
Alternative Ideologies of Law: Traditionalists and Reformers in Eighteenth-Century Lombardy

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Cesare Beccaria's *On Crimes and Punishments*, published in 1764, represented a new, "bourgeois" outlook on criminal justice and law in general. According to Beccaria, law was impersonal, appealing to self-interest and establishing equality of opportunity through the direction of central government. In contrast, one of Beccaria's most vocal critics, Ferdinando Facchinei, expounded a more traditional, feudal ideology. According to Facchinei, law was divinely sanctioned, justifying the immobility among classes, and enforced in a kindly but paternalistic manner. Modern scholars have dismissed Facchinei's ideology, adopting Beccaria's as "virtually self-evident". The author discusses both these world views. He submits that, while the respective proponents of each view differed in many respects, they were in fact speaking within the same framework. They both addressed the landowning elite of eighteenth-century Lombardy and tried to justify this group's power. Indeed, the two sides can be seen as representing "sub-ideologies" rather than diametrically opposed world views.

Dei delitti et delle pene (Des crimes et châtiments) de Cesare Beccaria, publié en 1764, présente une vision nouvelle et bourgeoise de la justice criminelle et du droit en général. Selon Beccaria, le droit est impersonnel. Il fait appel à l'intérêt propre et établit une égalité d'opportunité par la direction du gouvernement central. Par contre, Ferdinando Facchinei, critique acharné de Beccaria, propose une idéologie féodale plus traditionnelle. Pour Facchinei, le droit est de sanction divine. Il justifie l'immobilisme des membres des classes. Il est appliqué avec bonté mais d'une façon paternaliste. Les intellectuels modernes ont rejeté l'idéologie de Facchinei et adopté, comme allant de soi, celle de Beccaria. L'auteur étudie ces deux visions du monde. Il soutient que, bien que les deux adversaires aient eu des vues divergentes sur plusieurs sujets, ils évoluaient dans un cadre de référence commun. Ils s'adressaient tous deux à l'élite foncière de la Lombardie du dix-huitième siècle et tentaient de justifier son pouvoir. On peut même aller jusqu'à dire que ces adversaires ne représentaient que deux « sous-idéologies » plutôt que deux visions du monde diamétralement opposées.

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I. Introduction

The publication of Cesare Beccaria's *On Crimes and Punishments* in 1764 has been taken as representing a drastic departure not merely in the manner of conceiving criminal justice, but of thinking about the nature and function of law itself.¹ Beccaria and his friends who gathered in the so-called "Academy of Fists" in Milan under the leadership of the indefatigable Pietro Verri² have been seen as exponents of a "bourgeois" ideology, a way of seeing and evaluating the world quite different from the "feudal" ideology

¹F. Venturi, *Utopia and Reform in the Enlightenment* (Cambridge: Cambridge University Press, 1971) at 106; see also, M. Weisser, *Crime and Punishment in Early Modern Europe* (Atlantic Highlands, N.J.: Humanities Press, 1979) at 133-36; and M. Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (New York: Pantheon Books, 1977) at 11-30, 74-101.

²The members of the Academy of Fists were young men drawn from the Milanese elite who were determined to bring Enlightenment ideas to the culture and government of Lombardy in particular and to Italy in general. See F. Venturi, *Settecento riformatore*, vol. 1 (Turin: Giulio Einaudi, 1969) at 645-718. Pietro Verri was the moving spirit of the group. He wrote copiously on economic and administrative matters, vehemently rejecting traditional judicial governance in favor of active state intervention in economic improvement. See M.R. Manfra, *Pietro Verri e i problemi economici del tempo suo* (Milan: Albrighti, Segati, & C., 1932); Limoli, "Pietro Verri: A Lombard Reformer Under Enlightened Despotism" (1958) 18 J. Cent. Eur. Aff. 254.

of an earlier day.³ To some modern scholars, the world view expounded by the Academy of Fists seems virtually self-evident.⁴

In contrast, twentieth-century researchers have paid scant attention to Ferdinando Facchinei, Beccaria's earliest and in some respects most perceptive critic. A monk from Vallombroso in Venetian territory, Facchinei published his *Notes and Observations on the Book Entitled, On Crimes and Punishments* in 1765.⁵ The members of the Academy of Fists angrily replied to his work,⁶ which purported to indict Beccaria's book on no fewer than six charges of sedition and twenty-three of impiety. Beccaria himself affected an Olympian disdain for Facchinei, at least in print.⁷ Modern scholars, for their part, have either found Facchinei's writing turgid and his principles incomprehensible, or else they have dismissed him as an exponent of a vanishing world view.⁸

Prevailing interpretation certainly confirms that there has been a paradigm change between Facchinei and twentieth-century readers. A clear sign of a drastic divergence in world view is incomprehension.⁹ Cultural historians have noted that when two groups hold to vastly differing ideologies,

³D. Humphries & D.F. Greenberg, "The Dialectics of Crime Control" in D.F. Greenberg, ed., *Crime and Capitalism* (Palo Alto, Cal.: Mayfield, 1981) at 223-24; see also P. Jenkins, "Varieties of Enlightenment Criminology" (1984) 24 *Brit. J. Criminology* 112.

⁴P. Gay, *The Enlightenment: An Interpretation*, vol. 1 (New York: Knopf, 1969) at 439-47; M. Maestro, *Cesare Beccaria and the Origins of Penal Reform* (Philadelphia: Temple University Press, 1973) at 3-45, 125-43.

⁵F. Facchinei, *Note ed osservazioni sul libro intitolato Dei delitti e delle pene* (Venice: no publisher indicated, 1765); see D. Young, "Property and Punishment in the Eighteenth Century: Beccaria and His Critics" (1986) 31 *Am. J. Juris.* 121 at 130-32.

⁶P. Verri & A. Verri, "Risposta ad uno scritto che s'intitola Note ed osservazioni sul libro Dei delitti e delle pene" [1765], in C. Beccaria, *Dei delitti e delle pene: Con una raccolta di lettere e documenti relativi alla nascita dell'opera e alla sua fortuna nell'Europa del Settecento*, ed. by F. Venturi (Turin: Giulio Einaudi, 1965) at 178 [hereinafter, *Delitti* (Venturi ed.)].

⁷C. Beccaria, *On Crimes and Punishments*, trans. D. Young (Indianapolis: Hackett, 1986) at 6: "I have given public testimony of my religion and of my obedience to my sovereign in my reply to [Facchinei's] *Notes and Observations*; it would be superfluous to answer other writings of this sort."

⁸Maestro, *supra*, note 4 at 35-38; Venturi, *supra*, note 1 at 102-05; see Torcellan, "Cesare Beccaria a Venezia" (1964) 76 *Rivista storica italiana* 720 at 721-23.

