nor can he be the object of interrogation; this is the thrust of the Miranda-related cases. As we have seen, the same intuition gives meaning to the self-incrimination ban in the Fifth Amendment.

When the Crooker Court enunciated its holding it showed a fundamental misunderstanding of the underlying structural problem of criminal procedure – a pure adjudication situation is impossible because the police must use force to bring the suspect before the court, and exercising any additional force directly undermines the subsequent adjudication because force metamorphoses into "torture"* as soon as it exceeds that necessary to arrest the suspect. The existence of "torture" makes any confession involuntary per se.

We have defined "torture" broadly as the coupling of the accuser's formation of a guillt hypothesis and his exercising power over the accused. If the accuser can exercise physical or legal power over the defendant, it is inevitable that he will try to test his hypothesis on his experimental subject. The result is necessarily a clash between two opposing forces. The recalcitrant defendant resents playing the part of the laboratory rat in the accuser's experimental scenario, and the accuser insists that the defendant fit himself onto the Procrustean bed of his underlying hypothesis of guilt. The conflict invariably frustrates the accuser and produces selective and distorted perceptions that fit his preconceived ideas about the guilt of the accused. Selectivity and distortion are the by-products of every hypothesis-testing situation; the tester always tries to stretch the object of his testing on the skeleton of his basic hypothesis. When police sub-cultural characteristics, public pressure, and the moral indignation that insinuates itself into much police work are superimposed on the intrinsic problems, that are not easily avoided even

* "We are using the term "torture" here in the broadest possible sense as a violation of the principle of disjunction. Thus all the situations where the principle of disjunction is violated because the accuser is allowed to manipulate the accused physically or psychically are defined as "torturous". The word "torture" derives from Latin torquere, to twist, to turn.

in the serene conditions that accompany scientific experimentation, it is inevitable that some form of torture will emerge. Thus, we define torture not as physical suffering but as the coupling of hypothesis formation and power over the defendant.

VIII.

If the integrity of adjudication is to remain intact, if adjudication is to remain impartial, procedural rights must have an independent existence.[27] A procedural right can be seen from two basic points of view. First, it can be seen as a subjective right granted to the defendant in spite of the truth-finding interests of the criminal process. From this point of view a procedural right is seen as a political concession that runs against the basic purpose of crime repression. Insofar as these rights are derived directly from the Constitution, i.e. from a non-procedural source, this perspective seems to be valid.

[27] To say that a procedural right exists independently in this context simply means that it is seen as a substantive right of a person suspected or accused of a crime. This substantive aspect of criminal procedure – in this context criminal procedure could be seen as the Magna Charta of people suspected or accused of having committed a crime – exists not only independently but in clear opposition to the goals implicit in the substantive criminal law. If criminal procedure were totally procedural, i.e., ancillary to the goals of substantive criminal law, the finding of who is guilty and who is innocent would be the only goal of criminal procedure. It is clear that the substantive rights of suspects and defendants conflict with the goal of truth finding as it is evidenced clearly in the institution of the exclusionary rule. See Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782, Mapp v. Ohio, 367 U.S. 643, 81 S. CT. 1684, 6 L. Ed. 2d 1081 and especially also Boyd v. United States, 1886, 116 U.S. 616, 630, 6 S. Ct. 524, 532, 29 L. Ed. 746.

Since a right or a sanction cannot really be procedural, because the adjective procedural implies that a legal institution does not have an independent existence and that it serves a goal defined outside that particular institution, to say that a procedural right must have an independent existence is really a contradiction in terms. Instead, we should be talking about substantive rights that a defendant has in the context of criminal investigation, prosecution and adjudication. But since we are talking about procedural sanctioning, it is perhaps not too inappropriate to also talk about procedural rights.

However, second, the privilege against self-incrimination, the right to counsel, the right to be protected against warrant-less searches and seizures, the right against double jeopardy, and so on can also be seen as logical structural requirements without which a rational process of impartial adjudication is not possible. This less subjective perspective gives the procedural rights an independent existence, if it is possible to show that the rights of the defendant exist not only because the defendant must be protected but also because impartial adjudication is impossible in view of self-incrimination, in view of the absence of counsel, in view of the use of force by the state in order to make the defendant an unwilling source of evidence against him. Insofar as this is true the procedural rights of a defendant are not concessions, i.e., aberrations from the basic truth-finding function of criminal procedure: they are inevitable logical deductions from the basic requirement than an adjudication be impartial.

It is possible to defend the independent existence of the procedural right on the constitutional grounds. There one can say that criminal procedure is not totally ancillary to the goals of the substantive criminal law (truth-finding) but exists rather as an independent barrier that inhibits the direct imposition of the state's power over the defendant. Therefore, it is possible to assert the independent existence of procedural rights from the constitutional-political point of view, too.

However, virtually the whole procedural aspect of the Bill of Rights can readily be subsumed to a logical-requirement analysis: the right to counsel, for example, is necessary not only because this is a political right of a defendant when faced with the almighty state, but also because the impartiality of the adjudicator (judge or jury) is impossible unless the conflicting theses of the defendant and the government are presented by approximately equal persuasiveness. If, for example, the government's case is so much stronger simply because it has good lawyers, who prosecute the case, then the defendant's case might be lost simply because he had no lawyer. In the last analysis, therefore, it would be possible to show that he was convicted not because he was guilty, but because he had no lawyer. That is unacceptable, not only because it is manifestly unjust, but also because it does not make sense: it does not make sense, because the issue

of guilt and innocence was decided on grounds extrinsic to the issue (the guilt depends on the quality of defense).

The whole Fifth Amendment prohibition against self-incrimination, i.e. making the defendant an unwilling source of information against himself, is a manifestation of the disjunction requirement, which in turn is based on adjudication as a surrogate of force. Therefore, it is not only a question of giving the defendant the political right not to incriminate himself: it the case can indirectly be influenced by the exercise of force of the more powerful party (state) on the less powerful party (the defendant) then the adjudication is not really an adjudication, because adjudication is by the nature of things a replacement of force in the resolution of conflicts. A similar analysis would apply to the right against unwarranted intrusions on the suspect's privacy. All this is based on the intuitive understanding that judging would be a mere farce if the more powerful party were always allowed to win merely because it is more powerful. Such judging would be a transparent attempt to legitimize the direct and partial use of power.

Once, however, the concept of disjunction is introduced to the effect that the parties in conflict should strictly be kept separated, it becomes clear that the privilege against self-incrimination is not a easy-come-go protected personal interest of the defendant, but something without which adjudication ceases to be a meaningful replacement of force.

Or, take presumption of innocence. Despite all the complexity of its procedural and evidentiary detail – the trees that obscure the nature of the forest – it is possible to say that the presumption of innocence is a logical necessity. Imagine a "primal adjudicative scene": A charges that B has done something forbidden and ask a judge to adjudicate. In such a situation the presumption of innocence is a logical necessity because it simply means that A cannot accuse without proof; if that were possible then one quarrelsome A could bother a whole population of B, C, D, E, F … without ever producing anything beyond mere abstract accusation. It would also be illogical to require B, C, D, E, F … to produce evidence that they have done something in order to disprove A's accusations. (Ei incubit probatio, qui dicit, non qui negat.)

The double jeopardy proscription can likewise be logically deduced from the requirements mandated by the rational adjudication model.

To punish the same person for the same offence more than once would be manifestly unjust. This follows from the premise that the first punishment suited the crime and thus the second punishment must necessarily be superfluous. If the first punishment is just, then the second punishment is necessarily unjust. So much is clear.

It is less self evident that it is likewise unjust or illogical to try the same person for the same offence more than once. Also, as we shall see, it is all but clear what the "same offence" is. While there will usually be no problem concerning the identity of the actor, there are plenty of problems concerning the identity of the act. The act may be the same de facto or de jure. The matter is further complicated by the question of punishment for the "same act" more than once, and above all by the problem of finding the proper constitutional foundation for the logical deductions which follow from the above described premise.

Legally, the double jeopardy doctrine is derived from the Fifth Amendment of the US Constitution, which provides that "no person shall be … subject, for the same offense, to be twice put in jeopardy". This Amendment had been reiterated in may of the state constitutions and this is, as it should be, the legal source of the doctrine of double jeopardy.

If we ask why can a person not be tried more than once for the same offense, we find, that the theoretical basis is derived from the doctrine of the presumption of innocence. Presumption of innocence simply means, then, that one is held innocent unless found guilty by a competent court. From this point of view the presumption is valid only insofar as it is true that in general the people in any given society are innocent. In particular, however, an individual is either guilty or innocent. To say that he is presumed innocent

until proven guilty, per se implies that he might not in fact be innocent; if it were so clear to us that he is innocent, there would be no need to presume that he is innocent.

Presumption of innocence is not a logical presumption.[28] It is a postulate: it is a principle that guides criminal procedure and criminal law and is not a statement of fact. If it were a

[28] But see, for example, Fletcher, The Presumption of Innocence in the Soviet Union, 15 U.C.L.A.. L.REV 4, pp. 1203-1225 (June 1968) and by the same author, Two Kinds of legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 YALE L.J. 880 (1968). In such writings, presumption of innocence is seen as a technical rule distributing the burden of proof. But before such technicalities can be understood, it must be established that the presumption of innocence is a necessary logical corollary of the accusation itself – and it does not really matter whether that accusation occurs in the civil or criminal procedure. It is a corollary to the common sense conclusion that the person who comes forward to require adjudication must be able at least to carry the initial burden of proof. That "presumption of innocence" is not necessary in civil procedure whereas it presents such a great problem in criminal procedure is simply due to the fact that there is an immanent conflict between presumption of innocence and truth finding. Since in civil procedure truth finding is not essential, the truth about the civil dispute does not have to be discovered, because in civil disputes, truth serves ass a means towards the resolution of the conflict and not vice versa, there need be no antidote to the presumption of "guilt" of the defendant in civil cases. In civil cases, after all, nobody really cares whether the defendant is "guilty". The essence of the civil dispute does never have to be discovered, e.g., if the parties decide to settle the case before the end of adjudication. However, according to the criteria of substantive criminal law you are seen as guilty even though never really adjudicated as such. It is for that reason, that the Model Penal Code never talks of a "defendant", but rather of an "actor". Substantive criminal law requires the truth about criminal guilt to be discovered and it exercises such moral pressure on all the parties involved in criminal procedure that the presumption of innocence represents an attempt to counter-balance this pressure of the presumption of guilt.

Presumption of innocence is logical only insofar the adversary (not the inquisitional) procedure can afford to keep the parties in dispute apart. Such conclusion follows from the very nature of adjudication: the party, who raises the issue to be adjudicated, must have some evidence whereby he intends to persuade the adjudicator (the indictment measurement plays the same inhibitory role). The presumption holds valid only for the adjudicator – but not in the inquisitorial procedure

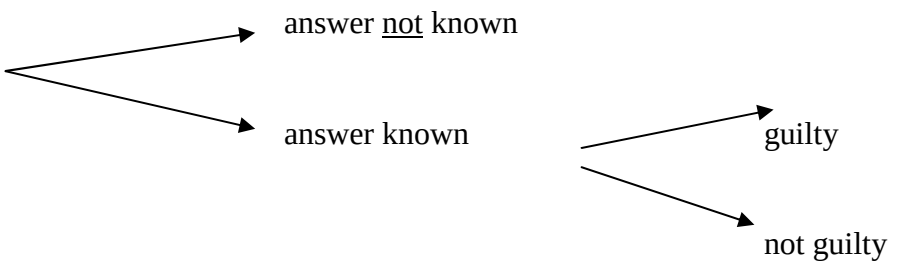
statement of fact to say that “all people are innocent”, there would be no need either for criminal law or for criminal procedure. On the other hand, it is also not logical to have a person indicted or perhaps even detained and at the same time to claim that that person is presumed innocent; if he or she is so innocent, why then is he put in prison even before being found guilty by a competent court?

From that alone, however, it does not follow that a person is not to be put in double jeopardy. If he has been tried once and found innocent in regard to a particular event, it does not necessarily follow that he must not be tried the second time for the same offence because exactly the same “presumption of innocence” is going to be operative in the second trial. Thus, it seems, that presumption of innocence in itself would not prevent the second trial for the same offence.

Let us examine now what must logically happen after a criminal trial is over. The scope of experiment lists the following possibilities:

1. the answer regarding guilt is either known or not known;
2. if the answer is known it is either a) guilty of b) not guilty.

Diagram:



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where the judge and investigator – the latter of necessity presumes at least some guilt – are merged into one person.

Given, however, the fact that the court cannot shrug its shoulders and pronounce the verdict of doubt we are left with only two possibilities, namely, guilty and not guilty. But is it really so self evident that the court cannot pronounce a verdict of doubt in criminal cases? Roman law knew the verdict of non liquet [29]but in practice that was an exception.

It is clear that a conflict is presented to an unbiased adjudicator in order to be resolved. It is in the nature of the conflict to be presented in either-or form, because in the last analysis one of the two judicial combatants must win and the other lose. Thus anything short of such a resolution which clearly redefines the social roles of the parties in conflict is an adjudicative fiasco. Judges, in other words, must decide, not doubt. In many social conflicts the decision, whatever it be, is more important than its substance of the criteria according to which it is arrived at.[30] These are criteria valid in any monocentric adjudication. In criminal law trials the issue is all the more delicate because a pronouncement of doubt after the first trial is concluded will, in effect, pronounce the defendant "possibly innocent" and thus also "possibly guilty". This "possibility" is all the more real if a future retrial is probable. The pronouncement of doubt in criminal trials is, in a sense, a suspended pronouncement of guilt, because a person is either guilty or innocent. He certainly is not "doubtful".[31]

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[29] The apud judicem procedure. The judge who declared insurmountable doubts regarding the matter before him, declared under oath that the matter is not clear to him (sibi non liquere). In such a case a new judge was appointed, except in cases where the matter was adjudicated by several judges and could be decided by majority in spite of the non-liquet of one judge. See Korošek, Rimsko pravo, p. 504 (Ljubljana, 1969).

[30] Again, in Roman Law, the judge was not required to explain his decision. If it is true that the decision often matters more than its rational and/or intuitive basis, then the reasoning out of the judgment is superfluous and probably damaging. If a decision is handed down without any explanation the parties are allowed to project their own explanations into it and are often more likely to be satisfied.

[31] The above explanation could have been given wholly on this level; the matter adjudicated is either as the prosecution asserts it to be, or it is as the defendant asserts it to be. The possibility

This is another reason for which the presumption of innocence has been invented. The trial must end in one of two possible ways – tertium non datur – because the third "doubtful" way of adjudication is in effect an unfounded adjudication of guilt. To prevent this, the doubt is overpowered by the presumption which effectively orders the adjudicator that, if in doubt, he must decide for the defendant: in dubio pro reo.

When the adjudication based on doubt is pronounced, it is not founded squarely on doubt, but asserts innocence positively. Were the judge is allowed to say, "I doubt that you are innocent but I rely on the presumption of innocence and therefore pronounce you acquitted!", he would effectively destroy the raison d'être of the presumption. This, then, is a problematic situation to which there are two possible solutions. The most obvious is that the judge should say nothing, but acquit the defendant under the heading of "not guilty". This is a lie, but then again it is not, because the law declares in advance that those who will not be persuasively prosecuted will be acquitted as if they were not guilty. if it is a lie and considered as such, it is still a very short one and does not require the judge to fabricate the nonexistent reasons for acquittal.

Another less pleasant and rational solution is that the judge should explain his reasoning concerning the doubt. Again, however, a dilemma arises: if he explains fully why he doubts the defendant's guilt, inevitably he will be explaining why he doubts his innocence, too. Thus, there is a schizophrenic duality to the judgment: the verdict is "not guilty", the explanation "doubtful" and perhaps implying guilt. The solution is clearly unacceptable, yet most of European criminal procedures have not found the way out.

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off "doubt" does not exist insofar as the subject matter adjudicated is concerned. Doubt is solely a state of mind of the judge and without any connection to reality. It merely means that the reality has not been sufficiently reflected in the subjective consciousness of the adjudicator. Thus, "not proven" is not a verdict in the strict sense of the word at all, because it is not related to the objective reality of the matter adjudicated, but only to the subjective (irrelevant) reality of the judge's mind.

Anglo-Saxon criminal procedure has it the best way, because the jury is not required to explain its verdict. If it says “not guilty” the defendant will be fully rehabilitated even though the prosecution and perhaps the defendant himself will have doubts about the rationality of the verdict. Yet the absolute and unexplained nature of the verdict gives full force to the presumption of innocence.

We said in the beginning that it would be irrational, and patently so, if a person adjudicated guilty and sentenced and punished should have to go through a criminal trial again for the same offence. That would necessarily imply that the first trial was not enough, that it was wrong, etc. If the possibility of second trials of guilty persons were systematically allowed, it would clearly result in the destruction of the adjudication system which would, by allowing this, implicitly declare itself untrustworthy. The distrust would be literally built into the system of adjudication. A system of adjudication, however, that does not evoke trust of those that subject themselves to it is at best a contradiction in terms and more likely a farce. The outcome would be a wide-spread paranoia. In a sense, criminal law is a guaranteeing response to precisely such a danger.

The above reasoning, however, extends beyond the verdict of “guilty”. It applies to the “non guilty” verdict for the very same reasons. The only verdict (the verdict of doubt) logically consistent with a second trial of the same issue is preempted by the presumption of innocence and, therefore, second trials are logically impermissible.

Presumption of innocence, therefore, cannot exist without the privilege against double jeopardy.

Historically, there had usually been three possible outcomes of any single trial: “guilty,” “not guilty”, or as the Scottish Law puts it, “not proven”. Medieval law called this last outcome absolutio ab instantia. Today, it is only known in the Italian and Scottish law and it is considered an anomaly because it patently contradicts the presumption of innocence.

Why? Again the "not proven" verdict of Scottish law, for example, actually means that the whole proceeding against a particular defendant can be reinstated at any time. In effect, therefore, the person is under the Damocles' sword of a possible and perhaps probable new prosecution.

What happens to the presumption of innocence in such a situation? Effectively, the person is presumed guilty, and as time goes on perhaps the probability of a successful compilation of sufficient evidence against him is increasing. Even if not, this same person is under the stigma and suspicion endorsed by an official prosecution and, furthermore, by an official verdict called "not proven".

