For Adam Smith a crime is not the result of a rational calculation of loss and gain, but the consequence of a vain desire to parade wealth to attract the approbation of others combined with a natural systematic bias in overestimating the probability of success. Similarly, Smith does not conceive legal sanctions as a rational deterrent, but as deriving from the feeling of resentment. While the prevailing approach of the eighteenth century is a rational explanation of crime and a utilitarian use of punishment, Adam Smith builds his theory of criminal behavior and legal prosecution consistently on sentiments instead. A well-functioning legal system is thus an unintended consequence of our desire to bring justice to the individual, not the result of a rational calculation to promote the public good, just like a well-functioning economic system is the unintended consequence of our desire to better our condition, not the result of a rational calculation to promote public good.
Introduction

Why do we commit crimes? How can we punish crime? The two questions are interrelated. To punish crime one needs to understand why there is crime to begin with. The interrelation of these two questions, and their historical context, is relevant if one wishes to better understand human beings, and/or if one wishes to reform a criminal justice system that is deemed outdated.

In the 18th century Europe, the challenges to understand crime and punishment come from both intellectual curiosity and reform spirit. The “Science of Man” that David Hume (1739) introduces calls for a scientific understanding of human nature and human conduct in all their aspects, including deviant behaviors. And the criminal justice system often symbolizes the outdated, violent, and above all irrational Ancien Régime’s institutions (Foucault 1975). The so-called Legal Enlightenment is the intellectual movement that deals mostly with how to rationally reform the existing legal systems. Its defining characteristics are: the lay definition of crime as social damage which produces a loss of welfare; a new idea of punishment whose only purpose is the defense of society against crimes; and the attempt to elaborate a rational theory of punishment to discourage the greatest number of crimes with the minimum social costs. What distinguishes the authors of this new trend, such as Montesquieu (1748), Beccaria (1764), Verri (1776-77), Voltaire (1777), Filangieri (1783), is the utilitarian explanation of criminal behavior which is seen as the choice of a rational individual who calculates expected value and costs and who rationally choses to commit a crime when the expected value of the crime exceeds the expected cost of its legal consequences. The reformation of the criminal system, thus, implies tinkering with these expected costs and benefits so that the expected costs would exceed the expected benefits, thus creating deterrence and an eventual decrease in crime.

3 Re the economic analysis of criminal laws in the works of the Legal Enlightenment see Simon (2009a; 2013a). Garry Becker (1968), Richard Posner (1973) and other authors of contemporary Law and Economics openly declared of taking inspiration from Cesare Beccaria and the Legal Enlightenment literature.
In this intellectual context, Adam Smith stands out as different. He distances himself from the European mainstream of his age, grounding his theory of crime and punishment consistently in human sentiments rather than rationalism and utilitarianism. Smith proposes indeed a theory of crime and punishment which is far from, if not even opposite to Cesare Beccaria, Gaetano Filangieri, and later Jeremy Bentham (Simon 2009b).

We suggest that this deep divergence is the consequence of a different anthropological view of the human being who does not appear inclined towards hedonistic pleasures or rational calculation. In the *Theory of Moral Sentiments* (TMS), Smith describes a type of person whose strongest wish is not the egoistic satisfaction of their needs but who, on the contrary, is always seeking those social interactions which bring them the happiness of shared feelings of reciprocal esteem (e.g. TMS I.i.1.1, p. 36. TMS I.i.2.1, p. 39, among others). This view of human beings offers a consistent understanding of both the motivation to commit a crime and the justification of its punishment, even if it may take different forms in different historical contexts.

We add to the existing analysis of Smith such as MacCormick (1981), Norrie (1989), Miller (1996), Salter (1999), Vivenza (2008), Stalley (2012), which tend to look only at the justification of punishment, but not at the motivation of crime, or at the historical contextualization of the criminal justice system. Our focus on Smith’s understanding of both the sentimental motivation of crime and of punishment and his historical jurisprudence highlights Smith’s focus on the individual’s defense against injury as opposed to an explicit attempt to achieve social optimality, making his legal theory consistent with his economic theory of individual actions and unintended social consequences. It also implies an analysis of Smith’s view of human nature which we believe allows us to present a more complete picture of Smith’s understanding of crime.

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Why crime?

