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Thomas J. Miceli. 2019. *The Paradox of Punishment: Reflections on the Economics of Criminal Justice*. London: Palgrave Macmillan, 229.

Thomas J. Miceli is Professor of Economics at the University of Connecticut (USA), with significant works in law and economics, and applied microeconomics.<sup>1</sup> He has published a new intriguing book exploring the criminal justice system from an economic standpoint. Such a perspective, of course, is not a new one,<sup>2</sup> but the author offers valuable insights which could challenge conventional wisdom.

The book is divided into three main sections: Competing Economic Theories of Crime (part I), The Institutional Structure of Punishment (part II), and the Other Objectives of Punishment (part III), followed by the fourth and final section – Concluding Remarks (part IV). Through all the chapters, it seems the underlining idea is to whittle down fundamental issues related to the economics of criminal justice and to offer alternative insights.

Starting with economic theories of crime, the author explains the traditional normative theory on the economics of criminal justice and juxtaposes it with the positive theory. As a starting point, both theories imply the concept of crime as a (non-consensual) exchange, and punishment as a price for that exchange. For instance, if party A (offender) takes something of value from party B (victim), party A is then required (by the forceful intervention of the state) to pay the cost of the item they have taken. For everything else being equal (*et ceteris paribus*), as the

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<sup>1</sup> Some of Miceli's most recent books are *The Economic Approach to Law* (2017), *Contemporary Issues in Law and Economics* (2018), and *Law and Economics: Private and Public* (2018).

<sup>2</sup> The economic analysis of crime and punishment may be found in the early works of Montesquieu (1748), Beccaria (1764), and Bentham (1780). However, the subject was mostly neglected by economists for centuries, until it was revived by Gary Becker in his famous article *Crime and Punishment: An Economic Approach* (1968).

price of a crime increases, quantity of supply decreases; and conversely, as the price of a crime decreases, quantity of supply increases. The main difference between the normative and positive theory is reflected in their goals and consequently, in the specification of the price of crime. The author emphasizes that Becker's normative theory (1968) focuses on the optimal deterrence and overall welfare maximization, while Adelstein's positive theory (1981) focuses on the retribution and corrective justice in individual cases. Thus, due to the different goals they strive for, the two theories envision significantly different punishment schemes. Miceli explains the differences in detail, and he also offers a goldmine of references for anyone who would be interested in investigating the distinction further.

The second part of the book examines how the two competing theories manifest themselves in practice, by analysing the institutional structure within which criminal policy is formulated. As an example, the author takes the United States legal system, but all the insights and the same methodology may be applied in any given institutional setting. The main point is to observe the legal rules as "rules of the game", and the offender and the government as "players", i.e. to apply game theory to the crime and punishment procedure. In doing so, Miceli elegantly demonstrated that the timing of punishment specification plays a crucial role in how efficient the criminal justice system will be. In the first place, punishment is specified by the legislator *ex-ante*, and subsequently, by the judges who implement the prescribed sentence *ex-post*. In this sense, the legislator places more weight on deterrence, by enacting the law and sending a credible signal to all potential offenders that law-breaking will result in a punishment. Contrary to that, judges confront actual offenders, and they are more inclined to impose "fair" sanctions, based on the circumstances of the case at hand. Thus, in Miceli's words, the interplay between legislator and judges reflects an ongoing balancing act between the competing theories, with the legislator emphasising deterrence (Becker's model) and judges stressing retribution and corrective justice (Adelstein's model). Furthermore, in the same part of the book, the author introduces a new player into the game – the prosecutor, thus expending the analysis to include plea bargaining.

In the vast majority of legal systems, plea bargaining involves negotiations between the prosecutor and defendant over the mutually acceptable sentence. Thus, the outcome of the plea bargaining depends on many factors, including parties' expectations about the possible result of a trial, collected evidence, available procedural safeguards of the defendant's rights during the trial, etc. The principal objection to plea bargaining is the real possibility of making a type I error or a type II error during the negotiations. In other words, innocent defendants may be

falsely convicted as a result of bargaining, and guilty defendants may get mitigated sentence. In this sense, Miceli raises the question of how plea-bargaining affects deterrence and whether it may achieve “justice”, i.e. appropriate punishment for guilty defendants and exoneration of innocent? Along with many insightful explanations, the author offers a two-folded answer to the raised questions: i) if offenders rationally anticipate that they will be punished within the plea bargaining procedure, then the prescribed sentences (by law) may have a relatively modest effect on their behaviour; ii) since the type II error is relatively more frequent in the plea bargaining procedure compared to the type I error, a compulsory prosecution system better fits the goals of retribution and corrective justice. Miceli concludes by quoting himself and his co-author: “plea bargaining is more likely to evolve in systems that emphasize the protection of innocent defendants, and systems that stress punishing the guilty are more likely to be able to sustain a regime of compulsory prosecution” (Adelstein and Miceli, 2001, p.60). However, some of the readers may think that the main problem is not in plea bargaining. In that sense, Easterbrook (1983) notes that even if an innocent defendant is convicted as the result of plea bargaining, the source of injustice is not in the bargain – it is, instead, in the fact that innocent people may be convicted in trial. And *vice versa*, in the case when offenders are not punished adequately, i.e. when they get mitigated punishment as a result of plea bargaining, the source of injustice lies with the fact that they could be exonerated during the trial. All the mentioned disadvantages of plea bargaining are, in fact, the reflection of the trial’s failures, and it seems that Miceli persistently analyses that reflection instead of facing the real source of the problem.