⁹T. Kuhn, *The Structure of Scientific Revolutions*, 2d ed. (Chicago: University of Chicago Press, 1970) at 111-59. In the context of changing scientific paradigms, Kuhn points out that, as a new paradigm becomes entrenched, older assumptions and world views appear silly, affected, or altogether incoherent. Changes in conceiving the nature of the world alter what is accepted as a legitimate question or as a legitimate answer. Thus, incomprehension becomes inevitable.

world views, or ways of making sense of the world,¹⁰ neither side can understand the other.¹¹ Often one side can make sense of the other only by forcing it onto the Procrustean bed of its own ideology. Thus, elite groups have “made sense” of folk beliefs and practices by treating them as heresy or witchcraft, thereby distorting the significance of these beliefs beyond the recognition of their adherents.¹² Such ideological misunderstandings can operate between periods as well as between groups. The basic assumption and values of the investigator are so remote from those of the investigated that incomprehension, distortion, or cavalier dismissal are inevitable.¹³

If there is a drastic ideological paradigm shift between modern academicians and Facchinei, however, it does not follow that there was such a gulf between Facchinei and the Academy of Fists. Literary and art historians have emphasized that the ideology of a work is best found in the outlook of its intended audience rather than in the unique individuality of the writer, composer, painter, or sculptor.¹⁴ Generally, works addressed to the same audience share a common set of underlying attitudes and concerns, no matter how much the works may differ in specific proposals or in the courses of conduct they recommend.¹⁵

¹⁰As used here, “ideology” refers to assumptions about facts and values that enable one to make sense of the world. Without such assumptions, it would be impossible to comprehend either the physical or the social universe. A person without an ideology would be, like Tristram Shandy’s mother, incapable of understanding or evaluating anything. In this essay, “ideology” does not refer to false consciousness, for consciousness can be judged false only in light of the evaluator’s own ideology. J.M. Balkin, “Ideology and Counter-Ideology from Lochner to Garcia” (1986) 54 U.M.K.C. L. Rev. 175 at 176-77. Anthropologists have long been concerned with ways of making sense of the world. As used here, a “way of making sense of the world” is synonymous with an “ideology”. Historians have applied this anthropological concern, showing how social groups made different assumptions about how the world does work and how it should work, thus arriving at very different understandings. See R. Darnton, *The Great Cat Massacre and Other Episodes in French Cultural History* (New York: Basic Books, 1984) at 3-7, 257-64.

¹¹E.g., C. Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth Century Miller*, trans. J. Tedeschi & A. Tedeschi (New York: Penguin Books, 1982) at 125-28.

¹²*Ibid.* at 65-91; see C. Ginzburg, *The Night Battles: Witchcraft and Agrarian Cults in the Sixteenth and Seventeenth Centuries*, trans. J. Tedeschi & A. Tedeschi (Baltimore: Johns Hopkins University Press, 1983) at 69-145.

¹³Darnton, *supra*, note 10 at 9-106; Foucault, *supra*, note 1 at 3-68.

¹⁴J. Wolff, *The Social Production of Art* (New York: St. Martin’s Press, 1981) at 26-48, 117-143; see also N. Hadjinicolaou, *Art History and Class Struggle*, trans. L. Amal (London: Pluto Press, 1978) at 95-148. Though the expression “vulgar Marxist” might have been invented to describe Hadjinicolaou, his concept of a “visual ideology” rooted in the intended audience has been widely accepted and much refined by art historians.

¹⁵J. Wolff, *Aesthetics and the Sociology of Art* (London: G. Allen & Unwin, 1983) at 85-108; see also J. Berger, *Ways of Seeing* (London: Penguin, 1972) at 83-112.

This essay maintains that Facchinei on the one hand, and the members of the Academy of Fists on the other, shared a number of fundamental values and assumptions and that they spoke to the same audience. Addressing the educated, landowning elite of northern Italy, both the "reactionaries" and the "reformers" were concerned with how that elite could maintain its power and justify its position, both in its own eyes and in the eyes of the popular classes.¹⁶ Both sides assumed (not unreasonably in light of the limited productive capacity of their society) that a "people-condition" was the inevitable lot of the vast majority of their fellow citizens.¹⁷ Given that postulate, both sides looked for the most effective economy of power to maintain order. Beccaria and his colleagues believed that they had found the answer in treating the law as the will of every member of society, making law impersonal, establishing ostensible equality of opportunity, exalting the power of the central government and appealing to self-interest. Facchinei believed the solution lay in treating the law as the command of divinely sanctioned superiors, making the law redolent with personal authority, maintaining sharp distinctions of rank, exalting local authorities and appealing to religious motives.¹⁸ The two sides were not caught in a web of mutual incomprehension, however, and Facchinei probably understood Beccaria better than some ostensible supporters.¹⁹ Similarly, the members of the Academy of Fists fully appreciated the force of Facchinei's arguments, at least in private.²⁰

Given a common audience and common concerns, the two sides can almost be seen as representing "sub-ideologies" rather than diametrically opposed world views. Just as liberals and conservatives in modern America accept the tenets of Liberal capitalism and share much common ground,²¹ so the Academy of Fists and Facchinei shared more than either probably cared to admit.²² Unlike modern American liberals and conservatives, however, the Italian opponents lived at a time of ideological transition from a feudal to a bourgeois outlook. Nevertheless, the reformers and the reac-

¹⁶See Jenkins, *supra*, note 3 at 112-16.

¹⁷See H. Chisick, *The Limits of Reform in the Enlightenment* (Princeton: Princeton University Press, 1984) at 45-75; see also D. Young, "Enlightened Obscurantists and Conservative Revolutionaries" (1986) 26 Hist. Educ. Q. 265 at 266-67.

¹⁸Young, *supra*, note 5 at 131-32.

¹⁹D. Young, "Let Us Content Ourselves With Praising the Work While Drawing a Veil Over its Principles: Eighteenth-Century Reactions to Beccaria's *On Crimes and Punishments*" (1985) Just. Q. 155 at 158-60.

²⁰*Ibid.* at 161-64.

²¹J.M. Balkin, "Taking Ideology Seriously: Ronald Dworkin and The CLS Critique" (1987) 55 U.M.K.C. L. Rev. 392 at 416-31. Sub-ideologies may be defined as alternative interpretations of the same basic assumptions and outlook.

²²See D.M. Klang, "Reform and Enlightenment in Eighteenth-Century Lombardy" (1984) 19 Canadian J. Hist. 39 at 39-44.

tionaries were, in some respects, closer to one another than either was to a radical such as Rousseau or to an early socialist such as the Abbé Mably.²³ This is not to minimize the differences between Facchinei and the reformers, but those differences can be clearly appreciated only when one realizes that they were speaking within the same framework. They did not speak past one another from the basis of utterly different ways of making sense of their world.

II. Background, Audience and Common Assumptions

Northern Italy in the eighteenth century was a society dominated by a landowning elite.²⁴ Agriculture far over-shadowed any other activity, and an entrepreneurial bourgeoisie scarcely existed.²⁵ The English traveler Arthur Young was equally impressed by the advanced state of husbandry and by the backward condition of industry and commerce in the region.²⁶ Such entrepreneurs as there were achieved their highest success in government finance and tax farming, and the ambition of the successful *borghese* was to acquire a landed estate and become a *gentiluomo*.²⁷

The landed elite reaped the greatest benefits from the agricultural prosperity of the eighteenth century and enjoyed a corresponding political dominance. The "unification" of both Venetia and Lombardy in the later Middle Ages had not meant centralization so much as a confirmation of the powers of local elites.²⁸ Similarly, the imposition of Hapsburg rule in Lombardy in the sixteenth and seventeenth centuries had merely superimposed a new administrative layer atop the entrenched local powers.²⁹ In the eighteenth century, landowning families controlled local political institutions and remained content with trade regulations which gave them a monopoly over the grain supplies in their areas.³⁰

²³See Young, *supra*, note 5 at 132-35; see also Jenkins, *supra*, note 3 at 114-17.