If Smith buys into the Humean “science of man”, he needs to find what is fixed and what is contingent in human behavior. Smith identifies a few characteristics that are constant in people across time and place—characteristics of human nature. What is relevant for us here is that we want to be and we believe we are the center of the universe and that all revolves around us. We naturally want to be the (proper) object of the approbation of others, and are naturally biased by our self-love.

The desire for approbation is one of those universal “first principles” from which Smith derives the explanation of complex social phenomenon and the possibility to formulate general laws on them\(^5\). Yet, for Smith, the desire to receive the approbation of others is not the same as the desire to be the proper object of approbation, that is, the desire to be approvable, not just approved. Smith claims that the desire to be approved is derived from the innate desire to be approvable. We learn to become the proper object of approbation by being approved, first by physical spectators and eventually by our internal impartial spectator even in the absence of physical external spectators. This is a lifetime process and never fully achieved.

For Smith, our self-love makes us believe that things that are close to us are bigger than they are, and things that are father away are smaller than they are. The “eye of the mind” needs to learn with experience how to correctly perceive distances, which means that we need to realize we are not the center of the universe but just one in a multitude (Paganelli—astronomy). This is achieved, in part at least, through the interaction of another innate sentiment: our desire to be lovely and not to be hateful, our desire to be approvable and not to be the proper object of disapprobation. Our desire to be lovely counterbalance our self-love and helps us lower the pitch of our passions so that we can gain the approbation of others. And while we start with trying to gain the approbation of a physical other in front of us, we eventually develop the ability to simply imagine another in front of us,

\(^5\) Re the influence of newtonism on Smith’s works see Hetherington (1983); Cremaschi (1989); Redman (1993), Montes (2013), Fiori (2012).
without requiring their physical presence. This imaginary other, or what Smith calls the “inhabitant of our breast”, or the “man within”, is a spectator of our actions that learns to distance himself enough from us to become impartial in his judgment. He is a hypothetical individual, who is independent and unconnected with the facts and persons involved, whose opinion represents that of humanity in general and which could be shared by each man. He is this invisible advisor who helps us to moderate our passions and to develop a moral conduct. (TMS, III, iii, 4, p. 108; TMS, VII, ii, 1, 44, p. 202). The approbation of this spectator is the mechanism Smith adopts to give an objective value to an essentially subjective morality. The impartiality of this spectator, though, is never perfectly achieved, since we as human being are not perfectible.

For Smith we gain approbation in two ways: by being moral, and by parading our wealth. We naturally admire a just and virtuous man, just like we naturally look up at the rich and we look down at the poor. We want the rich in the spotlight and we do not want to see the poor. A poor is ashamed of his poverty and wishes to become invisible to the eyes of others. A rich proudly shows off his riches gaining everybody’s attention and admiration. This is simply a description of human behavior. Smith does not necessarily endorses it or expresses moral judgment of it. But he remarks that this admiration for the rich is necessary. The admiration for the rich allows for peace and order in society. Peace and order in society rest in part on the authority of its leaders. Both wealth and virtue give authority, but it is easier to recognize wealth than virtue, thus potentially decreasing conflicts of legitimacy (TMS, VI ii.1.21, p. 166).

Such admiration for the rich is also necessary because of the complexity and the contradictions of the human soul. Nature has predisposed it to balance another innate and spontaneous feeling: envy (WN V.i.2, p. 115)\(^6\) which otherwise would destroy the social coexistence and impede the accumulation of wealth and the consequent progress.

\(^6\) See also the similar assertions in Lectures of Jurisprudence (LJB, I, 13: 402).
Yet, the admiration that wealth generates may, in some men and in some cases, became seductive at the point of overcoming the pleasure derived from the moral action and shadowing the consequences of reprehensible behaviors (TMS I.iii.3.8, p. 65). When this happens, the adulation of the external spectators prevails over the judgment of the inner impartial spectator and the moral restraint is weakened.

So Smith thinks that the two ways of achieving approbation are not always compatible (TMS I.iii.3.2, p. 64). The best possible scenario is when the two circumstances are both present and men acquire riches and a respectable social status by hard work and fair and virtuous behavior. This is a slow and gradual process, though. Furthermore, given that wealth is much easier to recognize than virtue, there is the temptation to increase wealth at the expense of virtue, especially since we tend to forgive and forget the questionable actions of the rich, given how much we look up at them, and how difficult it is to distinguish virtue than wealth.

