

Financial Crime and Early Criminology

*The ambiguity of a concept forged
in the eighteenth century*

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Abstract. This paper focuses on the contribution of early criminologists (particularly Beccaria and Bentham) to the analysis of the particular forms of crime of the powerful occurring in the financial arena. After a brief review of the contemporary criminological literature on financial crime, it provides, first, an account of some financial crises that occurred during the seventeenth and eighteenth centuries. Second, it searches within the writings of classical criminologists such as Beccaria and Bentham for definitions and clarifications as to what was regarded at the time as financial delinquency. Finally, in a concluding discussion, it highlights differences and similarities between past and current interpretations, all to a degree reflecting the ambiguous nature of this type of delinquency.

Key words: Financial crime, crashes, crazes, fraud, bankers

INTRODUCTION

Early (or classical) criminology is mainly associated with two eighteenth-century authors: Cesare Beccaria and Jeremy Bentham. Both have been studied thoroughly as progenitors of enlightened strategies for the treatment of offenders, advocates of humane forms of statehood and campaigners against institutional cruelty. It could be argued that both Beccaria and Bentham, while invoking reform of the criminal justice system, address the excesses of state action and the dominant social groups. In this sense, they can be deemed

founders of what is known as the study of the crimes of the powerful. However, commonly referred to conventional forms of delinquency, their arguments are mainly appropriated by penal reformers inspired by consequentialist sensibilities, namely those who are inclined to criticize retribution and support rehabilitation. This paper leaves conventional crime aside, focusing instead on the contribution of early criminology to the analysis of the particular forms of crime of the powerful occurring in the financial arena.

After a brief review of the contemporary criminological literature on financial crime, this paper provides, first, an account of some financial crises that occurred during the seventeenth and eighteenth centuries. Second, it searches within the writings of classical criminologists for definitions and clarifications as to what was regarded at the time as financial delinquency. Finally, it highlights differences and similarities between past and current interpretations, all to a degree reflecting the ambiguous nature of this type of delinquency.

COMPLEXITY AND IMPUNITY

Criminological analysis of financial crime leans on classical explanatory categories adopted in the domain of white-collar crime. Learning theories, for example, suggest that the techniques and justifications for committing crime are acquired through long-term socialization within specific occupational groups (Sutherland, 1983). The pioneering work of Sutherland has been expanded by authors who have focused on the economic sphere, such as Pearce's (1976) analysis incorporating elements of the sociology of deviance alongside variables and concepts belonging to classical Marxism, such as mode of production, surplus value and class struggle. Conflict as an explanatory variable remains paramount for the analysis of the crimes of the powerful, including crimes perpetrated in the financial sphere.

Anomie and control theory have also been mobilized to explain financial crime. The former posits that the settings in which the financial elite operate are already largely normless, thus encouraging experimental conducts and allowing for the arbitrary expansion of practices (Passas, 2009). Control theory, in turn, has suggested that a number of characteristics belonging to

offenders may explain all types of crimes, whether in the streets or in the suites. In this view, financial crime is committed by individuals characterized by psychological traits ranging from impulsivity and recklessness to the inability to delay gratification and a propensity to blame others first and themselves last (Gottfredson and Hirschi, 1990). Sykes and Matza's techniques of neutralization appear to lend themselves ideally to explanatory efforts addressed to financial crime. For instance, such techniques may be used to deny that powerful offenders cause harm or victimize specifically identifiable subjects, to claim that other conducts are far more harmful than those one adopts, or that in any case whatever conduct one engages in is an expression of loyalty to one's social group and, therefore, it is permissible.

An important strand of analysis focuses mainly on micro-sociological factors, for example, observing the dynamics guiding the behaviour of organisations and their members. As organisations become more complex, responsibilities are decentralized, while their human components inhabit an increasingly opaque environment in which the goals to pursue—and the modalities through which one is expected to pursue them—become vague and negotiable. Illegality in the financial sphere, according to this perspective, are the outcome of this vagueness, as firms incessantly seek to devise new ways of achieving their ends and, consequently, endeavour to innovate by reinventing or violating rules (Keane, 1995).

In further developments, attempts have been made to merge macro- and micro-levels of analysis, leading to the growing inclusion in the study of the crimes of the powerful of formal and complex organisations. These types of crimes, including financial crimes, are equated to manifestations of 'situated action', and explanatory efforts have addressed how contextual cultures affect decisions to violate laws (Vaughan, 2007). Cultural rules, it is argued, define legitimate goals and determine action and meaning. In the financial sphere, actors experience a relative autonomy whereby agency determines whether obligations to obey the law or to follow business norms justifying violations will prevail.

The finance industry is said to play a significant role in facilitating crime (Platt, 2015). Drug trafficking, human smuggling, piracy and terrorist activity, for example, would be unthinkable without financial institutions making investment capital available and without their being prepared to receive

the subsequent illegitimate proceeds. The financial crisis of 2008 showed a combination of behaviours and practices straddling the areas of conventional and white-collar crime. It also showed that the ambiguity, ubiquity and evolving nature of financial crime make the separation between acceptable and unacceptable practices extremely problematic.