²⁴A.I. Grab, "The Politics of Subsistence: The Liberalization of Grain Commerce in Austrian Lombardy Under Enlightened Despotism" (1985) 57 J. Mod. Hist. 185 at 189-91; M. Romani, "L'economia milanese nel Settecento" in *Storia di Milano*, vol. 12 (Milan: Fondazione Treccani degli Alferi per la Storia di Milano, 1959).

²⁵S. Woolf, *A History of Italy, 1700-1860: The Social Constraints of Political Change* (London: Methuen, 1979) at 89, 101, 129; see C.A. Vianello, *Il Settecento milanese* (Milan: Baldini & Castoldi, 1937) at 227-55.

²⁶A. Young, *Travels During the Years 1787, 1788 and 1789*, vol. 1, 2d ed. (London: W. Richardson, 1794) at 571-72.

²⁷See Klang, *supra*, note 22 at 46-55.

²⁸See S. Woolf, *supra*, note 25 at 20-22.

²⁹*Ibid.* at 63-65.

³⁰A.I. Grab, "Le riforme annonarie nello Stato di Milano (1765-1785)" in *Economia, istituzioni, cultura in Lombardia nell'età di Maria Teresa*, vol. 3 (Bologna: Società Editrice Il Mulino, 1982) 899 at 399-405, 434-37; see Grab, *supra*, note 24 at 185-92.

The economically and politically dominant groups shared a common educational background. The male members of the elite had been reared in schools staffed by the clergy steeped in the classics. Given the close connection between landed status and high positions in the Church, the dominant elite was tied to Catholicism by interest and by ideology.³¹ Though some members of the landowning families later dubbed their clerical schooling fanatical,³² and though many banded together in academies and showed a distinct interest in new ideas from beyond the Alps, few among them were freethinkers, let alone materialists.³³ Their education left them with a common stamp of religion and of classical learning.

This elite audience was not without its internal differences, particularly in Austrian-ruled Lombardy. After the conclusion of the Seven Years' War in 1763, the government in Vienna was determined to centralize its far-flung empire and to extract greater wealth from its many provinces, both by stimulating economic growth and by efficient taxation.³⁴ While most of the Milanese patriciate were hostile to such a program, some, particularly among the younger generation, welcomed it. If the Hapsburgs would curtail the power of local institutions, the elite might still aspire to high positions in the bureaucracy.³⁵ If the Hapsburgs would break down old trade barriers and end local protected markets, landowners might profit by becoming efficient capitalistic cultivators.³⁶ If the Hapsburgs would encourage manufacturing and "luxury", landowners might profit by producing raw materials on their estates, and even by establishing factories there.³⁷ While Facchinei and other conservatives addressed an audience of older, well-entrenched patricians content with their traditional status and local autonomy, Beccaria spoke to an audience of primarily younger civil servants, improving landlords and, perhaps, a small number of talented entrepreneurs eager to rise in the world.³⁸

³¹Vianello, *supra*, note 25 at 191-95; Limoli, *supra*, note 2 at 256-57; see Chisick, *supra*, note 17 at 5-7, 104-17.

³²Letter from Beccaria to André Morellet (Jan. 26, 1766) in *Delitti* (Venturi ed.), *supra*, note 6, 361 at 364-65.

³³S. Woolf, *supra*, note 25 at 82-84; see Beccaria, *supra*, note 7 at 4-6.

³⁴D. Young, "Despotism and the Road to Freedom: Cesare Beccaria and Eighteenth-Century Lombardy" (1984) 13 *Stud. in Eighteenth-Century Culture* 271 at 273.

³⁵See P. Verri, "Meditazioni sulla economia politica" [1771], in P. Verri, *Opere filosofiche e di economia politica*, vol. 1 (Milan: Società Tipografica di Classici Italiani, 1835) at 282-87.

³⁶Grab, *supra*, note 24 at 194-96.

³⁷A. Verri, "Alcune riflessioni sulla opinione che il commercio deroghi alla nobiltà" in S. Romagnoli, ed., *Il caffè, ossia brevi e vari discorsi distribuiti in fogli periodici* (Milan: Feltrinelli, 1960) [hereinafter, *Il caffè*] 183 at 183-95. *Il caffè* was a moral journal modeled on Addison's *Spectator* and published by the Verri circle from 1764 to 1766.

³⁸S. Romagnoli, "Introduzione" to *Il caffè*, *ibid.* at xxii-xxviii; xxxiii-xxxiv; see Humphries & Greenberg, *supra*, note 3 at 223-24.

Though it would be a mistake to minimize the differences between the reformers and Facchinei, it is important to see the extent to which they were writing for very similar, if not identical, audiences. Reformers and traditionalists shared certain values and perspectives, and though their solutions differed, they were offering resolutions to problems viewed in much the same focus. First, though the reformers might indulge in egalitarian rhetoric, both they and the traditionalists took it for granted that any advanced or developed society would be hierarchical.³⁹ Second, both sides assumed that, given inevitable inequality and limited productive capacity, the great majority of the population would always live a rather marginal existence and earn their bread by manual labor.⁴⁰ On these similar foundations the two sides built competing structures. Thus, the paradigm shift from feudal to bourgeois was by no means an overnight affair; so long as the economy, educational institutions and social relationships remained as they were, the two sides could offer their competing visions. Liberal and traditionalist versions of law and justice vied for dominance into the nineteenth century.⁴¹

III. Society and Law

In the view of the traditionalists, society itself was “natural” in the sense that it did not arise from conscious acts of will. Social institutions as they existed were part of the “nature of things”.⁴² For Facchinei, the paternal analogy was most apt for explaining the existence of all authority and all hierarchy:

Men have never been without a master; they have never been independent. It is incontrovertible, moreover, that the first paterfamilias was the first king and that the strongest or wisest among these was, so to speak, their emperor.⁴³

Just as a wife and children were subordinated to the head of the household, so the lower orders in society had been placed under the care and guidance of their betters. The paternal analogy was familiar and, in some eyes, compelling. It spoke of a society whose bonds were personal rather than eco-

³⁹*E.g.*, C.S. Franci, “Dell’agricoltura, Dialogo,” in *Il caffè*, *ibid.* at 48-56.

⁴⁰C. Beccaria, “Elementi di economia pubblica” in C. Beccaria, *Opere*, ed. by S. Romagnoli, vol. 1 (Florence: Sansoni, 1958) at 403, 413, 437-40; see Young, *supra*, note 17 at 266.