Alexander the Great is an example that Smith uses to make the case: his greatness is achieved with great crimes. Because of his successes, we tend to overlook those great crimes he committed to achieve his great successes. So we call him the Great and admire him. Alexander the Great is an example of a reason why, for Smith, we may commit crimes: our desire to gain great approbation from others. We can infer that also the crimes of the great merchants and manufacturers of the Wealth of Nations, who are willing to use the “treasure and blood” of their fellow-countrymen to enrich themselves at the expense of the great body of society would be explained this way (Paganelli 2009).

Thus, for Smith, the prospect of gaining great wealth, enough to change our status in the eyes of others, may motivate us to commit great crimes.

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7 Criminal behavior arises in those who, lacking in prudence, wish to show their own wealth to the point of obtaining it by going beyond the bounds of justice (TMS, III, iii, 31, p. 114).
But Alexander owes his greatness not just to his great crimes and successes but also to his great self-delusion. Our natural self-delusion is an aspect of our natural self-love, which systematically biases and distorts our perception reality, and which may lead us to crimes as Smith explains.

Our self-love naturally biases us so that we do not perceive probability correctly. We may understand that the probability of failure in some specific activity is very high, but we are convinced we are exempt for it. We love ourselves too much to admit failure, or its probability. That probability apply to others not to us. For Smith, our natural over-confidence, which every man in relative good health has, is what explains the profitability of lottery and the lack of profitability of insurances. The expected value of a lottery is less that its cost, yet many play because they are biased by their “presumptuous hope of success.” Of course, they will lose out. Mirroring this, the expected value of insuring a ship at sea is higher than its cost, but few merchants insure their ships, according to Smith, because of their overestimate their probability of success and underestimate their probability of failure, as naturally happens.

The same presumptuous hope of success is present also in the choice of professions, including joining the army in the hope of vain glory. The dangers are underestimated and the probability of glory overestimated so much so that young boys join the army against the will of their fathers and their salary will not be much, given the large number of them.

That presumptuous hope of success applies also to criminal professions, such as smuggling. Smuggling is the most profitable profession, when successful. But the chances of success are very low. High profits attract more and more people, who in their turn, lower the probability of success, increasing the profits of the successful ones.

Smith seems to imply also that our self-delusion affects the perception of the size of what we may gain, further biasing our “calculation”. Alexander’s delusion of his own grandeur, his
estimation of his probability of success in how much he could be gaining, was so distorted that resemble “folly”. Yet, he succeeded and became the Great. No rational calculation would have ever allow to do what Alexander the Great’s “folly” did. So, the other side of the coin of the motivation for crimes, for Smith, is our self-delusion, our systematic bias in perceiving probability of success and failure. This is as close as it gets to a rational calculation in Smith’s analysis. It is not much, given the role self-delusion plays. A potential smuggler evaluates his expected benefits and expected costs and acts according to his calculation. But passions prevent this calculation from being “rational” since our self-love systematically biases our perception of the probabilities. Due to our self-delusions, there are more smugglers than “optimal”, using today’s language, and most of them fail.

A couple of additional things to note here. First, even if one wishes to interpret Smith’s analysis as a somewhat “rational calculation of costs and benefits”one should not ignore that for Smith, this attitude, which induces man to earn more and more riches and accumulate properties, is not to be meant as a hedonistic form of satisfaction typical of utilitarianism, since it aims at a different range of pleasures. The individual wishes to have at his disposal a great amount of wealth not simply to enjoy, according to some rational scheme of consumption, a high degree of utility, but because, by showing it, he can be the object of attention and admiration from his fellows (WN, I, xi, 2, 31, p.197; TMS, VI, i, 3, p. 159).

Second, this may be one of the greatest limitations, if not the greatest one, of Smith’s model. Smith can explain crimes done to achieve gains great enough to change our social status. But he does not explain small crimes, or petty crimes where the criminal gains only a little bit. In fact, he claims we disapprove of those petty crimes and look down at the person who committed them.