The 2008 financial crisis, involving institutions which were deemed 'too big to fail', proved that such institutions are also 'too big to jail'. Scarce or shrinking resources resulted in criminal prosecutors avoiding complex financial irregularities committed by powerful actors. Many cases were regarded as unwinnable, also because offenders relied on a legal defense community closely associated with government departments (Barak, 2012: 3).

The treatment of financial fraud by the mass media is said to echo celebrity gossip (Levi, 2006), while corporate cultures and structures are regarded as facilitators of 'abuses undermining the legitimacy of the financial and justice system' (Sullivan, 2015: 172). Authors have highlighted the criminogenic conditions of the commercial banking industry (Tillman and Indergaard, 2013), or the effects of deregulation of financial practices (Shichor, 2015). Others have focused on aspects of victimization (Levi, 2001; Ruggiero, 2010; Dodge, 2013), or on the reasons why financial crime is and is destined to remain beyond incrimination (Barak, 2015). Finally, a strand of analysis has attempted to reveal the connection between neoliberalism and impunity in financial services (Whyte, 2015; Tombs, 2015).

The cases presented below, which occurred during the seventeenth and the eighteenth centuries, will give us an opportunity to examine the views of early criminologists around financial crime.

TULIP MANIA

The financial crisis known as the 'Dutch tulip mania' led to tulip bulbs being traded for very large sums of money throughout the 1620s and 1630s. The 'mania' resulted in a twenty-fold increase in the average price of bulbs and the sudden crash of the market. This crisis has long captured the imagination of commentators, who question how groups of individuals could be prepared to pay the equivalent of several years' income for a single bulb. In a fictional but realistic reconstruction of those events, Amsterdam is described as awash

with capital, populated by frenzy dealers, a place where arts are flourishing, 'fashionable men and women stroll along its streets and the canals mirror back the handsome houses in which they live' (Moggach, 2000: 24). The *Semper Augustus* bulb was sold for six fine horses, a dozen sheep, two dozen silver goblets and a seascape by celebrated painter van de Velde. True, rare tulip bulbs were mainly traded among wealthy aficionados, but the mania did not only affect collectors of luxury items, it also involved a rampant new class of traders guided by speculative purposes (Bilginsoy, 2015). The sublime flower was of extraordinary beauty, displaying blue, white and crimson colours and at one point, in monetary terms, was worth more than a Rembrandt's painting. A classic description of *tulipmania* appeared in Clarence Mackay's (2004) classic *Memoirs of Extraordinary Popular Delusions and the Madness of Crowds*, where the author observed that the ordinary activities of the country were neglected and the population, even to its 'lowest dregs', embarked in the tulip trade.

Although the tulip had previously captivated the Bavarians, the Persians and rulers of the Ottoman Empire, it was in Holland that the mania found its most fertile ground, reflecting the Golden Age experienced by the country in the early seventeenth century. Resources were poured into commerce and merchants would opt for lucrative trade with the East Indies or, at home, appropriate rare bulbs. The price of bulbs grew constantly throughout the 1630s, attracting wave after wave of speculators, including farmers and artisans. A futures market developed, with business spreading in taverns, brothels and barracks. Bulbs were sold when they were still in the ground, with operations taking the form of contracts for future payment and delivery. Distant echoes of contemporary futures markets could be detected in a trade that seemed to rest on empty promises, a business entrusted to the changing wind.

Tulip mania reached its peak during the winter of 1636-37, when some bulbs were changing hands ten times in a day. But the crash followed soon afterwards, when debtors became insolvent and in a week the flowers lost ninety-nine per cent of their previous market value (Dash, 2010). When the bubble burst in early February 1637, 'buyers for the most part would not pay, and sellers were left holding the bulbs. An obvious folly came to its apparently deserved end' (Goldgar, 2007: 2).

The waves of fear and greed displayed during the *tulipmania* were also the ingredients of subsequent crises, and eventually irrationality working together

with cognitive and emotional biases gave rise to 'neuroeconomic' studies. But long before that, books of wonders published during the seventeenth and eighteenth century listed *tulipmania* among earthquakes, storms, fires, comets, plagues, wars, famines and incredible ways to die, all prodigies equally worthy of mention. However, the tulip craze was not only described as a prodigy, but also as stupid. A Haarlem priest likened it to the plague, a sickness of the head, a tale of idiocy, greed and madness. 'Novels, plays, even operas have been written about the craze. Stories are told of huge fortunes won and lost, and all focused on the most improbable of objects: the tulip bulb' (ibid: 4).

Critics of the trade pinpointed the unreliability of the flower in contrast with the reliability of God. God, not tulips, would save you; to build your life on tulips was to build on sand or on sick foundation. If not deemed sinful, the activity of selling and buying bulbs was at least regarded as imprudent, as it was based on rush judgments, on the inability to establish monetary value and to adopt trustworthy conducts. The financial mechanism itself was absolved, while moralists, at most, would single out dishonest traders as responsible for the crisis. The blame was laid at the door of deceitful mediators and criminal florists, collectively engaged in setting up an oligopoly of sort manipulating most exchanges. The dishonest operators, it was suggested, would force prices up by buying all that was on offer, thus creating an artificial demand, and selling afterwards on a falsely created rising market. The victims of such practices ignored not only the value of tulips but also the moral stature of those trading them.