If the logic of the presumption of innocence is to be given some reality, then the criminal prosecution of a citizen must be considered an exceptional situation. Exceptional situations cannot be prolonged, nor can they be too frequent. Therefore a verdict must be given at the end of every trial that puts ad acta the case and the prosecution against a particular defendant. If the prosecution has not succeeded in proving its case and acquiring a conviction and punishment against a particular defendant, then the presumption of innocence should regain full force and the defendant be left alone on that account once and for all. He regains full social respect and is not to be bothered in this particular regard anymore.

The model of criminal procedure must necessarily be a model of a rational impartial adjudication. That model in itself dictates certain requirements that we tend to call procedural rights. These procedural rights can be seen as subjective rights granted because the defendant must enjoy certain safeguards, or they can be seen as objective requirements mandated directly by the logic of rational adjudication. One cannot have a khadi-justice situation where the same person accuses and judges: not only because this is against the rights of the person accused and judged, but primarily because this is manifestly irrational. Likewise one must have other procedural safeguards not only because they protect the defendant, but because they are mandated by the rational model

of adjudication itself. Therefore we are not choosing between granting or not granting certain procedural rights, rather we are choosing between a rational and irrational adjudication. If it is difficult to show today that criminal procedure would in fact follow the logical requirements of rational adjudication, that does not show the illogicality of the above argument, rather it shows the more and more transparent nature of the pretence that we have impartial adjudication according to the criteria of the substantive criminal law and not arbitrary imposition of force by the state. The ideal of legality and rational adjudication, however, is further eroded by the problems inherent in the principle of legality (infra).

IX.

If we have established that there are certain inescapable principles in criminal procedure the remaining question is how to sanction those rules. Every rule must have a disposition and a sanction, and the disposition without sanction is mere recommendation.[32] The same holds true for procedural rules, i.e. if they have no sanction they will not be obeyed.[33]

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[32] Štempihar, Autorsko pravo, 19___.

[33] It can be shown that the peculiar "procedural sanctioning" represents the very origin of the exclusionary rule. In Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 60 note 2, 16E L. Ed. 2d 694 (1966) the Supreme Court said:

> We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its truths go back into ancient times. Perhaps the critical historic event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all question posed to him on any subject. The Trial of John Lilburn and John Wharton, 3 HOW. ST. ER. 1315 (1637). He resisted the oath and he claimed the proceedings, stating:
>
> > "Another fundamental rights I then contended for, was, that no man's conscience ought to be wrecked by oaths imposed, to answer to questions concerning

One of the central problems of the modern criminal procedure is how to organize the sanctioning of procedural violation. The United States' solution is unique in that respect, because of its acceptance of the radical exclusionary rule.

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himself in matters criminal, or pretending to be so". Haller and Davies, The Leveller Tracts, 1647-1953, p. 454 (1944).

On account of the Lilburn trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England. These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights. Those who framed our Constitution and encroachments on individual liberty.

If exclusionary rule is to be interpreted as a procedural sanction, this can be done in at least two ways. First, the exclusionary rule can be interpreted as simple deterrent of illegal police practices. This has been the recent trend of the Supreme Court decisions: namely, to reduce the exclusionary rule to simple deterrents of police, while it is quite obvious that this is not the central reason for its existence.

Second, the exclusionary rule can be interpreted as in the above quotation for Miranda. The simple initial logic of exclusionary rule is the logic of exclusion from the eyes and ears of the fact finder-adjudicator everything that violates the privilege against self incrimination. The exclusionary rule is in that sense an evidentiary rule, rather than a procedural rule: it simply excludes what is not fit to be the basis for adjudicative decision-making. It would matter little today and in times of John Lilburn's trial in 1637 that the evidence in violation of the privilege against self incrimination was obtained by police or somebody else. It is clear that what follows from the above quotation of that trial is not some attempt to educate the police of England: it is simple exclusion of information that would make the defendant an unwilling source of evidence against him, because this is violation of the very idea of adjudication. How can there be impartial adversary adjudication if one "man's conscience … be wrecked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so".

In principle a violation of a procedural rule can be sanctioned in a substantive or in a procedural fashion. In the case of substantive sanctioning a violation of procedural rule becomes just another substantive case that lives its life apart from its procedural mother-violation.[34] For example, if a policeman threatens a suspect the policeman has violated simultaneously the defendant's procedural right but most probably also a substantive provision forbidding him from threatening criminal suspects. The policeman should accordingly be punished, the suspect, however, is because of that no less suspicious and if in fact guilty, no less guilty. There is in principle no trade-off between police misbehaviour and the guilt of a criminal. To questions of guilt or innocence the procedural propriety seems to be totally extrinsic: if a killer confesses after torture he is no less of a killer just because he has been tortured. This in substance is the view of most of the Continental criminal procedures.

In the above example it is clear that we are dealing with two substantive violations, the suspect's and the policeman's. Both must be properly "processed" and adjudicated, yet the policeman's violation should in principle have no effect whatsoever on the suspect's case simply because the procedural question of his threat is extrinsic to the question of the suspect's criminal responsibility, which ought to be decided by the criteria of guilt or innocence as defined in the substantive criminal law.

This view, however, is not logical if we see procedural rights as having an independent existence as outlined above (supra, VIII). If procedural rights exist independently – are not merely ancillary to the substantive, to the truth-finding goal of criminal procedure – then these procedural rights in fact become specific substantive rights of somebody under criminal suspicion. These rights (right to counsel, the right to be free from unreasonable searches and seizures, the right to be free from compulsive self-incrimination, etc.) must be sanctioned within that very criminal process, because the loss of procedural advantage occasioned by police's procedural violation must be compensated within that very

[34] This is precisely what Justice Frankfurter suggested in Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949).

procedural context. A procedural loss on the part of the defendant occasioned by procedural misbehaviour of his adversaries (police, prosecution) must be compensated by a procedural advantage.

If an adversary process is seen as a battle of two opponents, then an illegal move by one of the opponents must be answered by a compensatory remedy restituting the procedural balance of forces. In a chess match, for example, when one of the opponents makes an illegal move, it is logical to require that this illegal move be disannulled and the previous situation restored (restitutio in integrum). It would make little sense in such a context to allow the illegal move to remain while punishing, perhaps through the chess organization, the player who has made that illegal move. Unless the illegal move in that game is disannulled the integrity of the whole game and the legitimacy of its outcome has been destroyed.[35]

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35 Judicial supervision of the administration of criminal justice in the federal court implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safe-guards for securing of trial by reasons which are summarized by "due process of law" and below which we reach what is really trial by force. Moreover, review by this Court of state action is passing its notion of what will best further its own security demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of federal and criminal law in the federal courts. The principles governing the admissibility off evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution.

McNabb v. United States, 318 U.S. 332, 341. This so-called McNabb Judicial Integrity Doctrine is the closest analogy to the chess game simile that is explained above. This integrity doctrine seems to be followed by the leading theorists in the United States. See Kamiser, A Reply to Critics of the Exclusionary Rule, 62 Judicat. N° 2 (August 1978), at 82.

The exclusionary rule, consequently, is the only effective and logically inevitable form of procedural sanctioning. One must keep in mind, that this implies a certain view of criminal procedure as being primarily an adversary and therefore relative pursuit of truth, rather than an absolute inquisitorial demand for truth under any conditions.

The problem we outlined here points to a curious incompatibility between the substantive and procedural criminal law. This antinomy resides in the fact that the substantive criminal law pretends to give precise criteria of guilt or innocence as if the truth of that question is always ascertainable. There is no chance aspect to that perspective. The adversary criminal procedure, however, involves a chance aspect due to which the substantive question of guilt or innocence will be decided not merely according to the substantive criminal law criteria, but also according to the procedural rules themselves.

While substantive criminal law says that there are only guilty or innocent criminal defendants, the criminal procedure allows for a third category, namely those who would in view of procedural developments (procedural sanctioning, procedural accidents such as good defence confronted with bad prosecution, and other more or less accidental factors) fall under the category of the presumption of innocence. In other words, according to the substantive criminal law there are only guilty or innocent defendants, whereas according to criminal procedure we will pretend that a defendant is innocent even though he is not, if the procedural factors lead to that result. Typically, the Continental criminal law system resolves that conflict in favor of the substantive criminal law, whereas the American system adopts exclusionary rule as a procedural sanction and therefore implicitly declares that the truth-finding function of criminal procedure is secondary to its protective function and that criminal procedure plays a role independent of the goals declared by the substantive criminal law. The unfortunate side effect of the exclusionary rule is then a seeming trade-off between the procedural violation and the defendant's guilt. But whereas in the game of chess the result depends totally on the "procedural" developments of the game, the game of criminal procedure is sufficiently separated from the rules of the substantive criminal law so that this discrepancy between

the game and its result may arise. This discrepancy between the "game" and the "result" is perhaps due to the historical origin of the trial in criminal matters. In times of ordeals when guilt or innocence was decided by irrational criteria such as floating on the water or touching the hot iron, the result, i.e. the guilt or innocence, was dependant wholly on the "game" of the ordeal. There were no substantive rules to speak of in that respect. In all other games which are in their nature adversary, such as soccer, tennis, chess and so on, the result depends on what happens in the "procedure" itself. The substantive result is therefore wholly a consequence of the procedural happening. Insofar as there exist rules that govern that happening these are wholly procedural rules. In the game of criminal procedure, however, the criteria by which guilt or innocence should be decided are not the procedural criteria, rather they are alienated from the procedural structure and embodied in the substantive criminal law. If criminal procedure were a game, the winner should clearly be the person who is procedurally more skilful. The procedure, therefore, would be an end in itself, and not ancillary to an end which is not embodied in its own rules. Legal history, however, made criminal procedure a tool towards a goal that is totally alien to the game itself. "Procedural accidents" in the game of soccer, for example, legitimately result in the loss or winning of the game. Insofar as the result is due to luck that is seen as totally acceptable. Imagine, however, that the game of soccer or a game of tennis or a game of chess would decide not who is the winner in that particular game, but would decide which one of the two opponents is, for example, morally superior. Since moral superiority is extrinsic to soccer, tennis and chess games it cannot be decided in the respective "procedural" confrontations. Insofar as criminal procedure is a game with its chance input and existence independent of the question that it is supposed to decide, the same absurd result follows: namely that the question of guilt or innocence does not depend merely on the substantive criteria of the substantive criminal law, but to a large extent depends on the procedural chance of the "game aspect" of criminal procedure. This incompatibility between the substantive and the procedural aspect of criminal law is made evident in the problems of exclusionary rule. It follows logically that procedural sanctioning through exclusionary rule is acceptable only if we see the "game" of criminal procedure as having a purpose and existence independent of the goals of substantive criminal law.

In the Continental system where the goals of substantive criminal law are seen as clearly primary because the ascertainment of the truth as to the guilt or innocence of the defendant is seen as a primordial goal of criminal procedure, the exclusionary rule cannot be applied. Consequently, there criminal procedure is a mere servant of the substantive criminal law. That is not due to some theoretical position held by Continental theorists, rather it is due to the cultural and political attitudes towards authority.[36] If government is not seen as a mere opponent, but is rather seen as a State in a Hegelian fashion, then this same government and its definition of guilt or innocence cannot be reduced to a mere "game" aspect of criminal procedure. The latter consequently becomes a linear pursuit of truth that does not tolerate the chance aspect so typical of the Anglo-Saxon criminal procedure. In the Anglo-Saxon system the individual freedom is more highly regarded than the state-defined criminal truth. This is essentially a value judgment in which certain optimism regarding the human nature prevails over thematic revenge. In this sense the exclusionary rule is perhaps typically American.

X.

The exclusionary rule is a form of sanctioning procedural rules. We have already shown that the logic of procedure requires it, because criminal procedure plays a double role. The protective part of that role – truth-finding being the other part – must independently be sanctioned. Were it not procedurally sanctioned the whole criminal procedure would be like a police manual: a series of recommendations, a series of purely instrumental rules.

Therefore there emerges a conflict between the truth-finding and the protective role. That conflict is expressed in the exclusionary rule problems, American solution clearly demonstrating that the protective function is more important than the truth-finding one. The problem with the exclusionary rule is that a substantive consequence of acquittal

[36] See Damaška, Structures of Authority and Comparative Criminal Procedure, 84 YALEL L.J. 480 (1975).

occurs “because” of the procedural violation: the defendant is acquitted on a “technicality”. He is after all no less guilty because of police over-zealousness.

Nevertheless we accepted the result not so much on the practical ground of police deterrence, but more on the theoretical ground of the logical integrity of criminal procedure. The fact that the reasons are theoretical, should, of course, not be interpreted as meaning that they are practically irrelevant. The integrity of criminal procedure has an immense impact on the processes of normative integration. After all, morality is a product of social practices and criminal procedure is one of them.

Insofar as the demand for logical integrity and for the protection of the defendant established a separate ground for justifying procedural solutions, a ground separate from truth-finding, the discrepancies and incompatibilities between the functions are inevitable.

Were the goal of criminal procedure merely to find out how and why a past allegedly criminal event happened, one would then logically expect that some less cumbersome non-adversarial method would be used. Scientific discoveries are made by methods, which are more similar to the inquisitorial procedure, than they are to the accusatorial one. Without getting into the epistemological question of whether dialectical thinking (by thesis and antithesis) represents a superior approach to scientific problem solving and whether this is an adversarial method superior to the inquisitorial one, I think it fair to say that the monocentric organization by thesis and antithesis in criminal law is there primarily to sustain impartiality and the resolution of the conflict, rather than to further truth-finding. Thus the very wherewithal of criminal procedure and its way of doing things has very little to do with truth-finding: the conflict is not there in order to serve truth-finding. The reverse may be closer to the truth: truth-finding furthers the resolution of a conflict.[37]

[37] Insofar as conflicts in criminal procedure are rather contrived and artificial and created only to further impartial adjudication, the reverse may in fact be true. It is definitely true that a criminal

It is for these reasons that we accepted the extrinsic trade-off implied in the exclusionary rule. When we criticize plea-bargaining here and the fact that it allows the conviction and the sentence to be shaped by extrinsic factors that are not related to the defendant's guilt or innocence, one could retort that plea-bargaining does exactly the same for exactly the same reason: it influences the charge and the sentence by factors which have nothing to do with guilt or innocence as measured by the substantive criminal law.

However, when we criticize plea-bargaining here it is good to keep in mind that the trade-off in the "real" criminal procedure happens because there is an adversarial relationship and only in view of that adversarial relationship. A game of chess, for example, in which one of the players makes an unorthodox move is invalid and there would have to be a "retrial" unless the move can be disannulled retroactively. Here the sanction of a "procedural" violation is enforced within the very "procedural" context. If, however, there is no game at all, there can be no violation and therefore no procedural sanctioning!

If we see criminal procedure as a chess game, then plea-bargaining is at best a simulation of that game. In almost every negotiation, insofar as it figures as a replacement of conflict, the negotiation itself develops in the light of the balance of forces (or rather in the light of the subjective perception of the objective balance of forces) should the conflict really break out. The negotiations between two potential war opponents usually take place instead of the war itself, however, they tend to reflect the probable outcome should the war break out in spite of negotiations. That does not mean, however, that the game of negotiations is the same as the game of war. Different rules govern the two difficult procedures, i.e. the procedures themselves are radically different even though the outcomes of negotiations would imitate the outcomes of war.

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trial is not a clash of two private interests. The victim, if there is one, is pushed aside and a representative of the Government represents rather diluted interests of society at the trial.

The first question to be addressed, therefore, as far as plea-bargaining is concerned is whether it is still a criminal procedure at all. If it is, then the exclusionary rule and other "technicalities" do play a valid role, and vice versa.

Criminal procedure is impartial adjudication. Can the plea-bargaining process be called impartial? Is it really adjudication?

The impartiality of adjudication is maintained by monocentric organization of decision-making so that there is only one question of guilt, with only two possible answers, all this so that proper incompatibility of hypotheses is maintained, and their proper alteration before the eyes of a passive adjudicator enables him to remain ambivalent and therefore uncommitted. In that sense the conflict is essential to impartiality, because without a well structured conflict the issue cannot be monocentrically organized.

Plea-bargaining is a collapse of conflict into collusion: collusion, it is true, that imitates the conflict in its taking into account the potential use of evidentiary and procedural rules, but is nevertheless not "the real game".

The difference between criminal procedure proper and plea-bargaining is the difference between certainty and probability. In criminal procedure the defendant is either convicted or acquitted. The outcome is not at all reflective or pre-procedural probabilities because the post facto certainty makes otiose the previous probabilities. Probabilities per se do not influence the outcome.

Plea-bargaining, on the other hand, reflects the probabilities because the latter ones are never allowed to become certainty. Thus a defendant's murder charge is reduced to manslaughter because the prosecutor believes that his chance to win in the trial is only 70 per cent. The reduction from murder charge to manslaughter is reflective of the prosecutor's estimate of the probability of his winning the case.

Because truth is one thing and its ascertainment another, the latter may differ from the former. They are after all separated in time, space and mode. The discrepancy will be due to factors which have nothing to do with truth. These extrinsic factors reduce the 100 per cent truth to the 70 per cent probability that it will be ascertained beyond reasonable doubt.

A real trial's outcomes statistically reflect the probabilities, but it is good to remember that probability is a statistical concept representing the connection between statistical certainties in large populations and the extrapolations from those certainties into the probabilities of individual cases. Glueck's prediction tables in juvenile delinquency cases are a typical example.[38] Probability thus is nothing but a subjective estimate and as such it has nothing to do with the case. A defendant is not 70 per cent guilty of murder. He is either guilty or innocent. Consequently, it is absurd to translate this subjective estimate of procedural probabilities of winning the case into the reduction of charges.[39] This is, however, precisely what plea-bargaining does.

If the exclusionary rule is applied in an actual criminal procedure, it of course influences the probabilities of the outcome, but in the end it is impossible to say to what extent the

[38] Glueck, Sheldon and Eleanore, Predicting Delinquency and Crime (1959); Unraveling Juvenile Delinquency (1950).

On the question of probabilistic extrapolation from small populations see Rosen, Detection of Suicidal Patients: An Example of Some Limitations in the Prevention of Infrequent Events, 18 JOURNAL OF COUNSELING PSYCHOLOGY 6, 1954.