Smith’s understanding of crime based on the systematic biases of our self-love and the presence of an impartial spectator, is thus far from the Legal Enlightenment’s understanding of rational crimes—our sentiments always “interfere” by systematically biasing our calculations.
Scholars within the Legal Enlightenment tradition, such as Beccaria, define crime as the activity for which an individual gets benefit from imposing a greater loss on other individual/society (Beccaria 1764: VII; XXVII) and they determine it by the cost-benefit analysis (Simon 2009a: 16-17). Smith instead assigns the task of the approbation of human actions to the spontaneous sentiments and judgment of the impartial spectator described in Part I of TMS. The identification of what illicit behaviors consist of is entrusted to the spontaneous feelings of reaction of the impartial spectator. This thesis marks an even further distance from the schools of Legal Enlightenment which see the formulation of general rules of conducts analyzing ex ante the allegedly final effects of the human actions. Unlike the utilitarian authors, Smith does not believe that the law of justice can be deduced by the utilitarian calculus (Haakonsen 1981: 183) and that the morality of an action can be determined by a valuation of how much benefit and loss its produces. Otherwise we could find the case of an immoral action which is not punished because it produces for the criminal more utility than it detracts from the victim.

One individual must never prefer himself so much even to any other individual, as to hurt or injure that other, in order to benefit himself, though the benefit to the one should be much greater than the hurt or injury to the other. The poor man must neither defraud nor steal from the rich, though the acquisition might be much more beneficial to the one than the loss could be hurtful to the other (TMS III, iii, 6, p. 108).

Smith also differs from other Legal Enlightenment thinkers on how to direct behaviors that improve one’s condition as well as society’s condition. According to the exponents of Legal Enlightenment, a rational legislation and constitutional framework are valid instruments to drive personal interest towards those activities and conducts that better one’s condition increasing also public wealth and peaceful life (Simon 2011; 2013a; 2018). But this scheme can work only presuming an individual whose actions are mainly logical and widely foreseeable; a profile of a rational agent receptive of legal spurs which is very close to the neoclassical version of *homo*
economicus. Smith’s agent is the reverse since, as we have seen above, he is not guided by the logic of maximization of utility but by sentiments that are not necessarily rational. So Smith, rather than be confident in the perfect rationality of an omniscient legislator (Haakonsen 1981: 85-86; Griswold 1999: 250-52; Simon 2013b; 2017), entrusts the task to the innate virtue of prudence which moderates human passions in order to safeguard the wealth, the happiness and the respectability of the individual from the risk of immoral actions (TMS, VI.i.6, p. 160). His logic parallels the one he uses to explain the growth of an economy rooting it in the passions of individuals.

**Why Punishment?**

If the desire to gain the approbation of the spectators around us may be a motivation to commit crimes, the judgment of the spectator inside us may be the motivation for punishing these crimes.

According to Smith, we judge the propriety of an action as well as its merits or demerits (TMS, II). The propriety of an action concerns the causes of the action. The merit of an action concerns its effects (TMS II.i.5.3, p. 75).

When we observe someone’s behaviors toward a third person, we may feel either gratitude or resentment, meaning we believe that that behavior deserves either reward or punishment. Our judgment usually takes into consideration both the propriety and the merit of the action, that is, both its motivation (of the actor) and its consequence (on the third party) (TMS II.i.5.5, p. 76. See also TMS, II.i.2.5, p. 73). Our judgment on the merit and demerit of the action observed completes and strengthens our judgment of its propriety. It spurs in us a desire to behave in a way that deserves moral reward and avoids resentment. So when we identify with the resentment of the victim more than with the motivation of the action, we think that punishment is appropriate (TMS II.i.4.4, p. 75). Our judgment is generally not the arbitrary result of a partisan individual, since we are far enough
from the action we observe. Our judgment is thus formed impartially, and may receive confirmation from a similar judgment of others, strengthening its validity even more.

Consequently, according to Smith, punishment is the result of a spontaneous reaction of our feeling of resentment. It is one of the most significant distinguishing elements of Smithian legal theory since it breaks with the mainstream of Legal Enlightenment which on the contrary founds punishment on the rational utilitarian calculation of pleasures and pains (Simon 2009a: 17-30). Consistent with his view of the natural birth and evolution of the institutions, Smith believes that Nature has entrusted the formulation of rules of conduct not to a rationalistic logic and a methodical speculation, but rather to instincts and passions (TMS II.i.5.10, p. 93).

So, punishment is not a price that rational legislator conceives against unwished social actions but as a natural reaction determined by a feeling of revenge, a natural offspring of resentment (TMS II.i.2.5, p. 73; TMS II.ii.1.5, p. 77) which arises within us. In contrast with other scholars of his age, Smith doesn't banish vengeance from the penal system. On the contrary, he wants to appease the victim's resentment through the pain of the guilty. The Smithian idea of punishment, therefore, far from the new reformist trend of the 18th century, remains an expiation theory which can be summarized with the sequence: resentment-expiation-satisfaction. For Smith, though, this expiation is not a religious one nor does it aim to restore the authority of the sovereign by the torment of criminal’s body (cf. Foucalt 1975: 8-72). Smith is also in stark contrast with an author such as Cesare Beccaria, who refuses to use the legal sanction as an instrument to satisfy the victim. Beccaria claims: «Can the cries of a poor wretch turn back time and undo actions which have already been done?» (Beccaria 1764: XII).