While in some religious pamphlets the search for profit was still stigmatized, the central preoccupation was the social mobility that the widespread participation in this search was likely to generate. Of course, large merchants, landlords, doctors, apothecaries, and even ministers and elders of the church were chiefly involved in the trading of tulip futures. But the trade was also benefitting a variety of manual workers and artisans, such as weavers, whose involvement in the craze was seen as a prelude to the abandonment of their traditional activity. It is hard to establish whether this fear was provoked by an appreciation of productive manufacture and a simultaneous rejection of financial adventure, or whether it was associated with a threat to social order caused by the upwardly mobility of the working population. In both cases, however, concerns were epitomized by images of 'weavers leaving or even destroying their looms in hope of something better' (ibid: 267). Without the

constraints of the spinning wheel, moreover, men would find the way to the tavern unencumbered. The rapid social advancement of the workers coupled with their discovery of pleasure was, in sum, inappropriate.

‘Weavers and tailors now apparently rode about on horses or in wagons or calessen, small open coaches, and even, in the winter, a sleigh. One author vented his disgust that the florists, who had themselves sprouted from the “shit wagon”, had come to be able to ride around on knightly horses’ (ibid: 268).

Nice clothes and fine food were acceptable if those enjoying them had earned such pleasures through strenuous sacrifice, in appropriately productive settings where discipline reigned. The tulip trade, however, when involving artisans and other workers, took place at inns, where Bacchus was worshipped and where beer was no longer good enough for a rampant social class.

To summarize, if a form of financial crime was detected in the Dutch tulip mania, this was associated with unscrupulous traders manipulating the market, not with the characteristics of the market itself. When greed was stigmatized, the recipients of the stigma were mainly ordinary artisans and workers who dangerously subverted the natural order by imitating wealthier people. For them, not for the wealthier, the point was made that the financial sphere resembled gambling paired with sinful drinking and a diversion from honest toil.

A Satire of Tulip Mania by Jan Brueghel the Younger (ca. 1640) depicts speculators as brainless monkeys in contemporary upper-class dress: one monkey urinates on the previously valuable plants, others appear in debtor’s court and one is carried to the grave.

LONDON AND PARIS BUBBLES

Crises and bubbles hit the London markets in the 1690s, ‘in almost every case built around a new joint-stock corporation formed, in imitation of the East India Company, around some prospective colonial venture’ (Graeber, 2011: 341). Colonialism, but also the recurring wars in Europe, determined an unprecedented expansion of the financial sector of the economy, thus creating a situation in which the distinction between military and financial initiative became blurred. The shares of the East and West India companies were traded in the stock market, which therefore subsidized military occupation and, at

the same time, commercial enterprise. In 1717, the East India company, after establishing numerous trading posts along the east and west coasts of India, was exempted from payment of custom duties, and in 1757 turned from a mere commercial venture into a ruling entity (Mukherjee, 1955). Its members or employees, called 'servants', were largely rapacious and self-aggrandizing; they conducted their own private trading activities, thus damaging the overall profits of the company. Controlling the locals as well as its own 'servants' proved too large a burden and the company's financial collapse seemed imminent. After a series of governmental loans and bailouts, the East India company was not hampered but encouraged to continue its activities, as it was given greater autonomy in running business in America.

Responsibility for its financial collapse was imputed to unscrupulous employees, those predatory insiders who created their own parallel speculative system. The company itself and its financial operations were judged as healthy as any other expression of the 'civilizing mission' undertaken by colonisers. An advocate of free trade and an opponent of monopoly, John Stuart Mill, defended this monopolistic company; a theorist of parliamentary democracy, he was willing to countenance commercial forms of despotism (Mill, 1990; Ruggiero, 2013).

The South Sea Bubble occurred in 1720. This large corporation managed to buy a substantial part of the national debt in England and, as its stock market performance escalated, inevitably set the tone for new financial adventures. New firms mushroomed, some of which short-lived but still able to attract investors. 'Each issued stocks, whether their scheme activity consisted in the production of soap or the insurance of horses (Graeber, 2011: 347). Financial operations were facilitated by the belief held by investors that they could outsmart their fellow investors or competitors and that other people's gullibility could turn into a fortune for them. Fraud was rife, as in an episode told by Charles MacKay (2004), in which an operator promised revenues to customers without specifying what his business was about and, after a day or so of trading, vanished with the money collected.

'If one is to believe MacKay, the entire population of London conceived the simultaneous delusion, not that money could really be manufactured out of nothing, but that other people were foolish enough to believe that it could – and that, by that very fact, they actually could make money out of nothing after all' (Graeber, 2011: 348-9).

In the same year, in other European capitals optimism around making easy money grew relentlessly. The debts accumulated during the Spanish Secession War were turned by states into short-term bonds and obligations, attracting myriads of investors. New schemes were created, including some selling insurance against the vagaries of commercial life. Among them, some had a solid financial basis, while others limited themselves to selling mere pieces of paper, nevertheless triggering excitement that spread more rapidly than the schemes themselves. Satirical prints of the time depicted investors as monkeys eating 'cabbage,' or rather pieces of paper with different types of cabbage written on them. 'Certainly it made more sense to spend a thousand guilders for flowers beautiful in color, or scent, than for a piece of paper, a South Sea share certificate' (Goldgar, 2007: 307-8).