[39] There are, of course, many cases in which the trade-off is not between a procedural probability of convictions and the respective lessening of the charge and consequently the structure. Many a plea-bargaining is reached purely on the ground of potential bureaucratic inconvenience of having a full scale jury trial. These cases, however, are not problematic, since there the extrinsic nature of the trade-off is beyond any doubt and the problem of comparison with the similar side-effects of the exclusionary rule does not exist.

outcome is causally linked to the exclusionary rule. Also it is not the intent of the exclusionary rule to influence the outcome of a criminal trial. A procedural sanction merely guards procedural propriety and the respect for procedural rules. The influence its application has on truth-finding is an undesirable by-product whose casual link to the outcome would ideally be absent. After all, procedural sanction should remain precisely that.

All this is turned upside down in the plea-bargain whose outcome is a direct resultant of truth and procedural probabilities. The procedural probabilities do exist in a trial, but they are legally irrelevant. In a plea bargain they form the battleground of negotiation.

We object to plea-bargaining for many reasons, even though, for example, we do not object to the settlement and compromise in civil conflicts. There it is clear that confllict resolution takes precedence over the ascertainment of truth and that in fact the latter is important only insofar as it serves the former.

In criminal procedure, on the other hand, it would be absurd to accept the settlement merely because both the prosecutor and the defendant have agreed to it. It is no business of the prosecutor to secure a guilty plea in exchange for a violation of truth. Our intuitive reaction here is that the categorical imperatives of the criminal law are not (or should not be) for sale; that is one thing to settle for lower damages than those deserved, but another to reduce punishment below the one deserved. This, I think, is a clear indication of the difference between the cost-benefit approach of the civil law, and the deontological and moralistic approach of the criminal law.

It is somewhat paradoxical then that there are many more “settlements” in criminal law than in civil law conflicts.

Here it is well to remember that the conflict in criminal law is not really one that would occur between two directly controversial parties. The immediate victim is not allowed to participate because insofar as the damage is concerned he or she can seek it in a civil

suit, whereas vengeance is not seen as legitimate. Vengeance (retribution) is reserved for society and it is the prosecutor that represents it through the demand for impersonal punishment.

Conflict is the fuel of adjudication. Thus the lack of reality of conflict in criminal procedure predisposes it to collapse into collusion: Prosecutorial discretion – paradoxically enough – is at the same time necessary for proper adversariness (if he does not want to prosecute, there can be no conflict), but it also enables the prosecutor to lower the charges in the process of destruction of adversariness. If he did not have the right to reduce the charges, plea bargain would not be possible.[40]

[40] On the Continent the principle of legality as applied to prosecutorial role prevents this discretion. Cf. DAVIS DISCRETIONARY JUSTICE 188-212 (1969) as reprinted in VORENBERG: CRIMINAL LAW AND PROCEDURE, 813 (1975). Writers sometimes forget that there it is possible not to have prosecutorial discretion because the Court's role carries far more initiative. The prosecutor on the continent essentially "triggers" the procedure which then evolves with the Court's own initiative. The German Instruktionsmaxime, the institutionalized imitation of the investigating judge is seen as a main criterion for a differential diagnosis between accusatorial and inquisitorial procedures. The Officialmaxime i.e. "the duty of the governmental organs to conduct the entire proceeding ex officio, by virtue of the office" likewise figures as a surrogate of conflict. Eberhard SCHMIDT, EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STRAFRECHTSPFLEGE (3rd ed., Göttingen, 1965) 86 as cited in J.H. LANGBEIN, PROSECUTING CRIME IN RENAISSANCE (1965) 131. If in adversarial context conflict is inevitable because the case cannot proceed without prosecutorial pressure, then in the Continental procedure the surrogates of Instruktionsmaxime and Officialmaxime supply the necessary incentive. We said that this is theoretically not acceptable, not because it is procedurally compulsive in its pursuit of truth, but because it precludes impartiality of the adjudicator.

A measure of prosecutorial freedom is inevitable in a process that depends on his spontaneous initiative. Prosecutorial discretion, then, is a direct outgrowth of the demand for impartiality of the adjudicator.

Would the victim of the crime prosecute the case, the conflict would be much more genuine and negotiations much less likely. Adjudication is necessary where a total breakdown of communication occurs. Thus in civil disputes disjunction need not even be a requirement: it is a natural occurrence, because the parties eschew on another.

In criminal procedures, however, there is no personal animosity between the parties. The prosecutor is willing to step outside the official conflict situation and negotiate with the defendant. He is willing to negotiate for reasons of mere bureaucratic and administrative convenience. He would not be willing to do this were his personal interest at stake. As it is, the conflict between the prosecutor and the defendant is devoid of flesh and blood of vengeance, is alienated from its grassroots and it consequently collapses into collusion. This conflict is an artefact in which the abstract part called "justice" (and lately "society") is represented by a lawyer who has no direct stake in the success of his legal action. In a sense this is a problem of bureaucratization of justice, where an impersonal institution has taken over something that was originally invented and operated by directly involved individuals.[41] In a sense one could compare criminal justice to a planned economy that is detached from the grassroots of immediate human interest.

Reversely, however, the Court's virtually autonomous and spontaneous handling of the criminal case on the Continent prevents the free discretion that would make plea-bargaining possible in endemic proportions. Contra A.S. Goldstein and N. Marcus, The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany, 87 YALE LAW JOURNAL 240.

[41] See Esmein, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE, p. 11:

> In the accusatory procedure, the detection and prosecution of offenses are left wholly to the initiative of private individuals, an initiative which may slumber through their inertia, fear, or corruption …. But, on the other hand, the inquisitorial procedure has very serious defects; under it, the prosecution and the detection of offenses are entrusted exclusively to the agents of the states …."

Here and elsewhere Esmein apparently assumes that the institution of a public prosecutor is clearly an inquisitorial institution, i.e., it does not and should not exist in the accusatorial system. Esmein does not explain this from a structural point of view, he only shows that this has

The reverse logic applies to the defendant's position. He, for one, is not interested in having the "conflict" resolved, because as far as he is concerned, there is no conflict. He is willing to "quarrel" only after he has been physically restrained and because he has been physically restrained. The question of guilt is not in this respect like a dispute over a piece of property. There both parties actively claim the right, whereas in criminal procedure one party could not care less whether he is guilty or innocent – as long as he does not go to jail.

Only then does the "conflict" arise for him.[42] Consequently, there is less of a probability of settlement in civil disputes, where there is a direct and irreconcilable conflict of

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historically been so. It is possible to show that no criminal procedure operating on the initiative of public prosecutor can be genuinely accusatory and adversarial: the very fact there has to be a paid public official who creates the conflict implies that there would be no conflict, were it not for this artificial bureaucratic initiative. Moreover, this implies that the very conflict is not genuine and it further implies that such "accusatory" procedure is really not accusatory but to the extent of artificiality of prosecutorial initiative, in fact – inquisitorial.

[42] It could be said that in civil disputes, both parties are interested in truth because both parties claim that the truth is "on their side". If they don't, the definition of the conflict often changes from civil to criminal. For example, if the dispute is over a piece of property, it remains a civil dispute as long as both parties explicitly claim that the property belongs to them; the dispute becomes criminal, however, the moment one party is not willing to argue that the property belongs to him, but simply disappears with that piece of property, in which case we have a problem of larceny, where the defendant is clearly not interested in the establishment of truth and is clearly not interested in participating in any truth-finding whatsoever.

Also, in civil disputes the parties can generally be seen as interested in truth and truth-finding, whereas in criminal procedure this interest may only be present in those defendants that consider themselves innocent and therefore see the criminal trial as the occasion to exonerate themselves publicly. It is not possible to overemphasize the already stated conclusion, that all those problems

interests. In criminal procedure - invented by imperfect analogy to civil disputes – the conflict over guilt or innocence of the defendant is not irreconcilable, because guilt or innocence in reality do not matter. What matters is punishment, but that is not the centre of the conflict. Rather it is the currency with which the conflict is settled. Partially this stems from the presumption of innocence, because it is presumption of innocence that limits the conflict in criminal procedure to the question of guilt and innocence.

Therefore, the cause of plea-bargaining lies partly in the discrepancy between the interests of justice and society and those of their representative the prosecutor. On the other hand what is valid for prosecutorial initiative and discretion in the context of an adversary criminal procedure applies mutatis mutandis to the defendant's discretion not merely to confess, but also to plead guilty. If the parties negotiate and agree on the intended subject matter of the procedure, (guilt or innocence) there is no conflict, no adversariness, and consequently, no impartial adjudication. What remains is the polycentric question of punishment for something the defendant has not perpetuated. A truly surreal Kafkaesque predicament.

The plea-bargaining problem makes explicit what would without it remain covert. In that sense this question transcends its own limits. Here we can no longer avoid giving the first statement of our hypothesis in this respect. "It may sound rather strange and needs to be pondered, lived with, and slept on for a long time".[43]

Criminal guilt is not an appropriate subject matter for adjudication. Adjudication is not an appropriate tool for ascertainment of truth in matters where truth is more important than the resolution of the conflict. And in matters of criminal guilt, unlike in matters of civil

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stem from the original sin, the false analogy of criminal prosecution to private accusation, of criminal trial to civil trial.

[43] F. NIETZSCHE, ON THE GENEALOGY OF MORALS, 1969, SECOND ESSAY, Sec. 84, at 84.

conflicts and disputes, truth is first and resolution of conflict essentially secondary. The problem is, of course, one of definition: how seriously do we take the problem of criminal guilt.

In this paper by "criminal guilt" I mean an issue which is far too moral, moralistic, transcendental and metaphysical to be a subject and centre of a dispute that is basically nothing else but a structured and regulated quarrel. There is a great difference between "guilt" in torts and generally in other civil law areas, and the criminal "guilt". that difference is manifested in the respective differences between the sanctions imposed by the civil law and those threatened by criminal law. Civil law is mostly about relationships between people concerning things, whereas criminal law is – at least historically – about the relationship between man and God. It is about soul and sin.

Even the very "act" cannot in criminal law be regarded as an objective gesture. It implies circumstances and reasonably expectable consequences – factors that relate not to objective reality but to its perception and aperception.[44] In civil law disputes, the concurrence of the rule violation and the causal link between an act and the harmful consequence will often suffice. In criminal law the act, its consequences, the surrounding circumstances and the causal links that unite them into a whole, are most often mere symptoms of the defendant's state of mind.[45]

[44] Cf. J.HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960), 171-180.

[45] Even, for example, causality itself – considered an objective element of the corpus delicti par excellence – is in fact a subjective aspect of guilt, because it is relevant only insofar as it points to some human being either "causing" the forbidden consequence, or else "not causing" it, perhaps because there was an intervening cause in the form of another human being's act, or because of a mere accident. Scientific causality (a contradiction in adiecto anyway) does not play a role in criminal law.

Private disputes arise over private conflicts of private interests. In criminal law, however, there is essentially no private conflict of interests, because the harm is considered done to society, morality or some other non-palpable entity such as God[46], society's collective sentiments, ancestors[47], community as a whole[48], etc. It is, I think, fair to say that the victim in criminal law – the real victim entitled to play a fully legitimate role in criminal process, the one with the true active legitimation in criminal matters – has so far not yet been identified. We merely know that there exist a certain compulsion[49] to punish and a strong demand for impersonal punishment.[50]

We mentioned before that judging is possible only if there is conflict and quarrel. The sharper the conflict, the greater the incompatibility of claims and the supportive assertions and proofs, and consequently, so much more intense the reduction to monocentricity and – in principle – so much the greater the chance of impartiality.

It is essential to our argument here that adjudication is philogenetically and ontogenetically inextricably intertwined with quarrel and conflict. The very notion of impartiality makes sense only in juxtaposition to partiality and partiality is essentially a position taken by a party to a conflict.

The whole idea of adjudication becomes pointless the moment there is nothing to "adjudicate" because there is no conflict. The authenticity of judging depends on the authenticity of the conflict. In civil disputes this represents no problem, since has the

[46] H. BERMAN, THE ORIGINS OF WESTERN LEGAL SCIENCE, 90 Harv. L. Rev. 894.

[47] E. DUHRING, THE VALUE OF LIFE: A COURSE IN PHILOSOPHY.

[48] Id. at 56-96.

[49] FREUD, TOTEM AND TABOO , (1974), p. 92.

[50] RANULF, MORAL INDIGNATION AND MIDDLE CLASS PSYCHOLOGY, 1970.

conflict lost its intensity, settlement is a proper and genuine response. If the conflict is solely between the parties it can also be resolved solely between the parties. The only precondition to that is that the subject matter of adjudication not transcend the limits of the conflict. In civil matters the issue to be adjudicated is an issue merely because parties quarrel. It is not like that in criminal law.

In criminal law the situation is reversed: the parties pretend to quarrel, because there is an issue. The prosecutor prosecutes and the defendant defends himself only because there is the question of criminal guilt that must be decided. The issue does not arise from the conflict between the prosecutor and the defendant, neither does it arise from the more metaphysical conflict between the state and the defendant. The conflict, insofar as it exists at all is intended to serve as an artificial framework within which there will be proper finding of guilt or innocence. (Procedure and adjudication here do not serve either truth-finding or conflict resolution: they serve constitutional protective purposes.) It is beyond doubt that this was done through the analogy to the civil conflict regulation, the question being whether the issues are sufficiently similar to allow for the analogy.

Where the issue to be decided transcends the limits of the conflict itself – and insofar as it does – and where the conflict and its resolution become a means to the resolution of that transcending issue, rather than an end in themselves, adjudication as a process of truth-finding is no longer appropriate. In adjudication, conflict resolution by the nature of things takes precedence over truth-finding, as it is clear if one considers plea-bargaining or the general problem of the exclusionary rule. This is logical, because there would be no genuine adjudication, were it not for the conflict. In the last analysis adjudication is not and never was a tool of truth-finding. Insofar as there is truth-finding in adjudication proper (not in criminal adjudication) it is mere instrument toward conflict resolution.

Consequently, insofar as the issue of criminal guilt transcends the limits of the conflict between the parties, the process of adjudication is an inappropriate instrument. And if it is historically true, that criminal law evolved out of tort law, it is also true that the more criminal law separated itself from it, the more its accusatorial procedures became

inadequate. By abstracting the role of the victim not only has the conflict in criminal matters been watered down and consequently the probability of settlement disproportionately increased (plea-bargaining) simultaneously and by reverse proportion has the issue of criminal guilt been abstracted itself into a notion far above and beyond the individual injury.[51]

In simpler times when guilt was very much a question of causal link between an act and its consequence, adjudication would be appropriate. The spiritualization of criminal guilt brought about by the canonist movement of the 11th century, however, changed the concepts radically. The question can thus be seen either as procedural, there the answer being in introducing more inquisitorial elements, or, as substantive, the answer being to reduce the moralistic nature of criminal guilt and blameworthiness and shift the emphasis perhaps to more calculative or pragmatic considerations. In the latter case, however, the shift from monocentricity to polycentricism would also become imperative – as it did in juvenile justice cases and in those of civil commitment – and that would again be something else, not adjudication proper. But adjudication, after all is not an end in itself.

In criminal procedure, as we have established earlier, adjudication gives reality to the independent existence of procedural and constitutional rights and this is essentially a value choice and a political consideration: what balance of powers we were willing to

[51] It could be said that all the problems of criminal procedure stem from the fact that the truth criminal procedure is addressing is supposed to be a broader, more constant, more transcendental, more spiritual, in other words, more important form of truth. In this sense, all the legal technical and philosophical problems we are dealing with here have their origin in the Judeo-Christian projection of societal super-structure into the realms of the mystical and the religious.

In an atheistic society, where morality is seen as introjection by the individual of the needs of the society as a whole, the truth is much too relative to justify its projection beyond the limits of individual conflict – which in the last analysis is the problem of criminal procedure and criminal law.

strike between the individual and the state. From there on, the question is not legal any more.

CHAPTER THREE

THE PRINCIPLE OF LEGALITY

I

> "How can one create a memory for the human animal? How can one impress something upon this partly obtuse, partly flighty mind, attuned only to the passing moment, in such a way that it will stay here".[1]

We are not referring here either to "general" or to "special" prevention or any such pragmatic concept. The Law, the written promise – verba volent scripta manent – is this creation of memory for the human animal. And it is the principle of legality that mandates the written memory of the Law to be taken seriously.[2] A promise is a bridge over time; it necessarily means that something was stipulated in the past that will be – or

[1] Nietzsche, GENEALOGY OF MORALS, SECOND ESSAY, Section 3.

[2] The remembrance itself, of course, will not do: "One can well believe that the answers and methods for solving this primeval problem were not precisely gentle; perhaps indeed there was nothing more fearful and uncanny in the whole pre-history of man than his mnemotechnics: If something is to stay in the memory it must be burned in: only that which never ceases to hurt stays in the memory.'"

There can be no doubt that Nietzsche in his Second Essay creates the concept, falsely attributed to Freud, of the "Subconscious" and "repression" ("Positives Hemmungsvermögen). Nietzsche's thesis is that there is this "positives Hemmungsvermögen" in Man, an active forgetfulness that represses the unpleasant experiences while it digests them. The duty being essentially a promise that is against one's own best interest, it has to be supported by the rule of law, otherwise it will be suppressed into the subconscious. In that sense law is but an aid to memory, but an aid that has to be felt as pain, because "only that which never ceases to hurt stays in the memory". Compare this to the jurisprudential conventional wisdom that every rule is made of a disposition and a sanction unless it is to be either lex imperfecta or lex minus quam perfecta.

so the promise promises – done in the future. That this promise has to be written, i.e. , committed to the artificial memory of the ink on the paper, is in itself a declaration of mistrust. Nietzsche's autonomous man, sovereign over his soul and body who is supra-moral due to his pride in his ability to keep promises, Nietzsche calls this conscience, this man does not have to put his trust into words. He promises and delivers in good will.

It is also good to remember that at best written law is only second best. It would be far better to have a society that "sine lege fidem rectumque colebat".[3] It is because of the mistrust that the rules have to be written. In criminal law it is often suggested that the rules have to be written in advance and in clear language in order to afford "fair notice". How is it then possible that the mistake of law, a fair and honest ignorance due to the fact that the "notice" has not reached the ear of the actor, is not an absolute defense? No, the real intent behind the writing of the rule is not so much to make it known in advance – that is what Enlightened writers believed – but rather to fix it independently of any human memory.

The principle of legality is concerned with this definite advance determination of the criterion for punishment. Before the possibility of that is believed in, however, seriously doubtful assumptions about language and meaning have to be made. It is precisely because these assumptions are so questionable, that additional support for them has to be rendered in terms of postulates and ideals that can never, in fact, be materialized.