⁴¹See R. McGowen, “The Image of Justice and Reform of Criminal Law in Early Nineteenth-Century England” (1983) 32 *Buffalo L. Rev.* 89.

⁴²Facchinei, *supra*, note 5 at 7-12; see McGowen, *ibid.* at 96-98. McGowen clearly shows the force of the image of a natural hierarchical order among conservative British jurists in the late eighteenth and early nineteenth centuries.

⁴³Facchinei, *supra*, note 5 at 13-14. Unless otherwise indicated, all translations are the author’s.

nomie.⁴⁴ It had its harsh side. Thus, Facchinei frankly justified judicial torture, not because it was particularly useful as an investigative tool, but rather because it was necessary that a criminal, like a disobedient child, confess his guilt before the magistrate, his "father".⁴⁵ On the other hand, paternalism had its kindly side; Facchinei was convinced that the elite had much the same duties as did heads of households; if they alone had the right to participate in government, they likewise had a duty of benevolence toward their inferiors.⁴⁶ Traditionalists were apt to point out that Liberal social arrangements were scarcely likely to benefit the poor. In this vein, Facchinei bemoaned the growing replacement of personal loyalties with a cash nexus: "[In former times] servants were called 'slaves', but they were few in number, and they were treated like men. Nowadays, however, they are called 'domestics' but they are numerous, and they are treated like the lowest animals."⁴⁷

Facchinei marshalled the authority of religion to buttress paternalism. Religion, he declared, teaches obedience to parents and to social and political superiors. By enforcing the laws of the country, magistrates are enforcing the will of the Almighty.⁴⁸ Recognizing no distinction between sin and crime, Facchinei insisted on the need to repress intellectual and spiritual dissent.⁴⁹

In the paternalistic, theocratic society he favored, Facchinei was convinced that the very purpose of the law was to reinforce the natural social hierarchy. Different rights, duties, and punishments belonged to different social orders.⁵⁰ To decree equality before the law as Beccaria favored would be impious and seditious. It would, moreover, expose the lower orders to burdens and responsibilities that they were incapable of bearing.⁵¹

Given Facchinei's position, it is scarcely surprising that he favored a wide latitude for judicial interpretation of the law. Understanding the rights and duties of different groups required long study and careful balancing in particular cases; paternalism required discretion.⁵² Most fundamentally, however, Facchinei viewed law as a "brooding omnipresence", as something arising from the very nature of things, rather than as a clear, crisp act of

⁴⁴*Ibid.* at 14, 18; see Humphries & Greenberg, *supra*, note 3 at 223-24; and Young, *supra*, note 5 at 130.

⁴⁵Facchinei, *supra*, note 5 at 63-69; see Foucault, *supra*, note 1 at 33-58.

⁴⁶Facchinei, *supra*, note 5 at 28-29, 55, 106-07, 122, 142; see McGowen, *supra*, note 41 at 103-05.

⁴⁷Facchinei, *supra*, note 5 at 29.

⁴⁸*Ibid.* at 131-62.

⁴⁹*Ibid.* at 13, 40-47, 123, 159-61.

⁵⁰*Ibid.* at 72, 185.

⁵¹*Ibid.* at 164-67.

⁵²*Ibid.* at 23.

will. Law was not a command of the people or the prince, but rather, a rule of reason and religion. Thus, the judge would have to have great erudition and special initiation.⁵³ For conservatives generally, the power of a judge lay in his discretion, and that discretion was to be used to maintain the existing social hierarchy.⁵⁴

The reformers in general and Beccaria in particular vehemently rejected the paternalistic analogy as an appropriate social model. They understood the model clearly enough, and it seemed repulsive to them at an individual as well as a social level. Beccaria himself had been kept under house arrest by his father when the young man indicated that he wanted to marry for love rather than to form a suitable patrician nuptial alliance.⁵⁵ At a societal level, Beccaria maintained that paternal authority should end as soon as children reached adulthood. Any other arrangement would lead to nothing but timorous servility. To the extent that the family could serve as a model for social authority, it made a very poor one.⁵⁶

The reformers were mindful of the benefits of religious belief in maintaining stability, and they were careful to profess their own faith and to concede that belief could yield beneficial results.⁵⁷ They were equally determined that the clergy should enjoy no special privileges and that authority be divorced from any particular creed.⁵⁸ Thus, they were quite capable of turning the tables on Facchinei and pointing out that fanatical sermons had often incited popular revolt and that religion was as often the cause of instability as of order. To suggest that inequalities of wealth and power were divinely ordained was to invite a "prophet" with a "revelation" that the Almighty favored drastic social change.⁵⁹

⁵³*Ibid.* at 25-26.

⁵⁴*Ibid.* at 24. Conservatives commonly argued that a wide latitude of judicial discretion, a just application of mercy or rigor, was essential to maintain the personal bonds of society. See McGowen, *supra*, note 41 at 101-07, 118-20.

⁵⁵Maestro, *supra*, note 4 at 6-8.

⁵⁶Beccaria, *supra*, note 7 at 43-45. Beccaria's chapter "The Spirit of the Family" bristles with personal as well as political hostility towards paternalism:

Suppose there are a hundred-thousand people, or twenty-thousand families, each composed of five persons, including the head who represents it: if the association be made up of families, there will be twenty-thousand men and eighty-thousand slaves; if the association be one of persons, there will be a hundred-thousand citizens and no slaves at all.

Ibid. at 43-44.

⁵⁷*Ibid.* at 4-5, 76. Religious radicalism, so common among the French *philosophes*, was all but unknown among the Italian *illuministi*. Most of them regarded themselves as conventional Catholics, though they were often anti-clerical.

⁵⁸*Ibid.* at 41-42, 72-73.

⁵⁹See *ibid.* at 22, 41, 67.

If a society were neither analogous to a patriarchal family nor the instrument of God's purposes, then the law could not be viewed in the light that Facchinei saw it. Beccaria declared that society itself was a creation of human will, a social contract in which each party surrendered the "least possible portion" of his liberty to the sovereign.⁶⁰ All men, in other words, had willed the creation of the sovereign, but not necessarily the current distribution of wealth or power: "[L]aws, which are or ought to be agreements among free men, usually have been the instrument of the passions of a few persons."⁶¹ Hence it was incumbent upon the sovereign, as the representative of the will of the entire community, to end all confusion and lay down clear, simple laws that everyone could understand.⁶² The law should, in effect, emanate from the will of each person and apply equally to all; it should be mechanical and impersonal.⁶³ Such a program had a radical, egalitarian ring, and Facchinei, intending no compliment, dubbed Beccaria "the Rousseau of the Italians".⁶⁴ Beccaria was no radical, however, and the implications of his program were anything but revolutionary. He repeatedly stressed how legal equality would reconcile those with little property to the existing order. Law impartially applied, he urged, leaves small ground for complaint.⁶⁵ Further, if the law is to be regarded as an act of will, then, in submitting to it, each person is, in effect, following his own will.⁶⁶ This was to be a major justification of Liberalism for years to come, and Kant, among others, took up the theme.⁶⁷ Legal equality and legal positivism would serve as a stronger cement for the social order than benevolent paternalism and religion, so the argument ran.