The third part of the book undertakes a broader view of criminal justice, which includes analysis of the behaviour of repeat offenders, collective responsibility and the limits of punishment. It is not clear why or how the author selected these issues in the third section. One way or the other, Miceli starts with the theme of repeat offenders and marginal deterrence, i.e. poses a question of how punishment scheme should be structured to deter those who have already committed a crime from committing further criminal acts. Between the two extremes – applying the same legal rules for repeat offenders (the same sanctions, or “free redemption”) and employing more strict penalties due to previous criminal activities, the author suggests the moderate approach. Metaphorically speaking, Miceli explains that: “[...] by making those early sins essentially costless, free redemption may not lower overall sinning at all but merely shift it backward in time. In contrast, attaching some positive price to early sins (a stick), while still holding out the prospect of redemption (the carrot), can perhaps reduce overall sinning”. The whole issue of the behaviour of repeat offenders’ behaviour is presented in a very interesting

way by using the Prodigal Son parable.<sup>3</sup> At the same time, the engaging story is followed by the formal and precise economic model of repeat offenders and marginal deterrence. Everything seems bright and polished in this part of the book except the fact that the reader cannot find any convincing explanation of how big the “stick” and “carrot” should be, i.e. how exactly the punishment and redemption of repeat offenders should be structured.<sup>4</sup>

The second topic in the third part examines punishment and collective responsibility. It is common knowledge that collective responsibility in criminal law is a relic of the past. Still, Miceli tries to explain the historical path from collective to individual responsibility and, more importantly, he tries to justify the existing exemptions from individual responsibility and prove their relevance in a broader context of deterrence and retribution. While searching for answers, the author quotes Joel Feinberg (1991) who noted that “the demise of collective responsibility throughout the course of human history has not necessarily occurred because individual responsibility is an eternal law of reason toward which society has been striving in an ongoing quest for a more civilized world, but rather because the conditions that may have made it reasonable or necessary in ancient times are rarely present today”. Guided by these thoughts, Miceli identifies the conditions that have been altered over time and, as the most important one, he stresses the available technology. Namely, new technology provides for more efficient law enforcement, i.e. it decreases enforcement costs and the costs of making type I errors (the price of wrongful punishment). Thus, with a better-calibrated system of individual responsibility and sanctioning, both deterrence and retribution becoming more emphasised in comparison with a collective responsibility system. The author concludes that: “[...] as technology improves, even a vengeful society may eventually find it desirable to switch to individual punishment”. This conclusion is strongly supported by the set of equations explaining the optimal choice between individual and group punishment. The author demonstrates that if the effective sanctioning in the two systems is the same, random individual and collective punishment are equally desirable. Furthermore, he explains that when the technology of detection is sufficiently effective, “individual punishment will necessarily yield strictly greater welfare than group punishment”.

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<sup>3</sup> The author explains a broader concept of free redemption through the biblical story of two brothers and the forgiving father. For more details on this story see: New Testament (Luke 15: 11–32).

<sup>4</sup> For instance, Begović (2015) explains several factors that should be considered when determining a sentence for repeat offenders, such as asymmetry of information and the probability of sentencing.

Finally, the third main topic in the third part explores the limits of punishment by using an interesting metaphor of angels and bad men. Miceli uses Madison's (2008) observation – "if men were angels, no government would be necessary", and as the opposite, he uses Holmes' (1963) "bad men", who are amoral actors motivated solely by the threat of punishment.<sup>5</sup> In the given context, Miceli examines the limits of law as the ability of (legal) regulation to structure human behaviour. Angels are obedient, and thus the enforcement costs are lower with a more significant share of angels in a society. Yet, every community has a certain percentage of bad men, and it would not be efficient to make all harmful conducts in a community "illegal", and accordingly to punish all lawbreakers. Thus, Miceli states, it would be more efficient to have some complementary constraints to human behaviour, in addition to law, such as religion and morality. That could increase the share of angels in a community, improving the enforcement efficiency, and decreasing related costs. Miceli inclines to Friedman (2004) who noted that "[...] punishment is, in a way, only an add-on to the powerful work of social norms; an important one to be sure", but the author does not analyse in detail the interaction between these different sets of social norms, even though that could be crucial for the limits of punishment.

Lastly, in the concluding remarks, Miceli summarises the main three parts of the book and all the mentioned topics referring to the paradox of punishment. That curious paradox has its reflection in a continuing conflict between two fundamentally different goals to which criminal law strives: deterrence and retribution. Every criminal policy that strengthens deterrence could, at the same time, deteriorate corrective justice and *vice versa*. It seems one would need a magic wand to accomplish these two opposed goals simultaneously or at least the economic analysis of crime and punishment to determine what is the optimal proportion of the different motives within the same criminal policy. No matter how detailed Miceli is in conducting his analysis, he undoubtedly successfully explains the essence of the punishment paradox. Also, along with alternative insights, the author provides an extensive list of useful references for future research in the field of economic analysis of criminal justice.

Paradoxically, Miceli concludes his book by stating that criminal justice reform is mostly a question of social values and so it is not fundamentally an economic issue. In Miceli's words, the economic analysis takes preferences as a given and thus can help increase efficiency of the criminal law enforcement, but "it cannot tell society what values it should embrace, or what outcomes are just".

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<sup>5</sup> Holmes (1897) observes: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict".

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