Revenge may risk becoming cruelty. Smith solves the potential problem of punishment being transformed in immoderate cruelty by once again entrusting the sympathy of the spectator who is the judge not only of the behavior deserving resentment but also of the measure within which this resentment can be exercised and contained (LJA, 90, p.104).
Now, not all behaviors deserving moral reproof deserve punishment. Hurting someone is what makes the difference between deserving and not deserving punishment (TMS, II, ii, 1, 5, p.77; TMS, II, iii, 3, 2: p. 90).

This is one of the most important and well known passages within the Smithian theory because it explains the origin of justice and its unintentional fundamental role for the survival of society (TMS II.ii.3.3-4, p. 80-81). The acts of charity and of disinterested benevolence deserve approval and rewards but their omission, or the lack of gratitude as a consequence of them, do not cause an intolerable unhappiness to men, do not expose them to any risk, and so do not provoke indignation and hatred in the spectator. Punishment is not called for when charity or benevolence are missing. Whereas hurting someone requires a strong response which extinguishes his resentment, defend him from other similar harmful acts and satisfy the sense of justice of the society (TMS, II.ii.1.4, p. 77). Therefore, as the impartial spectator dictates, the only tasks of justice are redress and defense:

Resentment seems to have been given us by nature for defence, and for defence only. It is the safeguard of justice and the security of innocence. It prompts us to beat off the mischief which is attempted to be done to us, and to retaliate that which is already done; that the offender may be made to repent of his injustice, and that others, through fear of the like punishment, may be terrified from being guilty of the like offence. It must be reserved therefore for these purposes, nor can the spectator ever go along with it when it is exerted for any other (TMS, II.ii.1.4, p. 77).

The Smithian idea of injury in some aspects appears to coincide with that of Legal Enlightenment damage (Simon 2009a: 17). Both breaks with the Ancien Régime tradition which identified sin and crime; both define the seriousness of the criminal action and the corresponding punishment. Yet, beyond the appearances there is a deep difference between the two theories. The damage described in the works of utilitarian scholars is the tangible result of an economic calculation of the loss and gain of social undesirable behaviors and the same is for the equivalent
punishment which should discourage them. Instead, Smith’s concept of injury is more about the sentiment of someone, hit in his body, property, or freedom, who feels above all that his dignity is injured. A subjective and personal resentment which the approbation and sharing of the impartial spectator transforms in a positive and objective datum.

Smith therefore consistently applies his understanding of human nature, which sees human beings as creatures with sentiments rather than simply utility calculators, in both his theory of crime and his theory of punishment. Grounded in individual feelings, Smith’s theory of crime and punishment generates a theory of legal justice based on the individual, and not meant to promote what is good for society, even it does achieve it unintentionally. Smith’s legal theory fits comfortably within the same system with which he describes the economic system as well as within the Scottish Enlightenment idea that well-functioning social institutions are the result of human actions but not of human design, but it does greatly diverge from Legal Enlightenment.

**Why public magistrates?**

Engaging in the study of the science of man implies distinguishing between the permanent and the contingent. Smith sees that our desire to achieve the approbation of others, through virtue and wealth, and our systematic overestimation of our probability of success and underestimation of our probability of failures are permanent feature of our being. The presence of “the man within the breast” judging the propriety and the merits of our actions is also part of our unchangeable nature. What is contingent is the material and institutional context in which we live, including the level of wealth and the opportunities to gain great wealth, and thus the strength of the incentives to commit crimes.

In pre-commercial societies, the desire to parade wealth is just as strong as in commercial societies, but there is less wealth to parade, so we observe little wealth shown off. For example, in a
society of hunters, approbation comes mostly from physical achievements or wisdom, since wealth is highly perishable, private property is thus practically inexistent, and significant accumulation of wealth is unlikely. With no property, the only possible injuries are either physical or reputational. These injuries do not benefit the injurer though, so they are not very frequent, according to Smith. Prudence and the impartial spectator work relatively well, given the weakness of the incentives. There is no need for a civil authority and indeed there is none (LJB, I, 19-20: 404. WN V.i.2.2, p. 115).