The bubbles which occurred almost simultaneously in France and England were caused, at least initially, by the initiative taken by private agents to gain access to government bonds held by the public. For example, bondholders were persuaded to swap their government bonds for the shares of the South Sea company, which promised higher profits but collapsed in 1720. Optimist investors thought they could always resell to future optimists

'Yet many of those very subscribers were far from believing those projects feasible: it was enough for their purpose that there would very soon be a premium on the receipts for those subscriptions; when they generally got rid of them in the crowded alley to others more credulous than themselves. By offering to replace illiquid British national debt by liquid shares, the Lord Treasurer Robert Harley and the other founders of the South Sea Company were pioneers of a business model that created value by allowing investors to exercise the option to resell to a future optimists (Scheinkman, 2014). Simultaneously, numerous other joint-stock companies, nicknamed 'bubble companies' were founded, and 'there is a definite impression that many, though certainly not all, bubble schemes were fraudulent' (Scheinkman, 2014: 14).

LUXURY, USURY AND CRIME

Early criminologists did address financial issues, although they did so less as criminologists than as economists. One has to peruse their economic writings, therefore, and hope to come across some hint regarding financial delinquency. This type of delinquency, moreover, emerges when classical authors dealt with economic initiative in general, namely with conducts that

may or may not be connected with delinquent conduct, but may be harmful or beneficial to the economy itself.

Cesare Beccaria (1995: 69) repeatedly highlighted how the powerful are protected by their own laws, which manifest the passions of a few men and 'leave a gulf between the poor and the rich'.

'Who made these laws? Rich and powerful men, who have never condescended to visit the filthy hovels of the poor, who have never broken mouldy bread among the innocent cries of starving children and a wife's tears' (ibid).

He also identified crimes committed in the financial sphere when, for example, discussing currency fraud. He warned that, with gold and silver becoming currency for their universal capacity to mediate economic transactions, 'cupidity and personal interest bring disorder' (Beccaria, 1804: 20). Precious metals attracted the initiative of forgers, who flooded markets with their fake currency and took advantage of the lack of proper regulations. The authorities were therefore urged to control the quantity and quality of 'the precious metal that circulates in commerce and guarantee its validity' (ibid: 21). The solemnity of this guarantee could do little, however, against commercial speculation, which Beccaria described as 'securing information around where a good will be abundant, and therefore cheaper, and where it will be scarce, therefore more expensive, and knowing on time how to move those goods cheaply from one place to another' (ibid: 165).

An ardent advocate of freedom of commerce, Beccaria tried to explain how such freedom could lead to illegitimate conduct. At the basis of his explanation was the distinction between sterile and useful expenses, with the former encouraging unorthodox practices (Wahnbaeck, 2004). Speculation, the result of greed, may be legitimate if it turns into accumulation of wealth which eventually will be invested productively. In this way, Beccaria, expressed the classic notion of utility, namely that individual desire should generate collective happiness, and that exorbitant earnings are justified through the beneficial effects they produce for all. Beccaria was aware that financial operations generated exorbitant amounts of wealth and that its distribution was far from fair. Therefore, he found himself in the uncomfortable position to justify increasing inequality and, at the same time, engaged in denouncing powerful groups and institutions perpetuating such inequality. A way of outflanking this moral and political dilemma was offered to him by the possibility of analyzing

two key aspects of economic conduct: luxury and usury. And it is through this analysis that he formulated his views on legitimate and illegitimate conduct in the market. Let us see in more detail, first, how Beccaria's argument on luxury can be linked to financial issues.

His discussion of luxury was based on the Epicurean pleasure-pain principle, according to which human action is caused by 'flight from pain and love for pleasure' (Beccaria, 1995: 33). The search for pleasure is a never-ending process, first, because there is uncertainty as to how long it might last, second, because it might cease to satisfy when the possibility for greater pleasures suddenly arises. Constant dissatisfaction, therefore, is shunned through conspicuous consumption, an equally never-ending and expanding process, an innate part of the human natural quest for pleasure. 'Since any pleasure will lose its appeal (turn into pain) in the sight of even greater pleasures to be attained, there is no limit to man's urge to indulge in luxuries' (Wahnbaeck, 2004: 168). In brief, at first sight the Dutch craze around tulips appears to find perfect justification in Beccaria's pleasure-pain theory, which suggests that the human never-ending search for pleasure is innate. Further analysis of his economic reasoning, however, would suggest a more nuanced position.