If law were to be a series of crisp, clean commands, then there could be no room for judicial interpretation or discretion. The members of the Academy of Fists were bitter foes of bodies like the Senate of Milan; such institutions combined administrative and judicial functions and served as bastions of the power of the traditional elite and local custom.⁶⁸ Privately, Pietro Verri had lampooned the Senate and broad judicial discretion in his

⁶⁰*Ibid.* at 8.

⁶¹*Ibid.* at 3.

⁶²*Ibid.* at 12-13.

⁶³*Ibid.* at 10-12.

⁶⁴Facchinei, *supra*, note 5 at 188.

⁶⁵Beccaria, *supra*, note 7 at 37-40, 51-52.

⁶⁶*Ibid.* at 7-9; see D. Young, "Cesare Beccaria: Utilitarian or Retributivist?" (1983) 11 J. Crim. Just. 317 at 319-20, 324.

⁶⁷I. Kant, *The Metaphysical Elements of Justice*, trans. J. Ladd (Indianapolis: Bobbs-Merrill, 1965) at 100-01, 105.

⁶⁸Venturi, *supra*, note 2 at 648-58. The Senate of Milan was much like the French *parlements* or high courts. It served a number of adjudicative functions and claimed a right of judicial review over new legislation.

hilarious *Panegyric Oration on Milanese Jurisprudence*.⁶⁹ Beccaria was more circumspect in print, but he made it clear that judicial discretion was nothing but a synonym for personal arbitrariness. By interpreting the law, he wrote, judges make law, and this is something they have no right to do since they are not sovereigns.⁷⁰ Beccaria was eager to avoid even a hint of personal dependence or subordination. The discretion and interpretative authority of a judge, whether used for purposes of severity or lenience, reinforced the personal bonds so dear to Facchinei.⁷¹ Beccaria, therefore, would have left judges with an almost mechanical task of applying the laws which everybody (ostensibly) had willed and everybody (presumably) understood.

If Beccaria, Verri and their colleagues thought in terms of abolishing traditional courts and the paternalistic power to interpret the law, it certainly did not follow that they believed that the elite of northern Italy should be submerged or lose its hold on power. Their own ambition, and their ambition for their class, was that the elite should be leaders in a centralized, reforming bureaucracy whose chief function would be to improve the Lombard economy.⁷² It is noteworthy that, by the 1770's, most of the members of the Academy of Fists were in high positions in the Hapsburg civil service.⁷³

Traditionalists and reformers disagreed about the nature of society and about the role of law, and they obviously spoke most concerning their points of disagreement. Both assumed an hierarchical society. Facchinei sought to legitimate that society by paternalism, religion, and wide discretion in applying the law. The reformers believed that legitimacy could best be achieved by positivism, ostensible egalitarianism, and mechanistic application of for-

⁶⁹P. Verri, "Orazione panegirica sulla giurisprudenza milanese" [written 1763] in *Delitti* (Venturi ed.), *supra*, note 6 at 127. Verri pointed out that, while some other nations had judges who were servants of the law, the Milanese had:

a corps of judges who are masters of the law, and this is the Senate, which can pass judgment on the fortunes, lives, and reputations of citizens either according to the law, or contrary to the law, or outside the law, or according or contrary to the legislatively prescribed procedure. And where, my Lords, is there to be found a city anywhere in the world which can boast of having such an august body as we have, a body even more august than the law itself?

Ibid. at 136. The contrast with the value that traditionalists placed on judicial discretion could scarcely be more striking. Verri read and discussed the work among his friends, but he did not publish it.

⁷⁰Beccaria, *supra*, note 7 at 10-11.

⁷¹*Ibid.* at 12, 53. Beccaria was even skeptical of granting pardons, on the grounds that this amounted to a personal intervention in what ought to be an impersonal legal system. *Ibid.* at 80-81. Kant, who shared much of Beccaria's outlook, likewise took a dim view of pardons; see Kant, *supra*, note 67 at 107-08.

⁷²Beccaria, *supra*, note 7 at 77-78; see P. Verri, *supra*, note 35 at 283-85.

⁷³S. Woolf, *supra*, note 25 at 99-101.

mal rules. At the same time, Beccaria and his friends recognized that in equality was inevitable and even desirable. To understand that they were not simply contradicting themselves, one must understand both their views and Facchinei's on economic advancement and social mobility.

IV. Economy, "Luxury" and Social Mobility

Though northern Italian agriculture was generally prosperous in the eighteenth century, the industrial and commercial preeminence of the region lay three centuries in the past. For Facchinei, as for traditionalists generally, this state of affairs was desirable. "Luxury", they argued, was corrupting. Prudent calculation of self-interest was a vice to be avoided at all costs.⁷⁴ The rational pursuit of gain would undermine the close-knit paternalistic society which Facchinei favored. Thus, he compared the nature of crime in his own day with that of past centuries. Contemporary crime, he suggested, smacked of fraud, greed, and a complete neglect of duty; past crime, while more violent, was more honest and straightforward.⁷⁵ The virtues he favored were honor, self-denial, and a sense of the duties of one's station.⁷⁶ These were precisely the traits on which the traditional elite prided itself and the ones least compatible with capitalistic economic expansion.⁷⁷

In this connection, it is noteworthy that Facchinei urged that property is a natural, God-given right, not a social right, and thus crimes against property should be punished just as severely as crimes against persons.⁷⁸ Coupled with his argument that the law should reinforce the existing hierarchy, his point was clear. Facchinei was not only concerned with protecting the property of the wealthy from theft or vandalism, but also with ensuring that forms of property preserved the existing order and did not allow for social mobility.⁷⁹ As might be expected, he staunchly defended clerical mortmain, arguing that property that came into the hands of the Church should remain there forever, ensuring the security of the clergy.⁸⁰ Further, at least by implication,⁸¹ he defended entails [*fedecommissi*] by which landowners ensured that the family estate would be in the family for all time to come: the incumbent head of the family could not divide or

⁷⁴Facchinei, *supra*, note 5 at 31-36; see Venturi, *supra*, note 2 at 657-58.

⁷⁵Facchinei, *supra*, note 5 at 28. To the extent that the members of the Academy of Fists believed that there had been such a change in the nature of crime, they thought it was a change for the better. See Beccaria, *supra*, note 7 at 13; and P. Verri, *supra*, note 69 at 127-28.

⁷⁶Facchinei, *supra*, note 5 at 29-37, 165.

⁷⁷Young, *supra*, note 5 at 131-32.

⁷⁸Facchinei, *supra*, note 5 at 148-49.

⁷⁹See *ibid.* at 31, 38, 72.

⁸⁰*Ibid.* at 78-85.

⁸¹*Ibid.* at 165-67.

alienate the estate, and creditors could not reach it.⁸² Entailing was widely practiced in northern Italy, making it difficult for able or ambitious commoners to rise into the ranks of the elite and, conversely, ensuring that the wealth and status of landowning families were preserved indefinitely.⁸³ Such results were perfectly in keeping with the manner in which traditionalists viewed the world. Inequality of wealth was inherent in the nature of things, and it would suit a paternalistic social order well if the same families and institutions were always prominent.⁸⁴ Their authority would seem natural and their traditional virtues could be cultivated. Conversely, greedy commoners with their calculating prudence would find it difficult to rise above their station. Not merely private property in general, but existing forms of property in particular, were to be regarded as sacrosanct.