But as wealth becomes less perishable and can be accumulated, private property is more likely present, and wealth becomes an easier and less controversial way to achieve the approbation of others. This also means that there is more wealth to seduce and weaken moral restraints. And given property, the injurer does benefit from injuring his victim. “Avarice and ambition in the rich… [and their] affluence…excites the indignation of the poor, who are often both driven by want, and prompted by envy, to invade his possessions”: crimes become more likely (WN V.i.2.2, p. 115) and the presence of a civil magistrate becomes a need to guarantee security through penal laws which pursue crimes and judges who enforce them (WN V.i.2.2, p. 116).

According to Smith the origin of legal and civil authority therefore is a consequence of the birth of property and its diffusion (LJB, I, 11: 401). Smith’s theory is thus in open conflict with contract theories, as civil authority emerges only under specific circumstances, and not from a deliberate decision. It also differs from the theory of deterrence of the Legal Enlightenment. In the center-stage of Smith’s work there is always the individual; his interest is the ultimate aim of the authorities’ intervention. Justice is to defend each person and his property, not the society as a whole. We can see the pivotal role of the individual when we see that Smith puts the origin of the right to punish in the resentment of the victim and of punishment in the satisfaction of this personal sentiment. The dissuasion from committing further hypothetical crimes is one of the side effects of
the penal rules, but it is not the main motive which turns the resentment into a legal sanction\(^8\) (TMS II, ii, 1, 4-5, p.77; LJ). Legal justice is a mechanism to avoid private vengeances and retaliations, which could otherwise escalate.\(^9\) Deterrence is obtained unintentionally by assuring the satisfaction of the victim resentment (LJA, 93, p. 105). What today we would recognize as efficiency is here again an unintentional result—as usually happens when Smith analyses the origin of institutions.

So, the fundamental feature of Smithian idea of justice is a marked individualism which contrasts with the holism which characterizes Legal Enlightenment’s theory of justice as a social defense.

Smith is aware of this intellectual distance and underlines it, declaring openly his opposition towards the theorists of “publick good” (LJA, 91, p.104).\(^10\) They concentrate on the “correction of the offender”, on “the deterring of others” and on “the safety of the community” (LJA, 169, p. 136), placing the defense of society first and only indirectly dealing with the individual. Smith explicitly overturns them with his psychology of crime and punishment: he tells that, for example, we want to punish who stole some change from us, not because we are afraid that the loss of that change will compromise our fortune, but because we are upset about the loss of that change. Similarly, we want to punish who injured an individual, not because we are concerned for society, but because we are concerned about the injured individual (TMS, II.ii.3.10, p. 82).

Furthermore, Smith believes that when we stray from the criterion of resentment to embrace the one of the security of society, in the name of public interest, we risk inflicting punishment\(^11\) beyond the measure suggested by the impartial spectator(LJA, 91, p.104).\(^12\) A legislator who adopts

\(^8\) Unlike the authors of Legal Enlightenment (Simon 2009a: 18-19; 21; 25-26; 2011: 238-42), Smith does not reach the formulation of a theory of marginal deterrence which is the core of today economic analysis of crime and punishment.

\(^9\) Indeed, according to Smith, in the beginning the public authority played only an intermediation role to prevent the individual exercise of resentment from degenerating into a civil feud. Successively, during the course of history the state gradually tried to extend its task to the defense of social interests.

\(^10\) Although Smith knows the works of exponents of Legal Enlightenment – in his library there are copies of the works of Beccaria and Verri (Mizuta 2000: 23; 261)- he never quotes them and prefers to identify them generically as pupils of Grotious.

\(^11\) In reverse the exponents of Legal Enlightenment consider a punishment as lawful only when able to discourage the illegal act, while vengeance represents an excessive suffering which causes a greater deficit to society.

\(^12\) Smith’s dissent from Legal Enlightenment theory of social defense could be the explanation of the unpublished manuscript fragment which today is in the Appendix of TMS edited by D.D. Raphael and A. L. Macfie (1976, p. 390).
this doctrine could punish innocuous behaviors and limit personal freedom to maximize public welfare. When justice is inspired by holistic principles and when it is founded on utilitarian procedures, Smith fears natural liberty would be compromised.