Financial success, whether legitimate or otherwise, brings luxury consumptions, which like all other consumptions entail 'the acquisition of a good keeping the displeasure of deprivation at bay' (Beccaria, 1804: 102). In classical thought, luxury was deemed 'proportionate to the inequality of fortunes' (Montesquieu, 1989: 225), or regarded, alongside avarice, as the inseparable companion of economic growth (Mandeville, 1989). For Rousseau (1993), it brought the dissolution of morals, while for Hume (2011) it could become vicious when pursued at the expense of virtues such as liberality and charity. For Beccaria (1804), luxury causes a type of pleasure that overtakes the sheer displeasure of deprivation, lasting well after the 'grief of want' has disappeared. For example, a person who desires a certain kind of food is not only keen to satisfy her hunger, but also to enjoy a specific taste, while 'any nauseating food would satisfy a person who just wants to eat' (ibid: 103). There are, however, two types of luxuries, the first of which, noted Beccaria, do not imply forms of exchange, productivity or other interactive operations. For example, expenses for luxury goods may only require a sterile service by someone capable of providing them. These are harmful expenses, in that

the persons providing the service could be employed instead in productive activity benefiting all. The number of servants and the variety of their liveries, in this sense, are improbable indicators of the general wellbeing. On the other hand, luxury may entail an exchange of things, and can turn into added value enjoyable by all. Beccaria, in brief, marked the boundary between harmful and beneficial market operation, including financial operations, at the point where they become unproductive. Financial crime, therefore, is not an intrinsically illegal conduct, but it is merely dysfunctional for its economic consequences. Echoing commentators of the financial crises discussed above, Beccaria ended up absolving the financial system *per se* while singling out individual wrongdoers in that system.

Legitimate forms of luxury, implying an exchange of things rather than an exchange of things with services, may be the result of banking operations, where the disproportionate wealth of bankers is justified by their important social role. Beccaria contended that, charging interest to customers, banks do no more than assert the utility of their resources. Money, in other words, possesses its own specific utility, like land, labour and the industry, all measurable with respect to what they bring to the community. Money possesses a value determined by the activities it renders possible and encapsulates the profits that such activities may generate.

‘Every sum of money represents a portion of land, and the interest to be paid to creditors constitutes the value of the produce delivered by that land... This is, then, the true and legitimate interest of money, namely the ordinary interest of fairness and justice’ (ibid: 118).

An eminent associate of Beccaria in campaigns against torture and for penal reform, Pietro Verri (1999), expressed similar views, arguing that without luxury there would be no industry. Luxury accelerates the circulation of money, at the same time providing an incentive for the poor to emulate the rich. It encourages landowners, manufacturers and financial operators to innovate, thus leading to growth (Capra, 2002). ‘And while the peasants themselves were excluded from conspicuous consumption, they would nevertheless profit from it because it guaranteed both their jobs and their income’ (Wahnbaeck, 2004: 157).

While Beccaria and Verri witnessed and contributed to the reassessment of luxury during the eighteenth century, only the former aimed at distinguishing

between appropriate and inappropriate financial operations and unraveling the core deviant nature of speculative conduct. Charging interest for lending money is not usury, he claimed, because interest coincides with the immediate utility of what is lent. Usury, by contrast, is 'the utility of utility', in other words, it is the search for advantages which do not reflect the immediate productivity of what is lent. In Beccaria's formulation, therefore, usury appears as a form of financial delinquency, because it seeks advantages which are not translated into immediate productive performance: the money earned does not coincide with its actual utility in terms of production or value-adding investment. Moreover, the earnings acquired do not correspond to those yielded by a piece of land through its produce, land being, in Beccaria, the only source of wealth. In conclusion, usury in the form of financial delinquency is a deceitful, unfair distribution of wealth: the money appropriated exceeds its social utility. Two important considerations are necessary in this respect.

The formulation just presented could apply to contemporary cases of financial delinquency, for example, to cases such as Enron, Parmalat and many others, where the emphasis on the maximization at any cost, and in the short term, of the market value in the stock exchange is delinked from productive performance. Firms engaged in this type of delinquency give the impression of prosperous business through fraud or false accounting, showing a constant increase in the market value of shares, irrespective of production performance (Ruggiero, 2013). Beccaria showed a clear understanding of these conducts and the damage they cause.

His prescience, on the other hand, is coupled with other concerns which typified his epoch, one marked by the justification of increasing inequality. If the latter could be accepted in the form of luxury, which as we have seen was granted a degree of 'utility', why could financial crime, also fostering luxury, not be granted a similar utility? Where exactly does utility stop and crime start? Beccaria (1804) exempted himself from providing an answer to these questions by looking at the economy in general and at banking operations in particular as as gambling, governed by probability and favouring the long-term advantage of those endowed with more resources.

FROM UTILITY TO HAPPINESS

Beccaria's utility turns into the variable 'happiness' in Jeremy Bentham's philosophy, a variable from which the moral value of every act derives. A typical objection to this philosophy is that, as a goal, happiness may be valued irrespective of the morality of the action producing it. Hence,

'Suppose a hundred people in a community, with an option between a course of action which will make fifty-one happy and forty-nine utterly miserable; and a course of action which makes the fifty-one somewhat less happy and relieves the forty-nine of their misery. To consult happiness, the first course of action should be pursued; to consult numbers, the second' (Laufleur, 1948: xi).