Were these postulates and ideals materialized, would it not be patently redundant to talk of the legality of the laws? The rule exists to be taken seriously and obeyed. The rule is a command and it is a rule only insofar as it is prescriptive. Thus, the principle of legality

[3] "… that cultivates good faith and virtue without law", the opening line to Ovidius Naso's METAMORPHOSEON LIBRI.

exists as a confirmation by a polar opposition of the fact that a legislative command, no matter how concise, can be modified, interpreted, disregarded, etc.[4]

But before we open this Pandora's box of intelligible essences, let us consider one historical aspect of the problem. Several authors in European and Anglo-Saxon literature[5] argue over the historic origin of the formula nullum crimen nulla poena sine lege praevia. The language of this formulla is bad enough that it could not possibly derive from Roman Law. It was in fact formulated by Feuerbach in his Lehrbuch des gemeinem in Deutschland geltenden peinlichen Rechts (1799). There was, however, no need to invent either the issue of the formula. It stood neatly in Digestae:

> Poena non irrogatur quae quaque lege vel quo alio jure specialiter imposita est. (5D. 50.16.131)[6]

The point here, however, is not that the Romans were 2 000 years ahead of the 18th century European writers. It is simply common sense that a rule exists to be followed. This is implicit in the nature of the rule, otherwise there would be no need for it. The problem, of course, is that the rules in fact to not necessarily mean what they say and vice versa.

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[4] Iavolenus: "Omnis definitio periculosa est. Parum est enim ut non subverti posset". (Every definition is dangerous, because there is little that cannot be subverted.) Also see Unger, KNOWLEDGE AND POLITICS (1975) at 92 – 94.

[5] Hall, GENERAL PRINCIPLES OF CRIMINAL LAW (1960) AT 27 – 69.

[6] "Punishment should not follow unless it is specifically for that crime imposed by a legislative act ('lege') or some other form of law ('jure')." Hall, ibid. at 29, n. 10.

The real underlying political issue is simply, how limited will the power of the state be in relation to the rights of the individual? It is for that reason that the issue re-emerged in the 18th century: the bourgeois resentment and revolt against aristocracy and its power.

II.

That law should be above every man is taken for granted by most, even though it is not so self-evident that something created by man should and could be above him. It is not unusual that Man, who strives to be a master in everything and over everything, would in this instance want to submit himself to the Rule of Law?

From a less grandiose and more theoretical point of view, however, the idea that explains this paradox is simple: rather than allow one man to be a master to another, we invent an abstract Rule of Law that supposedly governs both. In this fashion the Rule of law prevents the rule of man. This is called the principle of legality.

This, of course, is a dangerous delusion based on the 19th century perception of causality in science. The idea was, that since in science the inexorable laws govern the events, in society the same should be possible. If in nature the laws can exist above and beyond the events, why not in society?

The analogy was problematical even at its inception. Assuming there are empirical laws that "govern" events, are these laws pre-eminent to events? Do events merely manifest empirical laws? Are the laws really "hidden" in the events the way a commoner denominator is hidden in denominators which it describes? Do the "empirical laws" exist apart from events at all? Are they not merely a pedagogical tool, an instrument of explanation? Are not concepts in general mere means of communication?

In science the laws are at best descriptive and are arrived at by induction. (Imagine a scientist who would claim that his laws are correct but that the empirical reality somehow does not live up to them.) In legislation the process of arriving at law is precisely the reverse: the laws are prescriptive and they function deductively. In science one looks for

what is and then invents the formula that explains and describes it; in law one looks for what is not and then invents a rule that creates the deontological tension between what is and what ought to be. A scientific law is more genuine (descriptive) the more the events conform to it. A legislative law is more genuine (prescriptive) the more the reality differs from it. A scientific law insofar as prescriptive is simply not a law; a legal rule insofar as descriptive is redundant. It is thus literally true that (legal) laws exist to be violated.

In science, if the events differ from the way a scientific law describes them – the law is invalid. In law, if the events (behavior) depart from the rule – the law becomes valid, i.e., the sanction is applied. In science, reality is the master and the law a servant. The scientific laws tend towards reality. Legal rules only make sense when they differ from it.

Legal rules address reality from an unreal point of view: if they do not describe reality, they must differ from it; if they differ from it, they of necessity are descriptive not of reality, but of something else. What is this "something else"?

What do the legislative laws describes through their prescriptions? If I say "murder shall not be committed" I am clearly not referring to reality of the events. It could be said, however, that I am talking of an "ideal reality". But what precisely is this?

Here one can say that human law and its rules are like any other human act. Its essence is to change the reality as is into something different.[7] Thus, law is turned into future: it does not describe what is, but it is possible to hope for the best in the future. Deontological statements only make sense if we look into the future. It is this human ability to understand the concept of "future" that makes law and morality possible at all. If time were to stop now, law and morality would lose all their deontological tension, to which the change of change is to essential. Only the past can be addressed in a descriptive fashion. Prescription is simply a particular description of future.

[7] See Kojève, INTRODUCTION TO THE READING OF HEGEL (1969) at 130 – 149.

If, therefore, humanity can somehow transcend the present and strive for a better future, this is where the origin of all human action and purpose lies. laws are all created in the past in order to govern the future. Every rule is therefore a bridge over time.

The deontological tension between the rule and reality, between the norm and normality, could, therefore, also be described as the present tension between past and future. And since many rules, norms, and commands address a reality that is unlikely to conform to the, the future remains future and is indefinitely postponed. (Much like the tavern owner who hung out the sign: “Tomorrow all beverages and food will be given gratis”.) In other words, if the deontological tension remains between the rule and reality, the rule’s fulfilment is indefinitely postponed into the future. Thus with rules – as long as they remain that – future never becomes present.

If law is to be seen as existing above any individual, it must not and cannot change every day. If it does [it often does because] the perception of tomorrow becomes erratic, perhaps because its hopes, values, and aspirations are not shared by many. This is then anomie where neither rules nor commonly aspired for future exist.

In that sense, human Law is a “statistical” phenomenon. It really is Law only insofar as it describes the shared perception of what ought to be and perhaps will be, but is not. Genuine Law is the sharing of aspirations. The moment, however, one requires “sharing of intent” one also implies an absence of the conflict of interest. If that means that true rules are only possible insofar as interests and, therefore, values are shared, then most modern legal rules, except for perhaps some moral constants, are legal rules only in the most mechanical and positivist sense of the word. They are true insofar as they are enforced by the physical power of the state.

If rules in a state are thus the indicators, the symptoms and the manifestations of the conflict of interest between groups and classes, they cannot point to any shared aspirations: this conflict precludes true deontological tension between past and future. In other words, my vision of future may be very different from yours, but if I am able to

impose my rule on you by force, this is only because I have more power. To that sort of rule there can be no deontological tension.

One qualification is perhaps needed here. Since an aspiration on which all members of society would agree, would no longer be an aspiration – but rather a reality, law can be said to work toward the intensification of the value sharing (normative integration). Obviously, then, most rules will necessitate sanction, if only to force the one remaining recalcitrant member into conformance.

This brings us into a strange position where we are forced to admit that the objective of every legal rules could in fact be expressed in terms of the intensity of sharing of the objective of that rule. In other words, if by some special magic formula the legislator would be able to achieve total conformity to any command he chose to give, then the command itself would become superfluous. In that sense legal rules address the question of unshared values: insofar as some people behave differently from others, the former are made to conform to the latter, minority perhaps to majority, the powerless perhaps to the powerful.

Insofar as Law is prescriptive, it really describes the situation that is not, for the same reason that the rules are needed.

Since law cannot give commands to the reality, but must instead command human beings, only those aspirations that pertain to human conformity can be expressed through law. This means that positive law cannot express any other aspirations but those that are intended to make certain already existing behavior uniform throughout the society. The organic ideal of deontological tension is lost, law becomes the abstract unshared reality backed by mechanic threat – and is reduced to a simple fear of force.

An antimony is built into the very essence of the legal rule: the rule could be effective, if the value it expresses were taken for granted by all; but the rule is only needed because the value is not taken for granted by all.

(Cf., Unger, Knowledge and Politics, 1976, pp. 99ss.)

III.

As we concluded in the section on "Adjudication" a rule is something intimately connected with a conflict. Because the rule's essence lies not in its description, but rather in the deontological tension between what is and what ought to be, a rule is of necessity an alter ego of the conflict itself. Were things as they ought to be in the first place, the rule would not even come into existence.

It is this prescriptive momentum of the rule that is called disposition, to which a sanction must be attached.

Deontological tension between the "is" and the "ought to be" – implicit as it is in every rule – testifies to a different conflict, contrast, controversy, and contradiction: the one between reality as is and the human intent to alter it. It is, I think, a legitimate question to ask how does humanity arrive at this reality-transcending point of view from which it feels secure enough to criticize what is and create rules according to its vision as to what ought to be.

Thus every rule, insofar as prescriptive, is a negation of reality. In criminal law, given the exclusion from participation of the victim of the criminal act, this is the central conflict: "He stole, killed, robbed, raped …… even though he ought not to have acted this way."

Insofar as prescriptive, every rule reacts to the past in order to change it in the future: punitur ne peccetur, non quia peccatur.[8] In this context the rule is an action intent on changing ("negating") its own negation. Therefore, insofar as prescriptive, every rule is a confrontation of an abstract vision with a concrete reality. Given this abstraction from reality one is then less surprised to learn that rules need to be "interpreted" before they assume flesh and blood existence. More about that later.

[8] "Punish in order that it will no longer be sinned, and not because it was sinned".

IV.

The bottle of criminal law is both half full and half empty. Its rules govern the governors and the governed. For both, criminal law represents a limit of the force and power they can use over other individuals. But, as discussed above, criminal law is also a statement about the origins of deontological tension: non sub homine sed sub deo et lege. Of course, the fact that the power to arbitrarily impose private value judgment is apparently denied to the policeman and the judge, does not mean that there is no imposition of arbitrary value judgment at all. Indeed, the very arbitrariness is not even denied. It is simply made to appear legitimate through the myth of formal democracy or some other "contrat social" explanation à la Beccaria.

Assuming arguendo that the bourgeois democratic processes indeed bring forward the communis opinio, the questionable nature of this statistical validation reemerges when one asks the impractical question: "With what right, except for power, does the community impose punishment at all?"

Fortunately for us it really does not matter here what sort of value judgment is in the bottle, that is, so long as we know precisely and in advance the watershed, the line of demarcation between "full" and "empty". In that sense criminal law is a quantitative science.

V.

If it is true that punishment is possible without criminal law, whereas the restraints on itss arbitrary use are not, then there can be no doubt that formalism is the only theory which fits the essence of criminal law. Principles such as "nullum crimen …", strict interpretation of penal statutes", "in dubio pro reo", etc. all testify to the heightened emphasis in criminal law upon verbatim, almost mechanically formalistic interpretation.

If the physical force of the sanction is indeed the essence of all law, then criminal law is the most "legal" of all branches: in a real sense it determines the sanctions for other non-criminal sanctions.

Being a sanction's sanction perhaps helps to crystallize in criminal law the formalistic undertones that tend to remain latent in less forceful branches of law. The existence of law requires the formalistic component because that is the essence of any written rule.

> "Those who dismiss formalism as a naïve illusion, mistaken in its claims and pernicious in its effect, do not know what they are in for."[9]

Unger further explains the negative feedback he calls antinomy – built into the concept of formalism. According to Unger, if words lack intelligible essences[10], then, formalism must be based upon "the notion that in the great majority of cases common values and common understandings of the world fostered by a shared mode of social life will make perfectly clear to what category something belongs"[11]. (Emphasis added.) Compare to

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[9] UNGER, KNOWLEDGE AND POLITICS, at 92.

10 The view of rules and therefore of naming implicit in the formalist thesis depends on the preliberal conception of intelligible essences. To subsume situations under rules, and things under words, the mind must be able to perceive the essential qualities that mark each fact or situation as a member of a particular category.

Ibid. at 92-93. But conceptualizations and rules are a consequence of the material development of society; they are "a mediation of the social practice into social consciousness". As such, they are epiphenomena. It follows that their real nature and essence can never be deduced exclusively from them or from their interconnections. Their essence must be sought in their implied goals and purposes and the power which stands behind them. Their nature will often not be understood in terms of the present, because their implied purposes and goals belong to the past.

11 Ibid. at 93.

this the classical language of Justice Holmes in McBoyle v. United States, 283 U.S. 25, 51 S. Ct. 340, 75 L. Ed. 816 (1931):

> "When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land …" (Emphasis added.)

This "evocation" of "sentiments collectives" depends upon the sharing of interests, i.e., upon the absence of the conflict of interests.

Yet we said that every rule is intended as a criterion for adjudication and therefore is inextricably bound with the conflict. The above "evocation" of the common and shared meaning is therefore possible only insofar as it is unnecessary. Owing to the very absence of conflict, Unger's own interpretation is distinctly Marxist. Marxism hold that the supra structure is created by the infra structure's relations of power through "social practices". It is the latter that create values – very much in the fashion of simple Skinnerian conditioning. In Unger's words:

> "Social practice will take the place of both intelligible essences and explicit consideration of purpose".[12]

I agree with Unger's conclusion, namely that:

> "[I]f objective values were available to us, if we knew the true good with certainty, and understood at its implications and requirements perfectly, we would content ourselves with a regime of substantive justice, in which rules were unnecessary".[13]

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[12] Id.

[13] Id.

However, it is clear that it is precisely the "social practices" which – through the hegemony of the dominant social consciousness[14] – do make values relatively "objective" and "shared". The criminal law, however, deals exclusively with that segment of the general public that fails to be sufficiently impressed by such processes.

The role of criminal law in society can be seen as the supple of the "social practice" of punishment (negative reinforcement) for those individuals, who failed to integrate the "social practices" of monetary and status rewards. The punishment tariffs of criminally activity clearly respond to a lack of what Unger calls "shared mode of social life". It is criminal law's central intent to compensate that – with the use-of-force "social practice". Clearly the difference between the judge and the criminal is that they do not "share" certain values. If there existed an "instant brainwashing machine", punishment with a more lofty aura would rapidly become obsolete.

Therefore, it is clear that insofar as values are shared in spite of the latent conflicts of interest, this is due entirely to "social practices". That does not, however, subtract from the correctness of Unger's conclusion, namely that, "sharing of values" and the need for rules and adjudication are in exactly inverse proportion. The myth that nevertheless connects them is called the principle of legality.

VI.

If the idea behind the principle of legality is that rules should be binding on those who apply them, then it is almost necessary to assume that this must be done through the compelling nature of logical reasoning.

[14] "…a complicated Gramsci-style description for a 1984-style indoctrination. See, e.g., Williams, Raymond, BASE AND SUPERSTRUCTURE IN MARXIST CULTURAL THEORY, 82 NEW LEFT REVIEW 3 (1974).

In the "International Encyclopedia of Social Sciences",[15] Professor Berman discusses the question of legal reasoning. As usual in such discourse, the central distinction is the one between the syllogistic and the "legal" logic. I will try to show that there can be no such distinction, that there is no such thing as "legal" logic, or, in other words that insofar as legal logic is "legal" it is not logical, insofar as it is logical it is not distinctly "legal". The question has been discussed by many authors and Professor Berman himself cites von Ihering and Oliver Wendell Holmes. In Professor Berman" essay on legal reasoning, the following seems to be the central proposition:

> However useful syllogistic logic may be in testing the validity of conclusions drawn from given premises, it is inadequate as a method of reasoning in practical science such as law, where the premises are not given but must be created. The legal rules, viewed as major premises, are always subject to qualification in the light of particular circumstances; it is a rule of English and American law, for example, that a person who intentionally strikes another is civilly liable for battery, but such a rule is subject, in practice, to infinite modification in the light of possible defenses (for example, self-defense, defense of property, parental privilege, immunity from suit, lack of jurisdiction, insufficiency of evidence, etc.). In addition, life continually presents new situations to which no [single] existing rule is applicable; we simply do no know the legal limits of freedom of speech, for example, since the social context in which words are spoken is continually changing. Thus, the rules are continually being made and remade.
>
> Also the "minor premises" – the facts of particular cases or the terms of particular legal problems – are not simply "there" but must be characterized, and this, too, requires interpretation and evaluation. Indeed, the legal facts of a case are not raw

[15] 1968, vol. 9, at 204, s.v. Legal Reasoning.

> data but rather those facts that have been selected and classified in terms of legal categories. [Emphasis mine].[16]

A syllogism, legal or not, is a subsumption of a minor premise under the major premise. According to Professsor Berman neither the major premise nor the minor premise is in law ever given, rather they are both subject to "infinite modification, interpretation and evaluation".

The answer to the question of major premise is relatively simple. First, in no system of reference, be it mathematics, philosophy, or any natural science, are the major premises " given". They must always be "created".[17] In mathematics they are created in terms of

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[16] "The legal history discloses that there is an irreducible element of experience in law that cannot be persuasively dissolved in logical analysis and which penal theory must somehow take into account". Hall, T., GENERAL PRINCIPLES OF CRIMINAL LAW, (1960) at 558.

[17] It is good to remember that the logic and the syllogisms do not describe the mental process of thinking. No one knows where an idea, an hypothesis about a major premise comes from. The syllogism is merely a method of communication. It communicates in a structured manner what comes like a deus ex machina to a living person – namely the idea. A syllogism is a method of persuasion, of logical proof – not a method of thinking at all. Thinking itself will rarely be simply a three-step-procedure.

Yet precisely since the syllogism is a method of communication, those who assert that legal reasoning cannot be "reduced" to logical reasoning are really saying either that judges and lawyers do not know themselves why are they doing what they are doing, or, that they do not know what they are doing in the first place. Only in these two situations is it logical to expect that they will not be able to communicate the dynamics of their decision-makings.

There is, of course, another possibility, namely that they do know both what and why they are doing what they are doing – but that they do not want to disclose the real grounds of their decision. The reasons for this are left to our imagination.

axioms; in philosophy they are created less deliberately – by assuming their truth – in terms of "certainties" [cf. Ludwig Wittgenstein, "On Certainty"], and even our whole relationship to life is one in which certain assumptions are made for us, we take them for granted; they are, therefore, not absolutely given.

Even the most basic major premises about our existence, about space, about time, are not "given", they are, at least from the point of view of the species as a whole, "created". It is for this reason, that Nietzsche called truth "a useful lie".

Nothing is absolutely given; in every frame of reference we make certain assumptions which in the last analysis must be built on faith, rather than on subsequent logical proof. And these basic assumptions "are always subject to qualification".