The members of the Academy of Fists held a more individualistic outlook. In their eyes, desire for personal gain was inevitable and natural: "No man freely gave up a part of his own liberty for the sake of the public good; such an illusion exists only in romances."⁸⁵ The desire for economic advantage in particular was useful and beneficial.⁸⁶ Competition for gain was preferable to private vendetta and an exaggerated sense of personal honor. International trade wars were preferable to mass blood-lettings.⁸⁷ In many respects, the virtues of the *borghese* were preferable to those of the *gentiluomo*.⁸⁸ The members of the Academy of Fists had a boundless faith that freeing economic enterprise, particularly the grain trade and the market in land, would result in more taxable wealth for the state.⁸⁹ At the same time, they believed that a capitalistic economy would increase the general level of prosperity; if poverty were not eliminated, utter destitution might be.

⁸²See A.P. Schioppa, "Sul fedecommisso nella Lombardia teresiana" in *Economia, istituzioni, cultura in Lombardia nell'età di Maria Teresa*, *supra*, note 30, 807. *Fedecommissi* were held in primogeniture. The *fedecommisso*, which literally means "trust", was conceived as a fiduciary arrangement, with the family collectively as both settlor and beneficiary and the current head of the family as trustee. The *fedecommisso* also resembled the common law fee tail.

⁸³*Ibid.*

⁸⁴See Facchinei, *supra*, note 5 at 72, 165; see also Grab, *supra*, note 24 at 190-91.

⁸⁵Beccaria, *supra*, note 7 at 8.

⁸⁶P. Verri, "Elementi del commercio," in *Il caffè*, *supra*, note 37 at 27, 30-31; see Beccaria, *supra*, note 40 at 436, 601-02; and P. Verri, *supra*, note 35 at 291-92, 304-05.

⁸⁷Beccaria, *supra*, note 7 at 3, 19-21, 41-42; P. Verri, *supra*, note 86 at 32.

⁸⁸See A.O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (Princeton: Princeton University Press, 1977) at 9-14, 56-66. The "bourgeois" virtues that the reformers advocated did not include charity born of a sense of *noblesse oblige* or of religious compassion. They favored abolishing traditional charitable institutions, and they held that the duty of the propertied classes should be to provide useful employment for the rural poor. Work, they argued, should always be necessary and never useless. See Secchi, "Anecdoto cinese" in *Il caffè*, *supra*, note 37 at 235.

⁸⁹P. Verri, *Considerazioni sul lusso*, in *Il caffè*, *supra*, note 37 at 113.

This, then, was one method of dealing with the apparent paradox of legal equality on the one hand and the frank recognition of economic inequality and a "people-condition" for most of the population on the other. "Luxury" or economic expansion would eventually raise everyone's living standard, thereby appealing to self-interest, the strongest of all motives.⁹⁰ Such expansion could not occur, so the reformers believed, unless the legal system treated all competitors equally and not paternalistically.

In light of Beccaria's position as an exponent of a "bourgeois" ideology, it is rather surprising to find him describing private property as a "terrible and perhaps unnecessary right."⁹¹ Even if this were a printer's error as some have suggested,⁹² he reaffirmed that property is a social, not a natural right. In his lectures delivered while he held the chair of political economy at the Palatine School of Milan, he declared that property "is the eldest daughter, not the mother, of society."⁹³ Nowhere did Beccaria or his fellow reformers even hint that there should be an enforced redistribution of property, however, still less an abolition of private ownership. The effect of their position was that the state had the right to do away with forms of property that impeded economic progress. Both mortmain and *fedecommissi* fell into that category. Both tended to concentrate wealth in a few hands, preventing the bulk of the population from improving its standard of living.⁹⁴ *Fedecommissi* in particular were an unmitigated evil. Beyond the reach of creditors, they made it all but impossible to borrow money for agricultural improvements. Magnates might have little incentive to improve in any case, for their estates were guaranteed to them, no matter how wasteful or inefficient they were.⁹⁵ Worst of all, however, *fedecommissi* stifled social mobility. If the best land were held in this fashion, talented entrepreneurs could never hope for the status which only a landed estate could confer. Similarly, agriculture would be deprived of proven managerial skill.⁹⁶

Social mobility, then, was among the priorities of the reformers, and capitalistic agriculture would be at once the cause and the effect of greater social mobility. This was an important aspect of reconciling legal equality and economic inequality. If equality of wealth were neither possible nor

⁹⁰Beccaria, *supra*, note 40 at 401-40; P. Verri, *supra*, note 35 at 192-202, 341-47, 361-63.

⁹¹Beccaria, *supra*, note 7 at 40.

⁹²Jenkins, *supra*, note 3 at 118.

⁹³Beccaria, *supra*, note 40 at 493-94.

⁹⁴*Ibid.* at 442-44. Beccaria was especially bitter in his attack on clerical mortmain, contrasting the idleness of the clergy with the vigorous activity of the merchant or improving landlord; Beccaria, *supra*, note 7 at 41-42.

⁹⁵Alfonso Longo, a member of the Verri circle and Beccaria's successor in the chair of political economy, penned the most scathing attack on this form of land ownership. A. Longo, "Osservazioni su fedecommissi" in *Il caffè*, *supra*, note 37 at 86, 90-97.

⁹⁶*Ibid.* at 87-90; see Beccaria, *supra*, note 40 at 442-44.

desirable, if the great bulk of the population would necessarily have to live by manual labor, at least such conditions would not be permanent and fixed by law. In theory, at least, there would be equality of opportunity in a competitive market which treated all individuals alike.⁹⁷ Beccaria realized that capitalistic agriculture of the sort he advocated would almost certainly destroy small peasant proprietors as well as large-scale and inefficient magnates.⁹⁸ In practice, the opportunity for social mobility would be restricted to those who already had substantial property. Within that group, the mystique of ancient lineage and even of land ownership might be greatly reduced. Pietro Verri's younger brother, Alessandro, suggested that political power and high status should accompany any form of property, for, at bottom, there was no difference between managing a successful large commercial enterprise and managing a landed estate.⁹⁹ Despite these practical limitations, the reformers seemed convinced that the slight chance of upward mobility and the acceptance of the view that one's status depended on one's own efforts would make the arrangements they wished acceptable to the bulk of society.¹⁰⁰

Though Facchinei and the members of the Academy of Fists disagreed on economic policy and on social mobility, they disagreed within a common set of assumptions. They both assumed that their economy would be agricultural, that wealth and status would be the prerogatives of the owners of landed estates, and that the bulk of the population would make its living by working those estates. Facchinei dreaded economic expansion, social mobility, and potential divisiveness. Beccaria and his friends dreaded economic stagnation, social rigidity, and the shackling of human energy. Each side was close enough to the other to avoid mutual incomprehension. Both rejected, if only by implication, any suggestion of leveling or complete egalitarianism. Both sides were addressing an audience that would command economic and social power regardless of which course was followed.¹⁰¹

V. Economies of Power: Education and Punishment

Nowhere can the underlying similarities and the sharp differences between the reformers and the conservatives be seen better than in the economies of power they proposed. They were at one in their belief that it is far better to dissuade people from crime than to punish them for committing it. Hence, both sides devoted particular attention to education, taking special heed of the need to persuade the bulk of the population to accept inequality

⁹⁷Longo, *supra*, note 95 at 86-90.