In sum, a preliminary choice is required between happiness of a large mass of people or intense happiness of a few. Choosing the latter, it becomes hard to establish boundaries to conduct. In Bentham's argument, however, happiness was referred to the largest possible number of people and was not a zero-sum good: more given to one person will not entail less given to another. On the contrary, in his view personal advantage turned into advantage for the public at large, like, for example, exorbitant earnings by some brought earnings for others as well, a circumstance that Bentham described as a 'sanction'. A sanction 'tends to make a man conclude that his own greatest happiness coincides with the greatest happiness of others' (ibid: xiii). Echoes of Beccaria's and Verri's advocacy of luxury return in this formulation. For Bentham, there are popular, moral, legal or political, and religious sanctions, each specifically according their approval to conduct in general and economic initiative in particular. In the financial sphere, following Bentham's argument, we may conclude that even speculative or illegitimate operations may be legally, politically, morally and religiously 'sanctioned' if they contribute to the happiness of the general public.

Ambiguous though this deduction may sound, it perfectly reflects the ambiguity of financial delinquency itself and of its appreciation by early criminologists. Bentham's distinction between primary and secondary mischief adds to the ambiguity of his argument while, perhaps, providing a possible solution to the dilemma. Primary mischief, he declares, 'is sustained by an assignable individual, or a multitude of assignable individuals, while secondary mischief, taking its origin from the former, extends itself either

over the whole community, or over some other multitude of unassignable individuals (Bentham, 1948: 153). If a person is attacked and robbed, she will be the primary sufferer of a mischief, while for her creditors and children the mischief will be of a secondary nature, in that they will suffer from that person's changed financial condition. For some crimes, however, it is impossible to identify the victims, because 'they are out of sight and there is nobody whose sufferings you can see': tax evasion is one such crimes (ibid: 163). Crimes occurring in the financial sphere are 'accidents' and crashes and crises are described by Bentham as follows:

'A groom being on horseback, and riding through a frequented street, turns a corner at a full pace, and rides over a passenger, who happens to be going by... he has done mischief by his carelessness' (ibid: 164).

Accidents due to carelessness may not be the only features of financial conduct, which indeed can be motivated by love for money. But because those who love money today will probably love it, at least in equal degree, tomorrow, and because they 'will find inducement to rob, wherever and whenever there are people to rob', punishing them is ineffective, needless and unprofitable (ibid: 168). This is why, Bentham concluded, embezzlement and commercial fraud are not usually punished as theft, and in general, anyway, financial acts of delinquency can be assimilated to what the author termed *offences operating through calamity*. As natural events, of course they may be dangerous, danger being 'the chance of pain or loss of pleasure', but calamities do not target specific groups or individuals and are not guided by intentional design to provoke harm. Similarly, harmful financial acts are either involuntary or victimless. Bentham's argument did not stop here: he took pleasure in expressing one view and its opposite. Is it a sign of intellectual openness or of the ungraspable nature of financial delinquency?

Intentional harmful acts in the financial sphere, in his view, may take place, and when they do they should be regarded as acts of mere delinquency. These include 'offences by falsehood', committed by those who abuse of 'their faculty of discourse', namely 'the faculty of influencing the sentiment of belief in other men... give other men to understand that things are otherwise than as in reality they are' (ibid: 222). The promise to earn money in financial operations may hide such abuse, and Bentham conceded that this could be detrimental to a country as a whole, as it runs 'against the increase of the national felicity,

against the public wealth, against the national population, against the national wealth, against the sovereignty of the state, or against its religion' (ibid: 223).

'Offences by falsehood' are usually accompanied by abuse of trust, a variable that Bentham discussed at length. Those invested with trust, he remarked, are bound to make sure that their behaviour benefits others, and their good faith is measured through the assessment of their capacity to keep promises. Consent by a trustee may not be obtained fairly. 'If not fairly obtained, it was obtained by falsehood, which is termed fraud' (251).

The beneficiary of that behaviour, however, may be a non-assignable entity, therefore, again, making it hard to assess the outcomes of the trusted person's acts. Breach of trust consists 'in not doing something that a person ought to do, or in doing something she ought not to do', but when responsibility for the breach is not attributable to a specific, identifiable trustee, 'we name this disturbance of trust' (ibid: 226). Financial crime, within this logic, could be deemed a form of 'disturbance of trust'. But in order to locate more precisely this type of crime in Bentham's analytical framework, we need to consider the broad classification he proposed. Discussing the consequences of mischievous acts, he distinguished between 'original' and 'derivative' consequences, the former affecting a specific victim, while the latter victimizing a wider sector of society. Mischievous acts of the second type cause both pain and danger, because they may spread and harm society at large. Derivative consequences produce a sort of 'pain of apprehension', Bentham argued, and may 'reinforce the tendency of a motive to produce acts of the like kind' (Bentham, 1967: 280). According to a further distinction, there are private, semi-private, self-regarding and public offences. The first are 'offences that are detrimental, in the first instance, to assignable persons other than the offender'. We have an example of the second when there are persons to whom the act in question may be detrimental, but such persons cannot be individually identified. Offences are therefore semi-public when they victimize a neighbourhood or a limited community. Self-regarding offences are those which are, in the first instance, detrimental to the offenders themselves. Finally, public offences are offences threatening 'an unassignable indefinite multitude', 'the whole number of individuals of which the community is composed, although no particular individual should appear more likely to be a sufferer by them than another' (ibid: 314-15). According to this classification, financial crime produces both

original and derivative consequence; it is private, semi-private and public, but certainly not self-regarding. There is, however, a crucial addition to these categories, relating particularly to semi-private offences: Bentham contended that these types of offences manifest themselves as 'calamities', like pestilence, famine, inundation, or damage caused by 'persons deficient in point of understanding, such as infants, idiots and maniacs' (Bentham, 1948: 245). We are back to the dual explanation presented before: financial crime may be the result on ineluctable, natural causes or of individual pathology.