Insofar as "major premises" are concerned, the system of logical inference in law is subject to the same qualifications as in any other system. In that sense every system is "subject to qualification". The precariousness of the basic assumptions does not make "legal" logic any more "legal".

This is not a combination of two major premises, rather, it is a major premise sui generis. The fact that the premise is not fixed in advance but has to be created by a recombination of rules does not mean that the process is arbitrary, "creative", "legal" – in short not logical. It simply means that major premises exist only potentially (as potential combinations) and have to be discovered. It is no different in e.g., physics, or medicine, where raw data are first confronted [hypothesis formation process], only then a hypothetical major premise is chosen, whereafter the adequacy of the hypothesis is tested

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Incidentally, a system of precedents will insofar as this last hypothesis holds true, become a structured system of misunderstanding and outright lies. If the first judge reaches the conclusion he rationalizes with reasons that have nothing to do with real reasons for the decision, then the second judge will have to use those combined reasons that were never genuine in the first place, to justify his decision which, too, becomes a precedent. When this is endemic, the law of precedents becomes a folie a million.

in an experiment. Only then the question arises whether a particular "fact pattern" fits such a hypothesis, i.e., whether the minor premise can be subsumed under the major premise. There is nothing praetor-logical in such reasoning. If properly done, if properly understood, it is eminently logical in the strictest sense of the word.[18]

Berman (and generally the Anglo-American jurisprudence) fails to take into account that legal "major premises" are not directly the legal concepts themselves, but are composed of combinations of those legal concepts. It is possible to show, e.g., that in a criminal code with 273 articles out of which 99 are found in the general part and the rest in the specific part, there are fifty billion combinations between such articles if one only takes the combinations of two, three, four and five and if one further assumes not only, that every article represents one single concept, but also that every single combination of two, three, four and five articles represents a single variation and therefore a single logical solution. Thus, even under such a simplified model there are innumerable combinations.[19]

In other words, "major premises" in law are not merely the explicitly announced and promulgated legal concepts such as "battery", "self-defense", "murder", etc. Major premises of law are combinations of those concepts. Only through such a permutational trick can a code of law ever aspire to even remotely reflect the rich variety of life.

Similar is the problem with the so-called Winship-Mullaney-Patterson triangle. (In re Winship, 397 U.S. 358 (1970), Mullaney v. Wilbur, 421 U.S. 684 (1975), Patterson v. New York, ___ U.S.___, 97 S.Ct. 2319 (1977). The issue there is which are "the elements of the offense", i.e., in fact, what is the offense? This is important for the burden-of-proof questions, but there is no simple answer to the problem. Offenses themselves are not given in the criminal code, only the elements which the lawyers then recombine into accusations and defenses are given. But that kind of "recombination" is going on in all

[18] See, e.g., Karl Popper, The Logic of Scientific Discovery, (1959) especially sec. 30.

[19] Of course, in reality, an article in a criminal code is rarely one concept and even if it were, a combination of two concepts would not necessarily yield one simple correct answer.

empirical and "scientific" disciplines. That is, in fact, why in science the major premises are called "hypotheses"[20]: one can never be certain that one has the "right" major premise. One tests it in an experiment. For a lawyer this experiment is the phase of adjudication in criminal procedure.

How else could a criminal code with its limited number of basic concepts ever aspire to "cover" the innumerable variations of human action. It is impossible to do that by exhaustive and explicit combinations of the elements into the particular "major premise". What the legislator does is that he breaks the life events down into their legally relevant aspects, i.e., elements which can then at will be recombined and which supply a rich source of "major premises" under which the factual situations can, or, cannot be subsumed.

This brings us to the second question, to the question of minor premises: "the facts of particular cases or the terms of particular legal problems". Again, Professor Berman is quite right when he says that those legal facts are not "raw data but rather those facts that have been selected and classified in terms of legal categories". But again if the question is, "Are there any objective facts per se?" the answer is, "No, but not only under the heading of 'legal logic'". Even in modern analytical philosophy, it is generally established that one cannot talk about facts per se. One does not have to go into mathematical and logical constructs such as "Gödel's proof (see book of the same title by Nagel and Newman, 1958) in order to show that all systems have to be validated from without. Wittgenstein has called this a "mode of life"; Schopenhauer called it "representation" and attributed it to "will", etc. The issue, however, is simple. The existence of things can be given only within a certain function, purpose or frame of reference. This can only be a product of someone" need and the resulting purpose. Without this, things will still "be there", perhaps, but they will be part of no one's system of reference. Facts, in other words, change their nature when seen through different "major premises", hypotheses, etc. The same "basic" object-event has innumerable

[20] Hypothesis, from Greek "hypo" under + "thesis" placing: a proposition stated merely as a basis for reasoning and argument.

identities anyway. In law a person is “insane”, in society he is a “nuisance”, in psychiatry he is “psychotic”, in religion he is “possessed” … so what is the “basic fact” then? Is there “objective” truth per se? If it does not exist elsewhere, why should the law be less logical if it sees the “raw data” – which, incidentally, are never totally “raw” anyway, as we demonstrated above – through a variety of different combinations of legal concepts? A question of existence only forces itself upon us in juxtaposition to the problem of non-existence. Absent a thinking and conscious human being in the universe, there even is no such thing as universe. Wittgenstein has conclusively shown that all systems of reference in the last analysis are nothing but “modes of life”, defined by purposes and interests that stand behind them. Every single concept in human logic, language, and existence, is subject to the qualification of, broadly speaking, human purpose. Without a human eye, nothing can be seen, and therefore nothing can exist, because without consciousness nothing is being observed, perceived, conceptualized.

The assertion, therefore, that “legal facts” do not exist by themselves, that they are selectively perceived, that they are subject to human perception and apperception, may very well be true – but it doesn’t prove anything. It doesn’t prove, for that matter, that legal “minor premises” are any different from any other minor premises.

The same human being is for one purpose a musician, for another a philosopher, for another a psychologist; he is one for his children and another for his wife. To say that that human being “exists” in abstracto would be superficial. Therefore, the fact of existence of that human being is nothing per se, but always something different in relationship to the perceiver. If the perceiver happens to be a judge, who calls this “human being” a “criminal” – that does not mean this “human being” is a “criminal”. He is a criminal only insofar as the legal aspect of his existence is concerned. In all other aspects he remains a body, a mind, a father and a husband, etc.

Consequently, if even in everyday life we distinguish between different aspects and identities of the same “facts”, then this simply means, that per se there are no facts.

It would be indeed surreal to assert, that there is something logically transcendent in legal reasoning. If all other processes in life seem to conform to some basic logical laws, it would indeed be preposterously paradoxical to assert that law by some divine right is an exception to that principle.

However, it is easy to be misled because "legal reasoning" rather than being genuine ratiocination often is merely an ex post facto rationalization. Judges' "logic" often obfuscates the real logic by a tour de force of mechanistic and rigid rationalization that is merely used to cover up and to camouflage. What Professor Berman calls an "appeal to authority", "continuity of legal reasoning", and "consistency of legal reasoning", are often the private value judgments of legal officers not entitled to make them, those judgments that would strictly logically be inconsistent with the rules of law – although by no means with the rules of logic.

The problem with legal reasoning is not the syllogistic aspect of it. The problem is rather that it may be very logical on grounds different from those asserted to be the basis of a particular legal decision. That, however, has more to do with sociology than formal logic: the question that should be asked is "why do the judges not assert the real reasons for their decisions?" The answer to that question may very well be that it would not seem "logical" to the general public and to the rest of the community, not because it would be inherently in conflict with the basic common sense, but because these real – not legally expostulated – "major premises" may be socially unacceptable. It they are unacceptable, because the community does not share the values that the judge accepts as major premises of his own system of reference within which he may very well move in logical and consistent manner, then the judge will try to cover up his real decision-making logic with a fictional syllogism. To a superficial observer his major premises may then very well seem to be "created" and his minor premises may very well seem to be "selected and classified".

But it was already Rudolf von Ihering who distinguished between a "jurisprudence of concepts" and a "jurisprudence of interests" ["Begriffsjurisprudenz;

Interessenjurisprudenz]". This distinction in itself ridicules the covering up of the real interest conflict with a jurisprudence of concepts. The reason for that camouflaging, however, has nothing to do with logic. It has more to do with the role the legal profession and the law plays in any particular social order: in a society where it must pretend that it supports such principles, whereas in fact it supports inconsistent interests, the discrepancy between the concepts and the real basis of judicial decision-making will be such as to remove all credibility.

To describe "legal reasoning" as something different and epistemologically idiosyncratic may then very well be an attempt to give intellectual legitimacy to processes that serve to cover up the real logic of interests with the unreal syllogistic rationalization.

Crimes are, therefore, the definitions in the special part in potential combination with just about every concept, rule, doctrine, or principle of the "general part" of the criminal law. There is no such thing as an exhaustive definition of a crime; rather there are [combinations of] rules, doctrines and principles, [combinations] which can very well be treated as hypotheses (potential major premises) under which we subsume particular factual patters that occur in the case life of criminal law.

In other words, it could be said that every single incrimination in the specific part contains the potential of billions of combinations from the general part. We can assume, for example, that we are just combining the rule concerning murder with every single rule, doctrine or principle of the general part. That means that we would combine the question of murder with the question of intent, negligence, insanity, mistake of fact, mistake of law, duress, necessity, self defense, etc. A number of combinations including more than two propositions from the general part at one time, is immense. That tells us something about the illusory nature of the principle of legality.

The combinations between individual concepts, rules, doctrines and principles within the body of criminal law are intended to and, in fact probably do reflect in an almost empirical fashion an aspect of the outside world. If one sees a man with a gun in his hand

running away from a body that lies on the street, for example, one initially adopts the hypothesis (major premise) of “murder”. This hypothesis is arrived at because, first we assume that the gun was the tool of killing and, second, that the killing was by intent of the actor. Should we come closer to the man lying on the street, however, and see that he, too, has a gun in his hand, a new concept (rule) of “self defense” is added to our hypothesized combination of concepts. Thus our primary perception of reality differs very much indeed from our secondary apperception of the same reality. It was Paul Valéry, who once said that thinking is the negation of what is immediately before us. To a layman the situation described above would be composed of the raw material of human drama. When I say “raw”, what I mean is simply that this material, if seen by the layman, is not necessarily interpreted in a legal way.

A lawyer, however, isn’t so much concerned with the blood and the guns and the whole drama of the situation, rather he tends to dissect the situation in terms of the concepts, rulels, principles and doctrines that he learned in the law school. His freedom to combine and recombine propositions may be limited, but it nevertheless exists. For example, if in this case the person lying on the street were a wounded policeman, w.o. had tried prior to the shooting to effectuate an arrest without probable cause, that could then be an illegal arrest against which the resistance is sometimes allowed. But the very (il)legality of the arrest represents a whole new world of combinations of procedural and constitutional concepts. I would, therefore, tend to say that freedom does exist and that in fact the difference between a good and bad lawyer is the difference between the extent of their respective ability to manipulate a greater or lesser number of concepts, rules, principles and doctrines, in other words, to be more or less free. This in consequence enables him to construct more specific combinations that, as it were, outspecify his opponent’s hypothetical major premise.

The primary limitation on this freedom is the “raw material” of the life situation itself. In the above illustration that “raw material” would allow for the hypothesis concerning self-defense, perhaps even illegal arrest and other similar issues of justification, but is does not seem to allow for, e.g., insanity, intoxication, mistake of law, etc.

The question is then quite philosophical, namely, whether there is one single correct interpretation of any factual pattern. Of course, ideally, to every factual pattern that occurs in criminal law, there will be a single correct legal answer. However, given that there are billions and billions of combinations, it is difficult to say that this is true. Every day brings a new case and new combinations of "facts". Even if law, criminal law in our case, does reduce life to a handful of legal concepts which make certain aspects of real life ("facts") legally relevant, this is in fact why lawyers' perception of life is, by this criteria of essentiality, drained of all drama, it is nevertheless true that even that handful of legally relevant elements still provides for the immense richness of combinations.

It seems that the question of freedom as we are here discussing it could very well be defined in terms of discrepancy between perception and apperceptions. It can probably be taken for granted that what we see, hear, touch, smell or otherwise perceive is thereafter "interpreted" in our brain. Even such well defined stimuli as, for example a painting, a symphonic work of a well known composer, a tree … just about anything that we take for granted, is apperceived in the sense that two different people with consequently two different attitudes towards reality, will apperceive that same stimulus in two relatively idiosyncratic manners.

The distinction between perception and apperception is well known in psychiatry, where certain patients can describe on a very low conceptual level, e.g., that they see a brown thing on four legs, however, they are unable to apperceive that object as a "table". From such a perspective, one is then almost shocked to discover that there are no "facts". This same question was extensively discussed by Ludwig Wittgenstein in his book "On Certainty". His position is essentially that in our world of different levels of conceptualization and interpretation of reality, everything validates everything else; therefore in the last analysis nothing is really validated by an absolute criterion. This is common to Wittgenstein's theory, and to what is known as "Gödel's Proof". Gödel has shown that any system of reference must in the final analysis rest on an axiom that has to be validated from the outside of the respective system. There is thus always the inevitable

leap of faith in every "mode of life". We are really not talking about the validity or invalidity of the whole criminal law system of concepts, because we do accept certain basic assumptions as valid (at least intellectually, if not existentially). The dilemma perhaps is not total freedom or total determination; the issue, as I see it, is the relative movement within perception and apperception. This very simply means that there are no "murders", "rapes", "burglaries", etc. unless there are criminal law and its lawyers willing to apperceive (interpret) the world in view of these punitive functionalities.

However, even if the "facts" of the objective reality are not subject to one single interpretation, they do, once we invoke the perspective of criminal law, impose a limit of the number of their interpretations (hypothetical major premises of criminal law). After all, a dead body will probably not lead to the hypothesis of embezzlement.

I would tend to explain this rather intimate connection between reality and criminal law by the practical and empirical origins of criminal law. First, there emerges a need for social control in a certain societal conglomeration, then there is the general view that certain behavior has to be punished. That is followed by the attempt to define and distinguish situations which are punishable from those which are not. All this can only happen through the inductive (empirical) processes in which the observer decided which are the common denominators to certain blameworthy situations. When he discovers that what he is after are not dead bodies or even all the killers, but rather the blameworthy attitudes of those who do kill, he has already arrived at a very important conclusion that what matters is not the body, not even the harm as in the law of torts, but rather, the act or what Jerome hall calls a "manifested effort".

In this sense, it is possible to say that the conceptual construction of criminal law is really not artificial. Rather it is a reductive punitive interpretation of rality, arrived at by the gradual evolvement of conceptualization and stripping off of what is inessential within this punitive perspective. In a sense one could say that the objective reality produced criminal law, whereas criminal law in turn through apperception produces its own sort of reality. These two are really not divorced from one another, but it is not possible to say

that they are one and the same thing. As Dostoevsky has shown in his "Crime and Punishment", it is one thing to say "murder", as a lawyer would do, but quite another to "really" describe what was going on between Raskolnikov and the world.

The question of insanity is a good illustration. What happens in the insanity area is that the lawyer's punitive perspective clashes with the physician's healing perspective and, therefore, they lack a common ground: the conceptualizations of the two branches of intellectual life are discrepant to the extent that they provoke discussions which never interesect.[22]

The problem of the discrepancy between perception and apperception can be illustrated in yet another fashion. Walter Buckley[23] developed a theory according to which there is no such thing as "information" precisely because the different pieces of perceptively identical information fall on different mental grounds when they are apperceived, interpreted by different people. The biblical image of the seed that falls on different grounds and because of that either develops or does not, I think, evinces the same understanding.

Thus, even though one can agree with Wittgenstein that nothing is certain in this world, because everything that we perceive is validated by everything else, whereas nothing

[22] Had Judge Bazelon understood that legal language is necessarily steeped in preconceived ideas, different from those of psychiatrists, he would perhaps also have understood that punitive and healing "modes of life" (perspectives) not only do not have anything to do with one another, but are to a great extent qualitatively incompatible. George Herbert Mead distinguished between antithetical "hostile attitudes" and "friendly attitudes". See his article, "The psychology of Punitive Justice", American Journal of Sociology 23:57 – 602, March 1918. One interesting by-product of the Durham problem, however was that it became clear through civil commitment cases that the primary role of criminal law is not to punish, but rather to prevent punishment in those cases where it is not clearly threatened in advance.

[23] "SOCIOLOGY AND MODERN SYSTEMS THEORY" (Prentice-Hall 1967).

validates the system as the whole, one can still concede intellectual validity and consistency to criminal law if we are willing to make certain axiomatic assumptions and function on the basis of them. Once these assumptions (principles) are made, the system of knowledge must develop into a consistent conceptual framework in which every pattern of object-events is automatically defined by a single correct combination of concepts that belong to the system. Ideally thus, a criminal code would provide a single correct answer to every factual pattern, even though there might be billions and billions of possible combination of facts and the corresponding legal concepts. The principle of legality would thus eliminate any "freedom" and consequently any arbitrary use of power that underlies criminal law. In the final analysis no absolute freedom of conceptualization exists. The relative freedom, however, does exist because the individual rules do not exhaust the richness of the legal nature of situations – and insofar as different levels of generality of legal interpretations are possible – there is freedom for the lawyer who can, by virtue of making a more specific argument, ascend on a higher level of specificity (Lex specialis derogat legi generali).

VII.

Ideally rules would not be abstract, but would be ready-made advance and concrete decisions. Rules are intended as abstract advance decisions of anticipated controversial situations only because it is impossible in concreto to predict future conflicts and controversies. But in principle a "rule" that "A is to be punished by two months imprisonment when on September 27, 1984 he steals B's bicycle", would be ideal- there would be no "obscurity", no "interpretation", no "arbitrariness". But absent human omniscience and omnipotence the discrepancy between the general legal act (abstract rule) and the specific legal act (concrete decision subsuming the facts under appropriate abstract rule) is inevitable. The abstract nature of the general legal act is an attempt to transcend time: what cannot be even predicted in concreto can be predicted and decided in advance in abstracto. Indeed, it is possible to say that in rules and through abstract rules the past governs the future.

The creation of the abstract rule presumes that a number of future situations, which the rule is intended to decide in advance, will have certain essential common characteristics.[24] The rule establishes these essential common characteristics as the elements of its definition (disposition) and it thereby makes them legally relevant. The maker of an abstract rule unconsciously assumes there exists an essential quality of, e.g., larceny that is preeminent to any particular theft, just as triangles, different as they might be, have in common a certain pre-eminent quality of the triangle.