⁹⁸Beccaria, *supra*, note 40 at 443.

⁹⁹A. Verri, *supra*, note 37 at 192-93.

¹⁰⁰Longo, *supra*, note 95 at 87; see Beccaria, *supra*, note 40 at 437-39.

¹⁰¹See Klang, *supra*, note 22 at 39, 41, 43-45, 66-70.

and the need for order. At the same time, Facchinei and the members of the Academy of Fists never doubted that infractions of the law deserved retribution. The purpose of punishment and the lessons it was meant to teach, however, had an entirely different significance for each side.

Facchinei started from the premise that social hierarchy was fixed as part of the divine and natural order. The surest way to diminish crime was to make certain that each member of society understood that order and his place in it. Hence Facchinei was a champion of education, a field normally dominated by the clergy. Aside from the basics of literacy and lower mathematics, all students should receive religious training and a respect for existing law as something quasi-sacred.¹⁰² If Facchinei gave any thought at all to schooling the children of the lower classes, he assumed that vocational education would be in order.¹⁰³ For the sons of the elite, the sort of scholastic education that Beccaria detested was to prepare them for positions of leadership.¹⁰⁴ Education should, above all, instill the traditional military and religious virtues of asceticism, self-denial, and devotion to duty; prudent calculation of self-interest, a desire to better one's social standing, and aspirations to "luxury" were precisely the character traits that Facchinei's educational program would extirpate.¹⁰⁵

When violations of law did occur, Facchinei would punish them harshly. He did not think of criminal sanctions so much as a deterrent, a device to teach calculating people that crime does not pay, but rather as an almost personal vindication of the divine and the social order.¹⁰⁶ The magistrate, the social superior, was charged with this holy task.¹⁰⁷ Thus, the criminal should be made to confess and acknowledge his transgressions in a personal act of penance before the magistrate.¹⁰⁸ Harsh punishments should be used, not primarily because they would dissuade others from crime, but rather because human wickedness deserved them.¹⁰⁹ Such punishments were a reaffirmation of the personal dependence and personal defeat of the criminal.

The reformers advocated a society of free, individualistic competition in which wealth and status would, in theory, be open to all. As critics such as the Abbé Mably noted, however, equality of opportunity was likely to

¹⁰²Facchinei, *supra*, note 5 at 174-78.

¹⁰³See *ibid.* at 178-81.

¹⁰⁴*Ibid.* at 180.

¹⁰⁵*Ibid.* at 30-31, 165, 179.

¹⁰⁶*Ibid.* at 87-94, 106-07.

¹⁰⁷*Ibid.* at 23-30, 38-39.

¹⁰⁸*Ibid.* at 59-65.

¹⁰⁹*Ibid.* at 118-20, 131-35.

mean very little to those who entered the competition with no substantial assets.¹¹⁰ In practice, the members of the Academy of Fists realized that the opportunity for social mobility was likely to be limited to a handful of families. No less than Facchinei, they assumed that the great majority would always be consigned to manual labor, especially agricultural labor.¹¹¹ They held out a far different means of making inequality acceptable. In *On Crimes and Punishments*, Beccaria spoke of education as the most effective means of preventing crimes.¹¹² He took up the subject again in his lectures at the Palatine School of Milan, addressing the type of education most appropriate for Lombardy's rural labor force:

They should not let their hard limbs grow soft by following a course of sedentary studies, nor should they seek a career which would habituate them to idleness and cause them to desert the most fundamental of society's occupations. It does not follow, however, that they should be condemned to total ignorance, which leaves them without the means of understanding their own station and all of its resources. In such ignorance, they do not know how to find any other remedy against the ills that surround them except at the expense of law-abiding and respectable people. Reading; writing; counting; the methodical, simple, clear elements of their vocation; and a gentle and insinuating morality should form their only erudition and the whole of their learning. This, nevertheless, would suffice to put their ideas in order and to make them more receptive to the progress of agriculture and better students of their own interests. At the same time, it would make them better able to calculate the inevitable disadvantages and evils to which wicked acts are condemned. The ignorance of these is perhaps the most common cause of crime among the lowest class of men.¹¹³

The passage shows the common ground on which Beccaria and Facchinei stood. Like the monk, Beccaria assumed that most laboring people would never leave their station and that it would be pernicious to prepare them to do so. They were the base on which Beccaria's and Facchinei's audience was supported.¹¹⁴ Likewise, Beccaria assumed, as Facchinei did, that left to their own devices, the common people were a source of crime, prepared to act "at the expense of law-abiding and respectable people."¹¹⁵ Like traditionalists, he believed that a simple education with a strong dose of "gentle and insinuating morality" was a proper antidote to the danger.¹¹⁶

¹¹⁰G.B. de Mably, *De la législation ou principes des loix*, vol. 2 (Amsterdam: no publisher indicated, 1776) at 129-32; see J.L. Lecerle, "Utopie et réalisme chez Mably" (1963) 26 *Stud. on Voltaire and the Eighteenth Century* 1049 at 1065-70.

¹¹¹See Beccaria, *supra*, note 40 at 413, 538; Franci, *supra*, note 39 at 56; and P. Verri, *supra*, note 86 at 29-30.

¹¹²Beccaria, *supra*, note 7 at 76-80.

¹¹³Beccaria, *supra*, note 40 at 440.

¹¹⁴See Klang, *supra*, note 22 at 39, 41, 55, 57-58, 61, 63, 66.

¹¹⁵See Jenkins, *supra*, note 3 at 119-22.

¹¹⁶See Young, *supra*, note 5 at 129-35.

The passage likewise illustrates Beccaria's divergence from Facchinei. First, having no faith in the efficacy of religious precepts,¹¹⁷ Beccaria argued for an education to instill precisely what Facchinei detested, namely, a prudent calculation of self-interest. Thus, the laboring classes should learn that crime does not pay.¹¹⁸ Second, and more important, Beccaria urged an inculcation of the benefits of the free market system he wanted. Thus, as better "students of their own interest," the peasantry should realize that the capitalistic "progress of agriculture" would improve their standard of living, if not their social standing.¹¹⁹ Beccaria's argument was that enlightened self-interest properly cultivated would preserve hierarchy and prevent crime more effectively than appeals to religion or personal loyalty.¹²⁰ Beccaria knew the traditionalist position well enough to attack it without distorting it.