Of interest is also Bentham's treatment of offences more specifically falling in the fiscal sphere. Tax evasion, for example, is a mischievous act, because public money is necessary to defend the community against its external as well as its internal enemies: 'It is certain that if all of a sudden the payment of all taxes was to cease, there would no longer be anything effectual done, either for the maintenance of justice, or for the defense of the community against its foreign adversaries' (ibid: 162). But taxing the income of traders is impracticable due to the difficulties of ascertaining their profits and losses, hence the 'endless source of evasion' available to them (Bentham, 1952a: 371). On the other hand, if equity in taxation should be based on the ability of subjects to pay their dues, some exceptions to this rule must be identified through 'particular and superior considerations': 'the most opulent and most powerful classes should be spared' in consideration of the risky nature of their economic activity (ibid: 375).

Among the beneficiaries of tax exemption Bentham included the holders of government annuities, the creditors of the nation who must be protected in their dealings. And in a telling footnote refers to the South Sea Company, the joint-stock company which is a proprietor of a certain quantity of government annuities. Its members, who engage in dealing with government, if required to pay tax, 'would relinquish the market altogether': 'had these dealers who part with their money not been protected against diminution in the value of the property they purchased, they would not have dealt at all' (ibid: 383).

Against fraudulent practices in the financial arena, Bentham proposed an apparently simple form of self-regulation. For instance, all 'banking-houses' should keep books where profits and losses are recorded. Inspectors appointed by the Treasury should check those books and 'the truth of the contents be verified by oath'. Employees should be examined *viva voce* in some respectable

judicial office, and if losses are recorded, 'the public should not be a sharer in the loss... for this is one of the few businesses, if not the only business, in which no clear loss can take place' (Bentham, 1952b: 404). Losses in this sector of the economy are caused by gross negligence or imprudence on the part of the dealer, 'and there is no reason why the public should suffer for the fault of the individual: and if it did in this way, the inlet to fraud would be unbounded' (ibid). The practice of bailing-out banks, according to this formulation, creates a criminogenic environment for those who operate in them.

Unlike traders, bankers should indeed be taxed, in that according to Bentham bankers do not have a shop, they do not sell anything: they live upon the interest of money, with the peculiarity that the money upon the interest of which they live is not their own but other people's. 'A man whose occupation is to use other people's money can afford to give up a portion of the profit in support of that government to whose protection he is indebted for the faculty of keeping it' (ibid: 406).

Like for Beccaria, it is when addressing the issue of usury that we find Bentham's allusions, but also explicit reference, to financial delinquency. As we have seen, Beccaria argued that the interest charged by money lenders corresponds to the value that money could produce if productively invested, while he identified usury with operations taking place in the speculative, unproductive sphere. Bentham moved beyond Beccaria's distinction, attacking the kernel of the theory that money was by nature unproductive and that interest, therefore, amounted to bribery or theft. At his time laws limited the charging of interest, in a sort of moral compromise championed, among others, by Adam Smith. That the arrangement was unpopular was proven by the general acclaim with which Bentham's *Defence of Usury* was received.

Bentham's views on usury were consistent with his opinion that economic activity should be divided into two groups, 'agenda' and 'non-agenda' initiative. The former were typified by state intervention in the control of private enterprise and markets, the latter by the initiative of private individuals. In England, he observed, most useful things were produced by individuals, and wherever a greater degree of opulence is observed, this is the outcome of 'non-agenda' activity (Manning, 1968). Also in money exchange Bentham (1787a: 1) advocated 'the liberty of making one's own terms, a meek and unassuming species of liberty [that] has been suffering much injustice'. The regulation of

money-lending was deemed absurd, as would the regulation of any other market exchange. Why should someone earning as much as they possibly can from the use of their money be labeled with the opprobrious name of a usurer? Those who sell a house trying to maximize their profit are not so called. Money is an ordinary good and, as such, should be subject to the law of the market: demand and supply. For this reason Bentham was against any form of law fixing the interest rate, as he was against taxing money-lenders, who in response would cease to lend or burden the borrower with the tax: a prohibition upon borrowing is a denial of relief to those who want to borrow. It is much easier to get goods than money, Bentham contended, and those who deal in goods make a profit that as an average is around 10-15 per cent. Money is lent at a statutory 5 per cent,

‘in the way of trading, then, a man can afford to be at least three times as adventurous as he can in the way of lending, and with equal prudence. So long, then, as a man is looked upon as one who will pay, he can much easier get the goods he wants, than he could the money to buy them with, though he were content to give for it twice, or even thrice the ordinary rate of interest (ibid: 6).