The choice here is clear: either we have no rules, but have judges who make ex post facto decisions, as was, to a large extend, the case with the common law; or, one must have clear advance definitions of what is essential and what is not. Clear definitions, however, are only possible with the above described assumptions concerning the intelligible essences (or whatever one chooses to call the characteristics which exist as common denominators of many particular concrete events). Returning to our example of a theft, once the assumption of larceny is made, the problem is reduced to finding the essence of that quality of larceny.

Once properly defined, the concept "theft" then becomes at the same time abstract and concise. The "abstraction" is merely from elements inessential to the "quality of larceny".[25]

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[24] See ARISTOTLE, NICOMACHEAN ETHICS 141 (Bobbs-Merrill 1962):

> What causes the problem is that the equitable is not just in the legal sense of "just" but as a corrective of what is legally just. The reason is that all law is universal, but there are some things about which it is not possible to speak correctly in universal terms. Now, in situations where it is necessary to speak in universal terms but impossible to do so correctly, the law takes the majority of cases, fully realizing in what respect it misses the mark. The law itself is non the less correct. For the mistake lies neither in the law nor in the lawgiver, but in the nature of the case.

[25] If there be any need to further illustrate that point one must only consider the difference between common law treatment of "larceny, embezzlement, false pretense, extortion, blackmail,

It is, of course, the definition of a criminal act that encompasses the abstract "essence" presumed exist apart from their concrete manifestation. The general rule for making a definition – per genus proximum et differentiam specificam[26] – tells us that a concept can only be defined by other concepts which in turn must also be defined – etc. ad infinitum. But assuming arguendo that intelligible essences exist apart from the unintelligible Wittgensteinian "mode of life", does a definition of a criminal act indeed cover only a

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fraudulent conversions, receiving stolen property and the like", (Model Penal Code § 223.1) and the lean and terse Continental language that eventually prevailed over the common law casuistic conceptual confusion: "A person is guilty of theft if he takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof". (MPC § 223.2)

This same capitulation of casuistry is obvious all over the Model Penal code – a veritable reception of the Continental criminal theory. Compare, for example, the present M.P.C. definition of insanity – it certainly is not a judicial invention, especially not after escapades à la Durham – with the 1937 Swiss definition. Fatherhood is undeniable even to the point where the translation of the French word "apprécier" is wrongly translated into English "appreciate" – thereby carrying improper volitive connotation. The proper "credit" in Anglo-Saxon criminal law was, until recently, (Fletcher, RETHINKING CRIMINAL LAW, 1978) not given to Continental "extractors" of the "essences" and is thus amusing to see, e.g., Justice Powell refer to the diction of Model Penal Code as "the leaner language of the 20th century". Patterson v. New York, __ U.S. __97 S. Ct. 2319, __L. Ed. 2d __ (1977) as cited in Vorenberg, CRIMINAL LAW AND PROCEDURE, 1977 Supplement, 18.

[26] In making a definition, we ordinarily first define the proximate genus and then establish the specific difference: per genus proximum et per differentiam specificam. The limits of a concept – any concept, not just a legal one – are thereby set, they are "defined" on the spectrum between generality and specificity. The genus line is drawn between the more general concept and the object being defined; the species line is drawn between the object and the next more specific subject.

well defined piece of conduct? The recent cases of Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson (supra) would seem to indicate otherwise.

In light of In Re Winship, 397 U.S. 358 (1970) where the Supreme Court held that the prosecution has to prove every single element of the crime, it becomes very important to know which are the elements of the "definition" of the crime.[27] Traditionally, the elements of a crime were considered to be the same as the elements of the definition of it. The definition of a crime, the so-called corpus delicti, is the definition given in the specific part of the criminal law or code, mentioning only those elements which are particular or idiosyncratic to that specific crime. In other words, it does not mention those elements in the general part: the body of issues applicable to every crime defined in the specific part of criminal code. Logically then one could say that general issues such as the questions of responsibility, insanity, particular modes of guilt, etc., are implied whenever an issue from the special part is in question. "Implied" in this context simply means that they must be "taken into account", even though they are not specifically mentioned.

This, of course, raises the question of whether those issues represent a part of the definition of a crime, even though they are not specifically mentioned. If they do, or rather if every single one of them is an element of the crime, then, according to Winship, each of these elements must be proved by the prosecution. This hypothesis pushed to the absurd has as its conclusion that, during the trial, the defendant could invoke every possible defense and thereby shift the burden to the prosecution to show the presence, or absence as the case might be, or that particular exculpating circumstance.[28]

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[27] The assumption here is that there must exist some "definition" of a crime in order that one particular event can be distinguished from another event, i.e., that when we see a homicide, we can know that it is not check-embezzlement.

[28] King v. Turner, 105 Eng. Rep. 1026 [K.B. 1816]; see also Perkins, CRIMINAL LAW, 1969 at 49.

In Mullaney, the problem was that the state of Maine required that a defendant charged with murder, (which upon conviction carries a mandatory sentence of life imprisonment), to prove himself that he acted in the heat of passion on sudden provocation, in order to reduce the homicide to manslaughter. Citing Winship the court held that the Maine rule does not comport with the requirement of the due process clause of the 14th amendment; that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In a sense, therefore, it was held that sudden provocation is an element of the crime, even though it is not, or may not be, specifically mentioned in the definition of that particular crime. The definition of murder of course does not mention ""he fit of passion on sudden provocation"" if it is mentioned at all, it is in the definition of involuntary manslaughter.[29]

The defendant in Mullaney v. Wilbur was charged with murder and raised the defense of sudden provocation, a defense in other words, which is not part of the "definition" of murder. It is not even an issue from the general part of the body of criminal law. Sudden provocation is an issue defined in another specific definition, a definition of manslaughter.

The Winship rule that the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged is much too broad to be really informative, because in particular situations it is difficult to say which facts are necessary to constitute the crime charged. In Mullaney, if the defense had not raised the question, it would not have been necessary for the prosecution to bother about sudden provocation at all. However, since the defense did raise the issue of sudden provocation, the burden was

[29] See the Maine murder statute, Me. Rev. Stat. Ann., Tit. 17, Section 2651, 1964, which provides: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life." The manslaughter statute, Me. Rev. Stat. Ann., Tit. 17, Section 2551, 1964, in relevant part provides: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, shall be punished by a fine of not more than $ 1,000 or by imprisonment for not more than 20 years ……"

upon the prosecution to prove the absence of sudden provocation. Thus, in a sense, one could say that the fact necessary to constitute the crime charged in this case is the absence of what is called "sudden provocation".

The inference one would logically deduce from Mullaney v. Wilbur is that the rule is that an absolute or relative defense must only be "raised" by the defense, if that element's proof is necessary to convict the defendant of the crime charged by the prosecution. The repercussions of that rule were apparently too destructive to the structure of the criminal process to be rally acceptable to the Burger Court.

In Patterson v. New York, - U.S. -, 97 S. Ct. 2319 – L. Ed. 2d – (1977), the defendant was charged with second-degree murder. In New York there are two necessary elements of second-degree murder: first, the intent to cause the death of another person and second, the actual causing of the death of that person. N.Y. Penal Law § 125.25 (McKinney). To reduce the charge from second-degree murder to manslaughter, however, there must be the element of "extreme emotional disturbance". The question then becomes whether this "extreme emotional disturbance" is one of the "facts necessary to constitute the crime charged" according to Winship, supra. If then we take into account Mullaney v. Wilbur, supra, the analogy seems to be almost perfect, because in Mullaney v. Wilbur the problem concerns the reduction from murder to manslaughter on the grounds of heat of passion on sudden provocation, whereas in Patterson v. New York, the same problem of reducing second-degree murder to manslaughter is based on the element of "extreme emotional disturbance" – a different word for the same concept.

If that analogy were consequentially carried through, Patterson would be perfectly identical to Mullaney, not only because of the similarity between heat of passion upon sudden provocation and extreme emotional disturbance, but also because the burden of proof to demonstrate this relevant circumstance ought to be upon the prosecution, since it is not only a fact necessary to constitute the crime charged, according to Wiship, but is also a fact the absence of which the prosecution must prove in order to succeed in its case.

The distinction, therefore, between Mullaney and Patterson can only be a formalistic one, because it seems that the Court could not explicitly overrule itself within two years. At the very least, one can say that the cases are not incompatible on substantive grounds, and that they will therefore have to be distinguished on formalistic grounds.

What are the formalistic grounds upon which we can distinguish Patterson from Mullaney? The Supreme Court is making the distinction between those necessary facts which are expressly or implicitly mentioned in the definition of crime, and those necessary facts which are not expressly or implicitly mentioned in the definition of crime. the "malice aforethought" and the absence of provocation: malice is excluded if provocation is present, and vice versa, and thus, according to the logic of Patterson, the absence of provocation is mentioned in the definition of murder, i.e., it is implied (negatively) in the concepts of premeditation. In other words, the Maine statute defining first degree murder, measures an element, I;e., malice aforethought which the prosecution must therefore prove, even though what is relevant is its negative side, i.e., the absence of provocation.

The New York Penal Law, however, in defining second-degree murder, only measures the intent to cause the death of another person and the actual causing of the death of such a person, i.e., it does not mention anything to which the concept of "extreme emotional disturbance" would represent the negative side. Mr Justice Powell, who wrote the majority opinion in Mullaney v. Wilbur, wrote the dissenting opinion in Patterson v. New York. In Patterson, he writes:

> The test the Court today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the non-existence of that factor in the statutory language

> that defines the crime. The sole requirement is that any references to the fact would be confined to those sections that provide for the affirmative defense.[30]

The problem, however, is not with Patterson. It, if anything, is an attempt to mend the sweeping ruling of Mullaney. The problem with Mullaney, however, is that it extrapolates from Winshipp, because the ruling in Winship talks about the facts necessary to constitute a crime as if these facts were a constant absolutely given by the particular definition of the particular crime.

This whole mess of symbolic logic is created by the old illusion called corpus delicti: the facts necessary to constitute the crime. The elements of the crime, however, are never exhausted by the definition of the crime. If such were the case, the task of adjudication could be relegated to a computer. In other words, the criteria of what is essential, or not, are not determined solely by the definition of crime, but are determined also by the behavior of both parties, the defense and the prosecution, during the trial.

For example, a homicide is murder when premeditation is present, but becomes manslaughter when this premeditation is based upon provocation, i.e., the adding of a new element of "provocation" changes the nature of the previously mentioned required element, "premeditation". In addition, the premeditated, provoked homicide could have been perpetrated in self-defense, in which case the newly added element, i.e., mistake kof fact, changes the nature of all previously required elements. Obviously, in most cases, certain of those elements will be introduced by the prosecution. In our case, these would be premeditation and the proposition that defense was not actual self-defense. Mistake of fact, insanity, justification, etc. would normally be introduced by the defense. All these facts, however, could fall under the category which Winship defined as "facts necessary to constitute the crime charged". Yet, it does not necessarily follow that they will be either introduced or in fact proved beyond a reasonable doubt by the prosecution.

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[30] This is not a new argument, See LaFAVE and SCOTT, CRIMINAL LAW? 1972, note 58 at 153.

One could say, therefore, that the Winship-Mullaney-Patterson triangle is based on the fallacy that there are well-defined sets of facts necessary to constitute the crime charged. In this respect, there are two extreme possibilities. If we must talk about "facts necessary to constitute the crime", the first possibility is the inclusion of all possible relevant issues that might be raised by the defense during the trial. This was the route taken by the court in the Winship and Mullaney cases.

The other extreme is to limit the relevant facts and issues, to those specifically mentioned in the particular definition of crime. This is the ruling of Patterson, the consequence of which is that the other issues, i.e., those not specifically mentioned in the definition of crime, must be, for no logical reason, proved, at least to a certain standard of persuasion, by the defense. Of course, the question of the burden of proof cannot be resolved on the grounds of such fortuitous circumstances as the possibility of an "element" of the crime being mentioned in the general or specific part of the criminal code.

At any rat, even if there were intelligible essences, this would not be the end of the matter, because the issues such as burden of proof and the burden of persuasion cannot be decided on extrinsic grounds of the "differentia specifica" of a particular crime, the "genus" b[31]eing in essence described by the general part of the criminal code.

In his book, "Rethinking Criminal Law" (1978) Professor Fletcher deals extensively with the question of burden of proof. According to his theory, the problem of the burden of proof is that it might be interpreted either as "burden of production" (i.e., "burden to raise a triable issue of fact" alias "the burden of going forward": the burden of producing some

[31] It is, of course, interesting to observe how the Supreme Court deals with the problem. Model Penal Code is based on the Continental theory, where the burden of proof and the burden of persuasion do not represent an issue at all. The ontological consideration of substantive criminal law on the Continent does not have to reckon with the (procedural) distribution of effort and labor. The central issue of substantive criminal law is truth – a concept as already explained not really compatible with the burden of proof considerations of an adversary process.

evidence in order to receive instruction on the issue) or the "burden of persuasion". The distinction between the two different burdens is of course one of intensity, the question being whether the defendant has to carry the burden of production or the burden of persuasion in cases where he raises an affirmative defense such as insanity, self-defense, mistake of fact, etc.

Fletcher regards this as a burden of proof question. We, however, now know that the question cannot be resolved on the basis of the distinction between a rule and an exception. In his interesting discussion, Professor Fletcher cites the ancient Latin formula relating to the burden of proving the affirmative assertion. Ei incumbit probatio qui dicit; non qui negat.[32]

The problem with this formula is not what it says, but what it assumes. The formula assumes that there is a difference between the rule and an exception to the rule. But of course the exceptions to the rules must likewise be based on other rules. In criminal law, if the rule is the definition of murder, the exception to the guilt of murder must likewise be based on a rule concerning insanity, self-defense, mistake of fact, lack of age, etc.

If a rule concerning a particular crime, e.g., murder, is not seen in isolation, but is seen as being potentially connected to every single rule of the general part of the criminal code or law, then of course the distinction between the rule and the exception loses all its meaning.

It loses all its meaning because the exception to the rule – the burden of proof to show the facts that support that exception being on the defendant – can be defined as an invocation of a rule more specific than the rule in question, the consequence being that the more general rule does not apply. The general validity of the power of exception to derogate

[32] The burden of proving a fact rests on the party who asserts it, not on the party who denies it. Paul, Lib LXIX, Ad Edictum, Justinian, Digest 22.3.2., Fletcher at 520, note 15.

the rule, therefore, derives its power from the principle that a more specific law derogates a more general law.

Consequently, no definition of any particular crime in the substantive criminal law can be seen as a stable rule. It cannot be seen in isolation, because it is potentially connected to all issues and rules defined in the general part of the criminal code or law. Insofar as that conclusion applies, there does not exist what is usually called a definition of a crime. In other words, every definition of a crime is composed of the particular definition in the specific part of the criminal code or law and potentially the whole general part of the criminal law or code. Consequently, to allocate the burden of proof according to whether a particular element is mentioned in the general part of the criminal code or law, is bound to be inapposite. When the Winship rule that the prosecution must prove every element of a crime beyond reasonable doubt is applied, it means inevitably that the prosecution would have to show not only the elements of the corpus delicti, but also all other elements that "might come into consideration".

The question then arises, how will those potentially relevant elements from the general part of the criminal code or law "come into consideration"? It is obvious that the court in considering a particular criminal case will not be either able or willing to consider all the potential issues from the general part of the criminal code. It is obvious that the defendant cannot invoke by mere abstract and general claim all of the potentially exculpatory provisions of the general type. The reasons for that are at least twofold. First, the prosecution would be faced with an impossibility of showing the absence of a number of issues which would in such a context be very metaphysical. Take the example of mistake of fact: When we prove the presence of mistake of fact we usually show the circumstances which led to that state of mind. However, were one to show the absence of mistake of fact, one would have to show a purely psychological fact without any objective indicators. Second, the volume of the evidence that would have to be submitted in every particular case would be such that it would tend to make the processing of criminal cases even more impractical than it already is.

It is for that reason, therefore that the defendant has to choose the issues from the general part of the criminal code or law that he deems applicable in his particular case. If he thinks that he was under the mistake of fact then he must at least raise the issue. Enough burden of production must be assigned to him, however, in order to prevent frivolous raising of issues one after another, which would lead to a cascade of consecutive evidentiary attempts and would run against the consideration that we mentioned above under second. In order to make the issue procedurally relevant, therefore, the defendant must produce enough evidence to raise a reasonable doubt in the minds of the adjudicators. The implication here, of course, is that in any criminal case there exists a series of rebuttable presumptions concerning the defendant's sanity, the absence of mistake of fact, the absence of necessity, the absence of duress, the absence of any other form of justification, etc. These presumptions are easily overcome by the defendant if he satisfies the burden of production. In terms of Winship rule, then one could say that satisfying the burden of production puts the general issue within the specific definition, which means that the prosecution has to prove beyond reasonable doubt that the exculpatory provision will not apply in that particular case.

The problem is not only one of rule and exception, the rule being in the specific and the exception being in the general part of the criminal code. I see the problem as a symptom of a fundamental incompatibility between substantive criminal law and the adversary criminal procedure.

The model of substantive criminal law, especially as, e.g., in the Model Penal Code, is one that invites clear-cut, yes-or-no monocentric conclusions: the defendant is either guilty, or innocent. This model thus does not admit of probability and the probabilistic estimates of guilt (insofar as that problem arises it is brushed aside by the presumption of innocence). Consequently, for the substantive model there is no such thing as "allocation" of the "burden of proof". There is no such thing because the actor according to the laws of substantive criminal law is either guilty or innocent, not "probably" guilty or "probably" innocent. The concepts of "burden of proof", "burden of persuasion", and

"burden of production", - are adversarial concepts and as such incompatible with the whole different way of reasoning characteristic of the substantive criminal law.

They are incompatible for the simple reason that they make sense only within an adversary conflict, an adversary alternation of hypotheses of guilt and innocence – a model that is primarily intended to further ambivalent impartiality, of the judge. Truth-finding is secondary here.

The exclusionary rule is a clear proof that the adversarial system prefers preservation of impartiality of the adjudicator to the truth-finding function of criminal procedure.

Thus, while the subject matter of substantive criminal law remains "truth, the whole truth, and nothing but the truth", criminal procedure shrugs it shoulders and says that truth is not really relevant since within an adversary system what matters is the impartial resolution of conflict. Were it not for the adversary criminal procedure the question of allocation of the burden of proof would have never arisen in the first place, as it does not in the Continental criminal procedure (where the judge himself is allowed to find out what happened in the criminal case).