In addition to threatening individual freedom, according to Smith, punishing to pursue the public good may also be ineffective. Since punishment is the consequence of human passions and feelings, if it pursues public targets which are unconnected with natural resentment, it could find feeble sharing in individuals’ judgments. This is possible Smith’s most original contribution: utilitarian punishment may most likely fail.

In a controversial passage of TMS, Smith allegedly claims that we justly punish with death a sentinel who falls asleep so that others may be deter from falling asleep, potentially jeopardizing the whole army. His language is tentative, though, reflecting the hesitation of the impartial spectator and how reluctantly he makes himself agree that the severity of the punishment is appropriate given the absence of resentment. Smith goes so far to claim that even “A man of humanity must recollect himself, must make an effort, and exert his whole firmness and resolution, before he can bring himself either to inflict it, or to go along with it when it is inflicted by others” (TMS, II.ii.3.11, p. 83. See also LJA 90-2: 104-05). The individual is sacrificed for the alleged wellbeing of society and this decision is not necessarily approvable.

While the sentinel will be executed, even if extremely reluctantly, other crimes meant to protect the whole society may not be punished. When Brittan punished with death the exportation of wool claiming that exporting wool would injure the whole society, it became impossible to find jurors or witnesses against the smugglers. People refused to inflict punishment for something they did not see meeting the conditions for resentment (LJA 90-2: 104-05). In this circumstance individuals show a scarce cooperation with the legal justice, jeopardizing its enforcement.

The risk of “improper punishment” arises when the justice renounces the criterion of resentment and extend its task beyond the protection of natural rights (Simon 2013: 406).
Smith’s logic here is remarkably similar to the one used to justify abandoning attempts to draft and enforce economic policies meant to promote the public good: they generally are either superfluous or counterproductive.\textsuperscript{13}

**Conclusion**

Smith wholeheartedly believes that the resentment is the original source of the right to punish, that it has to be the main target of the legal justice, and that it is also the proper measure of a fair punishment. He does not believe crime is the result of a rational motive, rather he sees crime as the immoderate desire of acquiring by any means richness to parade combined with our systematic presumptuous hope of success. This wish of gaining social approbation through parading wealth without consideration for the maximization of utility can drag men to the point to go beyond the bound of prudence and understate the final consequences of the actions. So, an utilitarian punishment –based on the hedonistic calculation of pleasure and pain and on a reliable forecast of the probability to enforce it- could not effectively deter a criminal who is not a perfect rational agent.

The theory of justice described in LJ and WN is consistent with its ethical premises exposed in TMS\textsuperscript{14}: both are founded on the judgment of the impartial spectator whose imaginary and metaphorical role in the civil society is played by the magistrate. This institutional actor judges by taking into consideration the injury caused by the crime and the consequent resentment of the victim and society which sympathizes for him.\textsuperscript{15} The attempts to bring justice to the individual result in unintendedly create a well-functioning legal system. The attempts to rationally redesign this system, like some Legal Enlightenment projects would propose, would switch the attention

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\textsuperscript{13} The Smith’s partial concessions to the alternative system of social defense –which we find in LJ and WN- can be explained recalling his distinction between natural and acquired rights and its consequences on the Smithian theory of justice (Simon 2013: 394-95; 404-408).

\textsuperscript{14} In LJ there is an explicit reference to Smith’s lectures on moral theory which deal with the topic (LJA 36, p. 17).

\textsuperscript{15} Re smithian classification of crimes see Haakonssen (1981: 118).
from individual justice to social public good. They would ignore human nature and this risking to create more damages than the ones intended to mend.

The man of system …. Seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chess-board. He does not consider … [that] every single piece has a principle of motion of its own altogether different from that which the legislature might chuse to impress upon it. If those two principles coincide and act in the same direction, the game of human society will go on easily and harmoniously, and is very likely happy and successful. If they are opposite or different, the game will go on miserably, and the society must be at all times in the highest degree of disorder” (TMS VI.ii.2.17, p. 233-4).

Smith’s legal theory, when considered in all its aspects—from the motivations to commit crimes, to the motivations enforce punishment, to the emergence of a civil magistrate—is remarkably consistent with his economic theory. The “man of system” may be equally dangerous for both the economy and the law. Understanding human nature with all its passions and sentiments, trusting the individual despite all its biases and limitations, generally unintentionally generates better functioning institutions than the ones rationally designed ignoring the passionate aspects of human nature. For Smith, this is true of the economic system. And it is true also for the criminal legal system.

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