In the eighteenth century the debate on the interest rate revolved, among other issues, around prodigality, in the sense that limiting such rate was seen as a restraint to prodigal borrowers. In Bentham’s view, prodigals were not affected by laws fixing the rate of interest, as they would borrow anyway. On the other hand, those who have no collaterals would find it hard even to find a friend who is prepared to lend them money, because they are unlikely to pay back.

In a letter to Adam Smith, Bentham (1787b: 1) felt that, after learning from a ‘professor of eminence’, he was forced to criticize him. And ‘should it be my fortune to gain any advantage over you, it must be with weapons which you have taught me to wield, and with which you yourself have furnished me’. Smith’s argument was that if the legal rate of interest were established at a level as high as ten per cent, a great amount of money would be lent to prodigals, who alone are willing to pay up such high interest. Sober people, he contended, would not venture into the competition. A great part of the capital of the country would thus be kept out of the hands which were most likely to make a profitable and advantageous use of it, and ‘thrown into those which were most likely to waste and destroy it’ (ibid: 2). In reply, Bentham retorted that prudent

and sober people would never venture into any innovative project, thus never contributing to growth and improvement: 'they will pick out old-established trades from all sorts of projects' (ibid: 3). Development has always been based on risk, he argued: any new manufacture, any new branch of commerce, or any new practice in agriculture, as Smith himself taught him, may present themselves as forms of speculation in which the innovator promises himself and others extraordinary profits. But if the innovation is successful, Bentham continued, the new trade or practice becomes established, while competition reduces them to the level of other trades and practices. Of course, there will be misconduct and fraud, but these, along with bankruptcies only account for 'not much more perhaps than one in a thousand'. Ultimately, one has to accept 'dangerous and expensive experiments' and these should be encouraged, even through monopoly. 'A temporary monopoly may be vindicated, upon the same principles upon which a monopoly of a new machine is granted to its inventor, and that of a new book to its author (ibid: 5).

Idiocy is the main culprit when financial irregularities emerge, and the damage is caused by borrowers and lenders who do not obey clear rules and lack an instinctive appreciation of the transactions in which they engage.

Regulating the prices of goods is a difficult task. And if legislators were broad enough to attempt it they would have to regulate also the quantity of what each consumer is allowed to buy. Such quantity is already regulated by the diligence and prudence of purchasers. You cannot prohibit a contract because one person sells too cheap or buys too dear, Bentham insisted, unless we are faced with fraud or ignorance on one party of the value of what is sold and bought.

CONCLUSION

There are both differences and similarities between the views of early and contemporary criminologists around financial crime. Beccaria was aware that the powerful, including those operating in the financial sphere, were protected by their own laws, and that the inequality exacerbated by financial operations was morally and politically abhorrent. Similarly, contemporary analysis highlights the impunity of financial criminals and the effects of their acts on individual and collective victims. Beccaria also attempted to establish

to what extent and under which circumstances money operations had to be regarded as socially harmful, thus echoing contemporary commentators engaged in established the nature of financial abuses. In the eighteenth century currency fraud, speculation, luxury and usury gave early criminologists large amounts of material to probe their theories, with Beccaria distinguishing between productive and sterile financial conduct and Bentham attributing to idiocy and abuse of trust the occurrence of irregularities. The former described forms of financial criminality based on the false claim of the value of stocks irrespective of economic performance, a description provided by contemporary analysts with respect to the Enron case and similar scandals. Few criminologists, today, would impute financial delinquency to accidents or calamities, but rather to criminogenic environments and cultures, although many would focus on single cases and pathological financial agents just like Beccaria and Bentham did on ignorance, isolated wrongdoers and predatory insiders. Perhaps both Beccaria and Bentham should have given more attention to the social outcomes of market optimism, when unfettered crazes attracted all sorts of fraudulent operators (Galbraith, 1987), like contemporary commentators are attentive to the effects of the prevailing neoliberal climate. Contemporary criminologists, on the other hand, may want to take more seriously the implications of development and its potential encouragement of unorthodox practices, thus following Bentham's intuition that the economy needs 'dangerous and expensive' experiments if it has to grow. Both early and contemporary categories retain a degree of ambiguity that mirrors that of the types of crimes addressed. Ultimately, the analyses of the past may differ from those of today in one significant respect: early criminologists were still concerned with public virtue and morality, theirs being by now the age of the economy. The question remains whether such concern is still vivid not only in criminology today, but in society at large.

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Finansiniai nusikaltimai ir ankstyvoji kriminologija
Dviprasmiškas XVIII a. požiūris

VINCENZO RUGGIERO

S a n t r a u k a

Šis darbas nagrinėja ankstyvųjų kriminologų (Beccarios ir Benthamo) indėlį į finansinių nusikaltimų analizę. Po trumpo šiuolaikinės kriminologijos požiūrio į finansinius nusikaltimus pateikiama XVII ir XVIII a. finansinių krizių apžvalga. Remiantis klasikiais Beccarios ir Benthamo darbais aptariama, kas tais laikais buvo laikoma finansiniu nusikaltimu. Galiausiai, apibendrinančioje diskusijoje apžvelgiami šiuolaikinio ir klasikinio požiūrio į finansinius nusikaltimus skirtumai ir panašumai, atskleidžiantys nevienareikšmišką jų pobūdį.