The whole idea of the "burden of proof" implies that the parties themselves control the influx of information and that, therefore, the truth is going to be discovered only insofar as parties to the conflict want to discover it. It follows that truth-finding is generally secondary in adversary procedures.

The whole Mullaney-Patterson problem is also one of a cultural conflict: a conflict between two different perceptions of the importance of "truth". And while the substantive criminal law model, especially its Model Penal Code variant, is typically Catholic and Continental – it assumes that truth not only exists but can be discovered – the adversary criminal procedure is a typically Anglo-Saxon cultural model, where there is no assumption about some transcendental or absolute truth, rather, what matters is the resolution of the immediate conflict (historically the restoration of Kings Peace) by a

relatively impartial adjudicator. Ergo, deductive versus inductive, synthetical versus analytical thinking.

VIII.

If the principle of legality as a postulate is intended to prevent judicial arbitrariness, this simply means that legality is an attempt to determine in advance the legal consequences of certain events. Thus, ideally, legality would be hypothetical, abstract and anticipatory decision-making, totally determining the legal outcomes of the future situations. These "future situation" are, of course, anticipated – in criminal law "incriminated" because the legislature knows on the basis of past experience that they are likely to re-occur. But surely we do not hypothesize here that the legislator is omniscient: how then can he not only predict future events but even determine their legal outcomes?

Two solutions combine to help the legislator out of this predicament. First, as we have shown above, there is the possibility to abstract from reality (from Latin ab trahere, to draw from) by reducing in the process the actual reality to the legally relevant reality. The latter, of course, is nothing but a series of denominators common to life events the legislator thinks he wants to influence in advance. We saw how precarious this process of extracting the lowest common denominators is. Second, the legislator breaks the actual reality down into its legally relevant constituent elements. This analytical process, of course, did not occur in abstracto. When case after case shows, for example, that people accused of murder defend themselves by saying that they did it in defending themselves against the victim, the concept of self-defense emerges. The concepts of self-defense is then withdrawn (abstracted) from particular corpora delicti and placed in the general stack of legally relevant elements available in any single case. What this means is that the real life situations have been broken down analytically so that the concepts may be recombined in solving future legal problems. Not every murder charge will involve the self-defense exception, but some will. When that happens, the law provides the criteria in advance. This in turn means that every intelligible criminal case represents a particular re-combination of legally relevant concepts: death, intent, causal link, self-defense, etc.

This introduces a peculiar aspect of the problem of legality. It is surprising – to put it mildly – that the question has never been put this way: "Is the law really in the rules (concepts)? Or is it in combinations of the rules (concepts)? Assuming arguendo that the rules are predetermined, does that mean that the combinations are likewise pre-determined?

This problem has, in jurisprudence, been called "interpretation". The term is misleading because it only addresses the meaning problem of the concept and rule. It, therefore, reduces the problem to philosophy of language.

However, aside from this qualitative aspect of the problem of "interpretation", there is a distinct quantitative problem.

It is interesting, for example, to work out the number of possible combinations in a single criminal code, not, perhaps to prove anything positive, but simply to show how illusionary is the idea of predetermination in law.

IX.

This ideal of predetermination, although it exists only latently today, has had an enormous influence in the nature of both Continental and Anglo-Saxon criminal law.

Take for example, a criminal code with 362 articles, of which 99 are in the general part and 263 in the special part.[33] Assume that every article represents only one issue,kor, in other words, that the concept of murder, theft, check-embezzlement, as well as concepts such as insanity, intent, negligence, etc., are one-dimensional issues, that they do not have multi-faceted natures. Further, assume that a combination of any two, three, four or five issues eo ipso yields only one possible and correct solution.[34]

[33] Yugoslav Criminal Code as of 1972.

[34] This is assumed upon a presupposition that a combination of two issues, such as, for example, murder and self-defense, in itself represents a problem of legal interpretation, since the concept of

The judge sees a certain combination of facts and he spots the legal problem therein. He breaks down the event of life and subsumes its dimensions under different provisions of the code. Thus, what is happening is the recombination of the basic elements to fit the actual combination of the facts in the event suspected to be an offense. Every such recombination in fact represents something new insofar as its solution is not predetermined by the law. And since most criminal codes are broken into different articles precisely for the purpose of making these recombinations possible and thereby of making it possible to cover many probable life-situations, this proves that the legislator himself realizes the necessity of allowing judges and lawyer to recombine the elements of the criminal code. The legislator thus implicitly recognizes the right of judges to make law insofar as the recombination of the issues in the code is something new and different from the code itself.

The question arises of what this extent is to which the recombinations of different issues in the criminal code are new and different from the rules themselves. This problem is closely related to the question of how many possible outcomes there are in a particular combination of issues. For example, does the application of the issue of insanity in the case of check-embezzlement yield only one correct answer, or two, or three? “Correct” in this case means “logically compatible with the code as a whole and with the specific applicable provisions”. If there is more than one possible solution to such a problem, then the choice is left to the judge deciding the case, and that choice is not predetermined. It therefore, allows for arbitrariness.

An ideally structured criminal code would always allow for only one solution, and that one the correct one, corresponding to the general logical determinants in the code and to the code’s policy intentions. In such a case, even if in fact all the issues would not be

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self-defense, in our example, in a case of murder is obviously a different question than in a case where self-defense is combined with an offense of a traffic violation, or self-defense in a case of rape.

worked out in advance by the legislator, they would be just as predetermined as are the elements in the system of elements in chemistry.[35]

We would like to show why this is impossible in terms of a combinatorial analysis.

We are here dealing with 3-2 issues (articles) which make combinations of two, three, four, five, etc., elements at a time. Theoretically it is possible to have combinations from two at a time up to 3-2 at a time. However, as a matter of practice we hypothesize that the application of the rules of criminal law rarely involves more than five issues at a time, if for no other reason then because the human mind finds it difficult to combine more than that many issues and still reach a solution. So we shall limit ourselves to combinations up to five at a time, assuming, however, that if a combination of two is comprehended in the combination of three, four, and five at a time, then the problem is not the same and these combinations ought to be counted separately.

The combinatorial formula for computing the number of combinations (C) of *r* issues at a time out of a total set of *n* issues is as follows:

$$C^{n}_{r} = \frac{n!}{r!\,(n-r)!}$$

Thus, under the above assumptions the number of combinations, taken two, three, four, and five at a time is:

$$\binom{362}{2} + \binom{362}{3} + \binom{362}{4} + \binom{362}{5} = 5.11 \times 10^{10}$$

[35] This, of course, is impossible. The most perfect criminal code can never yield singular logical solutions to all possible combinations of its elements.

Fifty billion combinations is a number that can never be de facto worked out by any legislator, yet in a perfect criminal code all these combinations would each yield a single correct answer and thus it could be concluded that, although the legislator has not actually worked out all the possible combinations by thorough logical consistency and the structure of the code, he has nevertheless prevented the judge from interpreting the rules of the criminal code because only one clear-cut answer is yielded from every combination.

However, the above computation is misleading because it comprehends combinations of two, three, four, and five issues in either the general or special part of the code. If we take into account this separation into the general and special part, it becomes clear that out of two issues one has to be from the general part and one from the special part, because there can be no question of guilt, insanity, etc. , unless there is an act involved, and this means that at least one issue is to be from the special part. The converse is also true, because there can be no offense (special part) which does not involve at least the question of guilt (general part). The same is true of combinations of three issues taken at a time (at least one issue from either the general or special part), four at a time and five at a time.

This requires a modification of the above formula to the following one:

$$\frac{362}{2} \times 99 + \frac{99}{2} \times 362 = 4{,}686{,}660$$

The above computations hold true where we take three issues at a time. To this we have to add the number of combinations where we take two issues at a time (263 x 99 = 26,037), and the analogous computation of the number of combinations for four and five issues taken at a time, and the total number there is 672,257,982 possible combinations.

This proves how useful the division of the issues is into the general and special part: 5×10^{10} as compared with ca. 5×10^{8}. Of course, this is not related to the formal separation of the issues into the general and special part of the code and holds just as true for the

common law as it does for the Continental law: the effect lies in the conceptual rather than the formal separation.

The concept of "judicial interpretation" may, in terms of our analysis, mean two things:

1) it may mean simply the establishment of a single correct answer to the problem presented by any one of the above 600 million combinations, i.e., if we talk in terms of the "ideal" criminal code;
2) it may mean the creative process of finding a solution to any one of the 600 million possible combinations presented in particular cases where the single correct answer is not yielded by putting together two, three, four, or five issues at a time.

This "creative process", however, will most often mean a referral to the "spirit of the law", so violently criticized by Beccaria, because when the code itself does not yield a logically inevitable answer, what begins to matter is "the intention of the legislator", as perceived by the particular judge.

One can only speculate as to what percentage of cases will require the input of the "creative process". But even if our estimate is very low, say 10 percent, this still means 6 million combinations.

In other words, it is impossible to avoid judicial interpretation of the rulels of (criminal) law; "strict interpretation of the statutes" is thus a question of degree, or, an impossibility in absolute terms. Beccaria's "perfect syllogism" will not be applicable in many cases, because the application of the rule of criminal law is never only a subsumption under one abstract rule of a simple life situation. It always involves at least two rules and most often more than just two.[36]

[36] In that sense, of course, Professor Berman's position is, in the last analysis and for reasons different from those that he advances, entirely acceptable. Professor Berman attributes vagueness and indeterminacy to the metalogical nature of legal reasoning; we are merely saying that the reasoning itself is, or at least can be perfectly logical, insofar as it is possible to catch the life into

If we take into account the fact that we neglected the problem of subsumption of the same fact-combination under more than one different abstract rule of the criminal code, because there are rulels such as lex specialis derogat legi generali, or, lex posterior derogat legi anteriori; if we take into account that there are several different incompatible postulates in every modern criminal code, for example, in the case of a murder which will never be repeated, the goals of general and special prevention are incompatible and the punishment imposed clearly a compromise of two postulates which neutralize each other and allow the judge to use his own intuition (arbitrariness); if we take into account that every article comprehends usually more than one, or two issues, etc. – we are bound to come to the conclusion that the idea of preventing judicial arbitrariness is an illusion.

X.

But because the above illusion was seen as possible, and thereby made a fiction, there occurred a series of consequences in Continental criminal legislation, in the procedure, in short within the whole operation of the criminal legal process. The belief that criminal adjudication can be judge-proof led to the following fictions:

1) concise and logically consistent criminal legislation is possible and it ought to be achieved by legislative skill;
2) there exists nothing but the law, the criminal code, and there is not need to make past decisions of judges a part of the law, since it is obvious that the code itself provides all the singularly correct answers to all the possible combinations: in other words, there is no need to make specific rules concerning particular combinations of issues, and if there is such a need, it can be easily resolved by adding qualifications to already existing incriminations;
3) the logical exactitude of the inevitably correct solutions provided by the code makes the judge a kind of computer, a machine, which occasionally may not be correct in his

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well defined legal concepts. Professor Berman explains the indeterminacy of law on the basis of form, we attach it on the basis of substance.

service, yet this can clearly be solved by the procedural means of appeal; the possibility of arbitrariness being reduced to zero, not much attention will be paid to the recruitment of judges.

The consequence of these fictions has been that the predictability of decisions in a Continental criminal court is much lower than it could otherwise be. Because the judicial solution of a particular combination of issues is, although recorded in the case file, never printed or otherwise made available to the broader professional public for future use, and (with the exception of the minimal publication of the supreme court decisions because of the idea that they ought to help make the practice more consistent and uniform) there is no accumulation of knowledge. Every judge, when he encounters a novel combination of issues will have to solve it by himself and only for himself, without having any organized access to possible previous solution of the same problem: the cases are not recorded, there is no Shepard's to find similar cases, there are no digests. Since the channels of communication between different judges solving similar combinations of issues through the dimensions of time and place have been cut, (1) the progress in the differentiation of the legal concepts that occur in repeated confrontation with reality, (2) progress in the cumulation of information and ingeniousness in solving particular problems, the progress which makes the solutions of more able judges available to less capable ones and makes possible further progress through innovation – all this is stifled.

There is optic proof of this in the comparison of a European criminal code with the mass of legal information compiled in the Anglo-Saxon legal system: one relatively small book compared with mountains of books. The issue, for example, of behavior modification as a means of reformation receives not attention in the Continental system, although perhaps there are some cases related to that, whereas in the United States the problem is dealt with in several recorded and retrievable cases. The problem of the use of the polygraph in criminal procedure receives one sentence in the code of criminal procedure, an abrupt and categorical statement by the legislature about its admissibility whereas in the United States there are more than 100 cases in which one gets a considerable amount of factual and legal information; perhaps the solutions are not clear, but at least the problem is

articulated. The same problem, however, harkens back to the Continental legislator himself, since he has no available information when he is supposed to make a policy decision on the admissibility of polygraph evidence. What often happens in such cases is that a particular country gets some information from the Anglo-Saxon system, promulgates a procedural rule, which is blindly copied by all who do not have the available information themselves, and is then commented upon by professors who do not have any serious available information. This will not be true in all cases; obviously, but many cases do not arise anyway, because many problems are overlooked in the first place.

Many problems are overlooked for the simple reason that Continental criminal law and theory do not have sufficient contact with reality. The feedback channels are cut because judicial decisions are not recorded and thus not accessible to the professional public. But, why are they not recorded in the first place?

It is our belief that this is due to the fiction that a judge's decision is not law, but only an application of the law; that all the decisions, all the possible combination are somehow embodied in the structure of the code and that all a judge does is merely make a potential logical outcome concrete, that he, in other words, does not make law, but only produces a solution which was already immanent in the criminal code.

This frustration of the growth of knowledge in law has numerous other consequences. One of them is the fact that the law as a subject represents much less of a challenge on the Continent, requires less intelligence to operate it and less ability to think and work in it. It is simplistic and simple at the same time. This makes the study of law substantially easier, or, in other words, many more people are capable of becoming lawyers. This increases the supply of lawyers on the market, which in turn reduces their price and makes the legal profession a vocation even less attractive to those who think they can do better. This draws into the legal profession the kind of people who think that they could not make it elsewhere, for example, as doctors, engineers, etc. They enter the profession with lower expectations, but also with a lower commitment which in turn, because they

soon operate the legal system, makes them satisfied with the system as it is, which, taking into account the element of time and the need for progress, means that the system is further simplified.

On the other hand this has the positive advantage that legal aid is cheaper, because legal fees are lower, and since the system is simplistic anyway, the low quality of legal help really is not as pernicious as it would be in the Anglo-Saxon system.

The predictability of decision-making in the Continental system is low, because not many of the combinations have been worked out in advance (or rather, have not been made public) and thus the judges tend to rely on the professional advice of their colleagues. this advice however, cannot be known by the defense counsel or by the prosecutor because this is the so-called oral law and its distinguishing characteristic is that it occurs between two or three people privately, whereas the recorded information of the Anglo-Saxon system in effect makes the advice a judge may get from the other judges available to those concerned with the prediction of the outcome of the case. In Continental legal systems this prediction is based on the good or bad intuition of the predictor, his personal knowledge of the judge, etc. On the other hand, these same characteristics will in some cases enhance the predictability, because of the above described lack of differentiation, reduced to a narrower spectrum and thus the method of plausible guesses in prediction has a lower probability of mistake even though not much thinking is involved.

Also, because the commentaries of the codes are often taken for granted by the judiciary, this makes prediction in certain cases easier, because one can count on the fact that the judge will follow the commentary written by a well respected university professor. This is all the more true because the judge in the Continental system sees himself not as a law-maker, or a law-interpreter, but rather as an official executor of the law: his perception of his own manoeuvring space is narrow indeed; he thinks that creativity ought not to play a role in decision-making and this perception becomes his habitual attitude in solving cases and thus, if a solution is offered to him in the commentary, he is more likely to accept it without much further deliberation. In contrast the self-assertive Anglo-Saxon judge is less

likely to accept an offered solution un-reflectively, and thus predictability is reduces to some extent.

Another important consequence of the cutting of the channels of information by ignoring the law-making dimension of judicial decision-making is that the creativity of differentiation and adaptation of legal norms is limited to the legislator. “The legislator”, however, is usually a group of professors, senior judges, and prosecutors, who divide among themselves the labor of the creative adaptation of the rules of criminal law – when the occasion for law reform arises. This group of perhaps at most 20 people is then expected to perform the creative work which in the Anglo-Saxon system is spread over a much greater number of lawyers, judges, amici curiae, etc. Quod capita tot sententia, and this in itself limits the reach of creative differentiation. If we add to this the above mentioned impossibility of retrieval of the relevant conclusions arrived at by individual judges in particular cases, we have the following two comparable situations:

1) In the Continental system we have a group of twenty people who work on the criminal code’s adjustment with little available information and no direct contact with reality;
2) In the Anglo-Saxon system we have practically all the lawyers who work within the operation of the criminal justice system participating in the process of solving the combinations of issues, providing new possible answers to old questions, detecting new problems, working out the connections, for example, between Constitutional law and criminal law, etc.

Besides, the above legislative committee is supposed to achieve its goal of reform in a relatively short time span, whereas adaptation in the Anglo-Saxon legal process is built into the system’s operation and thus there is continuous creative input.

XI.

The Anglo-Saxon system of criminal law, however, has its own set of problems, which although often the reverse of those in the Continental system, lead to much the same

results. Take, for example, the question of predictability discussed above. A very high level of predictability indeed, would be expected if the entire above mentioned 10 % of possibly ambiguous outcomes of particular combinations (the number we arrived at was 6 millions) were casuistically worked out one after another. Theoretically, if all these solutions were retrievable, this would mean that the predictability of a solution of a particular case would indeed be perfect. Yet what in fact happens is that, although the facilities of memory and recall are perfected insofar as this is humanly possible, there is an internal communication overload: there is so much information available and relevant that it becomes practically impossible to master it even in the long run, not to mention in the usual situation of the lawyer who, according to Socrates, "is always in a hurry".[37]

> "A growing organization, and hence also a growing state or government, must be able to change its own patterns of communications and organization, so as to overcome the results of the 'scale effect", ……It must resist the trend toward increasing self-preoccupation and eventual self-immolation from its environment; and it must reorganize or transform often enough to overcome the growing threats of internal communication overload and the jamming-up of message traffic."[38]

This detachment from actuality is in fact achieved through too close a contact with it: because, in a constant feed-back process with individual cases, Anglo-Saxon criminal law tends to become too differentiated, too casuistic, too afraid to violate reality a little, too eager to shape every legal pigeonhole to fit the factual circumstances of the case. In short, its creativity is also counter-productive in terms of the practical operability of the system. The consequence is a chain reaction of differentiation of legal concepts, a mass of information impossible to master, and in the last analysis the "jamming up of the message traffic".