Similarly, Beccaria rejected the personal, religiously flavored conception of punishment so dear to Facchinei precisely because Facchinei's system represented a threat to social order, to the hierarchy they both took for granted. In a famous passage, Beccaria imagined the reasoning of a poor man who had been made to feel the weight of personal subordination:

What are these laws which I must respect and which leave such a great distance between me and the rich man? He denies me a penny which I ask of him, and he excuses himself by exhorting me to work, something with which he himself is unfamiliar. Who made these laws? Rich and powerful men who have never deigned to visit the squalid hovels of the poor Let us break these bonds which are so deadly for the majority and useful only to a handful of indolent tyrants; let us attack injustice at its source. I shall revert to my natural state of independence, and for a time I shall live free and happy by the fruits of my courage and industry ... King of a small band ... I shall see those tyrants grow pale and tremble in the presence of a man whom they, with insulting ostentation, respected less than their horses and dogs.¹²¹

Beccaria's purpose in this passage was emphatically not to sound a clarion call for radical egalitarianism or to play the "Rousseau of the Italians". Rather, he simply wished to suggest that personal subordination would breed personal resentment, and blatantly class-conscious law would beget class antagonism.¹²² Harsh punishments, notably the death penalty, aimed at the "sinful" criminal, would not stop a determined man, for brutal punishments are brief compared to a lifetime of ill-gotten gain "at the ex-

¹¹⁷Beccaria, *supra*, note 7 at 7.

¹¹⁸*Ibid.* at 35-37, 48-49.

¹¹⁹Beccaria, *supra*, note 40 at 437-40; see P. Verri, *supra*, note 35 at 192-97, 345; Franci, *supra*, note 39 at 56.

¹²⁰Beccaria, *supra*, note 7 at 14-19; see Longo, *supra*, note 95 at 87-88; see also Weisser, *supra*, note 1 at 25, 137-38.

¹²¹Beccaria, *supra*, note 7 at 50-51.

¹²²*Ibid.* at 38-40, 74-78.

pense of law-abiding and respectable people".¹²³ Turning the tables on the conservatives, Beccaria suggested that religion might actually promote crime by offering the criminal an easy repentance and the prospect of eternal happiness.¹²⁴

Beccaria's solution was to make the criminal justice system of a piece with his educational system. Punishment itself would be a matter of careful calculation: exacting the maximum psychological impact on the convicted criminal and on potential criminals at the cost of the least possible pain to the criminal himself.¹²⁵ A relatively mild impersonal punishment, such as life at hard labor, would guarantee order far better than the revenge that conservatives advocated. Calculating people would find it in their best interest to refrain from crime, and punishing a small number would provide lasting and constantly observed examples for a multitude.¹²⁶

Facchinei understood Beccaria's economy of power clearly enough to attack it intelligently. Similarly, the reformers were perfectly aware of the traditionalist position. What they offered was an alternative method of justifying the social hierarchy. Facchinei's economy of power was personal, religious, and ascetic, while Beccaria's was impersonal, secular, and utilitarian. Both sides, however, were appealing to one and the same audience, arguing an agenda for that audience. The audience was asked to choose between two methods of establishing its legitimacy. Under such circumstances, an underlying stratum of common ways of making sense of the world was a necessity for reaching the reader.¹²⁷

VI. Conclusion

Conservatives and reformers in eighteenth-century Italy argued bitterly over a great deal. Their assumptions about the nature of law, society, and government, about what constituted the good life, often seemed drastically at odds. One should remember, however, that both the Academy of Fists and Facchinei were speaking to a relatively small group of landowners in a society where wealth and status rested ultimately on landed property. Both sides took it as given that estate owners would continue to be economically and politically dominant, that the bulk of the population would be engaged in manual labor, that the lower orders would be the principal source of

¹²³*Ibid.* at 51; see Foucault, *supra*, note 1 at 3-31, 73-103.

¹²⁴Beccaria, *supra*, note 7 at 51-52.

¹²⁵*Ibid.* at 23; see Foucault, *supra*, note 1 at 104-31.

¹²⁶Beccaria, *supra*, note 7 at 46-53.

¹²⁷See Jenkins, *supra*, note 3 at 116-21.

crime, and that both law and education would and should make social hierarchy legitimate in the eyes of the popular classes.¹²⁸

Given this common ground, a drastic disparity in social paradigms was scarcely likely. Certainly there was no mutual incomprehension. So long as their common assumptions appeared valid, both paradigms could appear plausible, and each side could see the other's point. Facchinei might rail against Beccaria as a seditious freethinker, but he appreciated the thrust of Beccaria's arguments better than many of those who purported to be his friends and supporters.¹²⁹ Similarly, while the members of the Academy of Fists might affect to disdain Facchinei as a bigot and an obscurantist, they understood the appeal of his polemic, and they even beat strategic retreats when necessary. Thus, Facchinei correctly perceived that Beccaria wished to deny the state the right to inflict capital punishment.¹³⁰ Defending *On Crimes and Punishments*, Pietro and Alessandro Verri stressed that Beccaria merely denied the utility of the death penalty; they realized how much support they would lose if Facchinei's interpretation were accepted.¹³¹ Similarly, impressed with the force of conservative sentiment, one member of the Academy of Fists wrote privately concerning Beccaria's book: "Let us content ourselves with praising the work while drawing a veil over its principles."¹³²

Though reformers and conservatives shared much in the context of their own time and country, and though neither side had to resort to a Procrustean bed to make sense of the other's reasoning, the position of Beccaria and his associates seems "obvious" today, while it requires a conscious effort to understand Facchinei. Advocating Liberal capitalism, impersonal law, and a free market, the members of the Academy of Fists helped to set in motion a series of changes that transformed the economy and society in which they wrote. Powerful sovereigns found it to be in their own interest to put much of the reform program into practice.¹³³ Further, the Liberal program could be transferred to a commercial and industrial society, as at least some of the reformers had understood.¹³⁴ Facchinei's program, by contrast, was geared much more closely to the audience for which he wrote. When change eliminated that audience and its assumptions in the late eighteenth and nineteenth centuries, his own work would seem virtually

¹²⁸See *ibid.* at 128; Klang, *supra*, note 22 at 68-70; and Young, *supra*, note 5 at 129-30.

¹²⁹Young, *supra*, note 19 at 159.

¹³⁰Facchinei, *supra*, note 7 at 20, 104-08.

¹³¹P. Verri & A. Verri, *supra*, note 6 at 179-86.

¹³²Letter from G. Carli to P. Frisi (Jan 1, 1765), in *Delitti* (Venturi ed.), *supra*, note 6 at 186-87.

¹³³See S. Woolf, *supra*, note 25 at 93-111.

¹³⁴P. Verri, *supra*, note 86 at 27-32; see Humphries & Greenberg, *supra*, note 3 at 223-25.

incomprehensible, a relic like Galenic medicine, based upon a defunct ideology.

Beccaria and his associates certainly deserve credit for helping to inaugurate a new paradigm for comprehending social institutions and setting priorities in public policy. Their own ideology and assumptions, however, sprang from the audience for which they wrote and of which they were members. Hence, their way of making sense of their world was close enough to their opponents' outlook to make possible a mutual comprehension and similarity of purpose which modern students have too often ignored.