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[37] Plato, "Theaetetus", 172.

[38] K. DEUTSCH, THE NERVES OF GOVERNMENT 251 (1966).

To this we add that the handling of a particular case becomes a dependent variable (1) of the ability of the lawyer to master more or less information instead of the rules themselves; (2) of the time available to be committed to a particular case, which in fact means the amount of money the client is capable of spending. But since most criminal defendants do not have the means to pay for an extensive research of the legal determinants of their cases, they are likely to remain without efficient legal help – in a precarious position and at the mercy of the judge and the prosecutor. Unfortunately, this lack of brain allocation to criminal law does not bear upon the actual level of differentiation, since, as is usually the case, it is not the whole population of lawyers involved that creates new developments of a particular legal discipline: perhaps the upper 5 percent engage in this creative process and thus the fact that criminal defendants do not have money to pay for lawyers does not considerably influence the level of differentiation although defendants are in fact left at the mercy of these negative consequence of over- development.

The Continental system is simplistic throughout in a relatively homogeneous manner: judges, prosecutors, and lawyers share the same simplifying attitude toward the law. A criminal defendant there is thus in a position to take advantage of this because at least it enables him to understand what is going on in the case. There is a trade-off between predetermination and theoretical predictability on the one hand, and the intelligibility (non-obscurity) on the other hand: the more predetermined the outcome of a particular case because of the amount of available information about solutions to "similar" cases, the less intelligible and more obscure is legal reasoning to the layman. Besides, a higher level of differentiation involves a higher number of termina technica (jargon) and concepts and a geometrically growing complexity in legal reasoning. And, although predictability theoretically rises in direct proportion to the number of issues determined in advance, de facto because of the above described "jamming up", the reverse may be true at a certain point of hyper-development. Thus, in a certain sense the Anglo-Saxon system has the worst of both worlds, too: it has invested an enormous amount of energy, time, and money into making its system fit reality better and into dealing with the questions in a more differentiated manner, with more conceptual tools, more factual information, and

more sophistication: all this in the erroneous belief that this promotes the goal of criminal law that we call Predictability.

Of course, this was not a deliberate process at all. It derives from the fact (1) that the chain reaction of differentiation had already been started in the English Common law in the 17t^{h-}century's doctrine of precedent; (2) that there was a mergence of profession and aristocracy in the Anglo-Saxon system, which provided for a higher status for the legal profession, greater attractiveness to the more ambitious and energetic part of the population; (3) that from a higher initial energy investment into the process of working out many more combinations resulted; (4) that it is connected with the characteristic distrust of abstractions and deductive reasoning in the English culture, etc. In short, this process may be seen as a positive feedback system with an increasing series of responses, the spiral of a vicious circle, in which the cause at one point in time produces the consequence in the next point in time, which in turn amplifies the power of the first cause, etc.

XII.

Given the complexity of the situation, the impossibility of quantifying most of the factors involved, the difficulty of detecting all the connections between the operation of the criminal justice system and the larger systems of social consciousness, the legal profession and its power, prestige, and income, the dimensions of the political system and the role of the criminal justice therein, etc., it becomes impossible to compare the Anglo-Saxon system of criminal law and the Continental system in terms of precise answers to the question of which system offers more security, more predictability, and is more adequate in its social role.

On thing, however, is clear. The American system has had to resort to plea bargaining and the Continental has not. Plea bargaining is a "short-cut" and in itself it proves that the system of differentiation has hypertrophied.

> "Often in history, growth in organization and progress in technique appear to imply just such a simplification of some crucial link or coupling in the chain of inter-locking and self-sustaining processes by which the organization is kept going. Thus the maintenance of an ever growing written tradition is facilitated by the invention of increasingly simple alphabets and increasingly simple methods of writing and, eventually, printing.
>
> One of the most effective responses to these threats consist in strategic "simplification".[39]

Plea bargaining, however, is not exactly ideal strategic simplification, i.e., it is more a simplification than strategic: it does simplify the whole procedure enormously, but it is incompatible with such goals of criminal law as the ideal of justice, the pursuant of truth, with the aprioristic and deontological nature of criminal law adjudication, etc. It proves that the system of criminal law has been overly differentiated, that it has moved too far on the curve of differentiation and that the jamming up of the message traffic has occurred, that it has become too time-consuming to engage in full discussion of all the elements. The same fact combination in the Continental system will be relatively easy to deal with, although it may be counter-productive in terms of the policies criminal law is to promote.

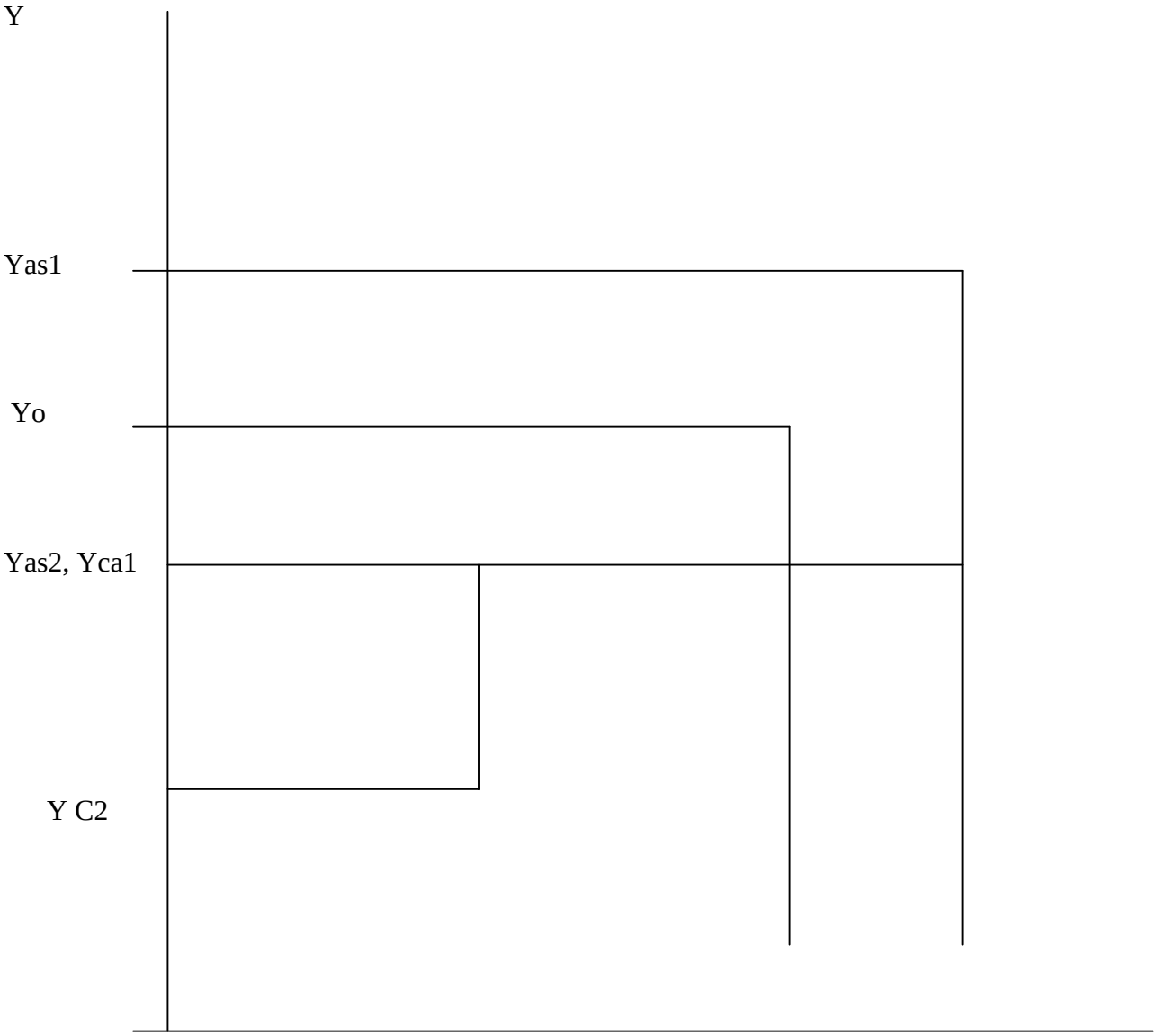
Consider, then, the following diagram, where the obviously unrealistic assumption is that the level of predictability of an outcome in a particular case is solely a dependant variable of the level of differentiation achieved either in the same system at some point in time, or in different systems of criminal law. The curve *q* (the level of differentiation achieved at

[39] A computer, however, can take into account as many similar correlations at a time as we wish, and thus we could have the whole mass of factors and their mutual influences worked out at one particular point in time. There, however, the problem occurs of how to quantify the factors and how to know that the whole set of them is in fact not a circle of mutual validation existing only in the mind.

a point in time or in a particular system) rises progressively, because once the chain reaction of differentiation is started its progression becomes more than arithmetical. It becomes geometrical, if not logarithmical. On the other hand the curve p rises with the curve q (as its dependant variable). At point where zero issues are predetermined, the predictability of an outcome is likewise zero (a despotic, and arbitrary system, Weber's irrational lawmaking and law-finding, etc.). Thereafter the predictability, for some time, rises with the number of issues determined in advance (i.e., with the number of differentiations in the system of criminal law), because one has clear-cut conceptual tools to grapple with particular fact combinations. That is, differentiation, is nothing more than making separate conceptualization for separate fact combinations.

(P)

Predictability as a dependent variable of the level of differentiation (predetermination of outcome of particular combination of issues):



legend: X axis: time or a continuum of different systems of criminal law

X axis: number of issues determined in advance by the legal system

The level of predictability, i.e., the probability of a correct answer of how the particular combination of issues is going to be solved in a particular case

XoYo: the optimum point where both differentiation and predictability are maximized

Xas Yas1 Yas2: the projected point of an overdeveloped system of criminal law where jamming-up of the traffic of messages has already occurred and the predictability therefore has sharply declined;

Xc Yc1 Yc2: the projected point of an under-developed system of criminal law where there is still enough possibility for further differentiation in order to increase the predictability.

But the point O, where the value of both x and y, i.e., the value of differentiation and predictability are maximized, is the point of reversal: further differentiation leads to a decrease in predictability because of the "jamming up of the message traffic" and because of other accompanying phenomena w described above. Thereafter further differentiation will result in a sharp decrease in predictability. Taking into account just these two elements it then turns out that (1) a system of criminal law may well become overdeveloped in time and become counter-productive to its own goals, i.e., less predictable, less uniform in the application of rules, less "just" because similar cases are amenable to different outcomes, less consistent in its pursuit of the policies implicit in the system, etc.; or (2) on the other hand this scheme may be seen as a comparison of different systems, where, for example, the Anglo-Saxon system is probably left at the O (optimum) point in which both predictability and differentiation are maximized, and therefore resort to the short-cut (plea bargaining) occurs to make the system manageable.

The Continental system, however, is probably to the left of the O (optimum) point because there differentiation and predetermination are so low that they in fact do not afford much of predictability either.

Of course, to make the picture more realistic, there ought to be numerous other similar diagrams showing different correlations between different factors of the system. But since the great majority of them are not in the least quantifiable and since it is doubtful that they can be operated as relatively independent variables, since it is impossible to say what the real correlations are between different elements-factors of the system, since it is impossible to isolate the correlation of any two of them without taking into account numerous others and the system as a whole, this would not be worthwhile. Still, an analysis such as the one above makes it possible to see the problem in a different and more differentiated perspective in which it would be possible to break down different goals and factors and to prove their mutual incompatibility and correlation.

Beccaria advocated "geometric precision" and he also was the first one to introduce mathematical analysis into economics. He would no doubt have liked this kind of

analysis and would have preferred it to the “seductive eloquence and timorous doubt”. Indeed, if (1) we realize how fictional, circular, and assuming concepts such as “differentiation”, “predictability” etc., in fact are; and, (2) we do not assume their truthfulness but use them only as a mode of analysis, advantageous to verbal manipulation, then these fictions can be useful in proving the fictitious nature of previous modes of analysis.

For example, Beccaria advanced the postulates of non-obscurity, of the simplicity of the rules of criminal law on the one hand, and at the same time the goal that the judge should perform a perfect syllogism and avoidd “interpretation” and resort to the “spirit of the law” on the other hand. He wanted both goals at the same time. We have shown, however, that after a certain point the avoidance of judicial interpretations involves a trade-off in predictability. We have proved that a perfect criminal code, with singularly logical outcomes of all the possible combinations, is an impossibility and a fiction, and that this fiction in European criminal law leads to the neglect of such mundane matters as the recruitment of judges, because the belief that judges can function without making law leads to ignoring their importance in the process of adjudication. We have proved that the number of combination is so large that it is practically impossible to make a judge-proof criminal code and that of necessity some lawmaking will be left to judges. Thus we have eliminated the fiction that judges do not make law, the fiction which in fact produced the consequence that judges were making more law than in the Anglo-Saxon system, while ostensibly they are given greater power here than on the Continent. The fact that Continental judges adhered to the same fiction of the “perfect syllogism” explains why they themselves do not see themselves as law-makers, which supposition is supported by the fact that there is no cumulation and exchange of information about particular judicial solutions. Thus the fiction of the “perfect syllogism” produced the “fiction of the non-law-making judge”, this faction is responsible for the non-printing of judicial solutions to particular cases, which in turn reinforces both the fiction of the perfect syllogism and the fiction of the non-law-making judge.

The reality, however, is quite different from this circle of fictions and can be unraveled only with a mode of analysis that breaks out of the circle by introducing at a certain point in the circle a notion and a mode of thinking which is not contaminated with the assumptions lawyers usually work with.

However, it would be fictitious in the second degree if we believed, as they do for example, in econometrics and policy decision making, that what we have discovered is "truth". We have just ascended to a different level of the circle of fictions hopefully a higher and more useful level in terms of our goal: to make criminal law more consistent. Just as Beccaria's fictions were useful in his own time, so these fictions may be useful today, because they a precipitate a change in the mode of operation of the system of criminal law. But since all the concepts the human mind invites in order to manipulate reality toward goal and purpose are fictional and unrealistic in all respects other than in respect to this particular goal and purpose, a change in the goal and purpose will make the fictions sooner or later become transparent and they will be replaced with fictions that are more useful in terms of attaining the new goal and the new purpose.

CONCLUSION

If it is true that neither the words themselves, let alone their combinations, can make absolute a promise between people and groups; if it is accepted that the idea of legality, if isolated from a relatively stable balance of social forces, is an illusion, if not delusion, then, the question is: what role do written rules purporting to be guarantees play?

Generally, of course, the degree of guarantee or safeguard needed is in direct proportion to the amount of mistrust in any human or group relationship. Mistrust, on the other hand, is but an awareness of incompatibility of interests between individuals and groups. It follows, that there will be no need for guarantees, safeguards and therefore for rules in the following two hypothetical situations. First, if there is no conflict of interest (family, postulated communistic society) and, second, if the individuals involved are not aware that there are conflicts of interest.

But conflicts of interest have in the class sense, heretofore, always existed in history. If history has not been a total bellum omnium contra omnes this must only be attributed to the lack of awareness or vast preponderance of oppressive forces - usually both. The reader will at this point perhaps remember the references to dominant social consciousness and its hegemony over society's strata made in the first chapter. In that sense, the society is literally held together by the dominant social consciousness induced by social practices - the enforcement of criminal law being a major one of them.

It, therefore, cannot be stressed too often, that the role of criminal law, even though both its adjudication and its legality are illusory, is to give the appearance of legitimacy and reality to lies such as justice, right and wrong, and a series of other more particular elements of the morality and duty. After all, does a statement that something is wrong, carry any power, unless it is backed up by God or some physical

power of the law? Thus, I think it is fair to say, that were it not for Church and Court, future individuals would become unscrupulous psychopaths (except that in such a case the term "psychopath" would not even carry its present-day negative connotation).

Consequently, even though it is easy to show how little substance there is to adjudication and legality, how untrue they are they are in their descriptive and in their prescriptive garb, they are nevertheless useful even as lies. Their power lies in the sphere of moral inhibition introjected into the individual psyche, the sphere that once established (as Superego), cannot be undone by mere rational and persuasive argument.

On the other hand, once these moral inhibitions have loosened their grip to the point, where it is possible for reason to penetrate the appearances of these socially useful lies (myths) - this could be called the intellectual aspect of anomie - then these false values dissolving into destructive truth can no longer be sustained. After all a lie, useful as it may be, can only masquerade as truth if nobody challenges it: the Emperor can walk naked only if onlookers are willing to believe that their disbeliefs are a proof of their incompetence. In that sense, every Emperor and government can have power only to the extent to which people are afraid to believe their own independent thoughts. The "objective reality" of the enforcement of criminal law, with its judges, courts, lawyers, policemen, jails, prisons and electric chairs, supports with intellectual legitimacy derived from criminal law's conceptual structure, the reification of a value system which conceals the harsh and unjust reality. The indoctrinative effect is stronger than that of mass media, for it appears to be something more than mere communication.

At the core of this, therefore, lies the problem of power - power of one human being over another. The power to make a man a means to something outside himself. In this sense, history is above and beyond the individual, because in the system of exploitation even the exploiters, as Hegel has shown, are exploited. Power of

necessity alienates man from man and therefore man from himself and the world[40]. In that very real sense throughout history the individual has been continually a sacrifice on the altars of power and "progress". Even the historic materialists assume that the cascade of social orders from slave-ownership to capitalism gives "meaning" to the sacrifice of the individual. This whole theory, therefore, depends on the meaning of "progress". In the name of this "progress", the individual has arrived at the state where he has never been more alienated from "his self", and the human species has arrived at the point where it has never been closer to self-destruction.

Criminal law was and is an accomplice in this process of destruction of the individual, but on the other hand, it thus helped to make the "progress" possible. Criminal law is justified, if progress is the lesser evil. But it is not.

[40] CF. Unger, KNOWLEDGE AND POLITICS, 1975 at 191-235.
Kojeve, Introduction to the Reading of Hegel, 1969.