An economical analysis of the criminal law

The economical analysis of the criminal law deals with how a criminal system should be in order to be considered efficient.

When somebody commits an crime, he or she is arrested and condemned: so these consequences represent a more or less relevant element of dissuasion.

Actually, offences should always have a less expensive market option (for example, stipulating a sale contract instead of stealing the desired object); therefore, the aim should not be that of reaching an adequate level of punishment to act as a deterrent, but that of reaching a punishment (or better, a mix of punishment and probability of being punished) that inflicts a damage (equal to the one caused to the victim) to the criminal. In this way, the aggression would actually take place only if it is efficient.

An example of efficient crime is that of a hunter who gets lost in the forest and, almost starving to death, finds an unattended hut. Obviously, the hunter will be disposed to break into and to eat the food he finds inside the hut; this is due to the fact that the advantage of saving his own life is more important than the loss suffered from the owner of the hut: the crime is therefore efficient, or else the person would have probably avoided the criminal action.

In these cases the legislator tends to safeguard the person in need, dispensing him from any penal responsibility; the same thing happens, for example, if somebody exceeds the speed limits in order to reach a hospital in time. The operativeness of this position is, however, subordinate to the concrete verifiability of the particular circumstances that make our behaviour efficient.

Even the efficience has a limit. Here there is an example of an efficient murder: a “sadic” hunter offers a hundred-thousand Euros to ten people who love danger, to be chosen for being the prey of the hunter. The murder is clearly efficient, but this kind of agreement is controversial.
What is interesting, here, is that in today’s institutional reality, crimes continue to exist. This proves, in the first place, that we do not have punishments able to function as deterrent; moreover, almost every crime is basically inefficient, as the damage caused to the victim is far worst that the benefit obtained by the criminal.

The ideal level would be, for example, to have only efficient murders, but reality is different. However, this is not the only problem: the probability of conviction for a murderer is less than 100 per cent, because finding all the murderers would be more expensive than its real value. As a matter of fact, one part of this cost will be formed by an excess of police forces and judiciary apparatus, and another part by the punishments inflicted to innocents (because with the lowering of the level of evidence there will be the risk of condemning also the accused who are innocent).

Then, it is important to take into account the costs that an efficient system involves: arresting and punishing a criminal always involves a cost. Generally, the more severe the punishment is, the more it will cost. But if this can be true for a single crime, on the general level a strong punishment will serve as a deterrent for other offences, resulting in a saving on the costs.

The relationship between the harshness of the punishment and the raising of the costs of a single crime can be explained with an example: when a convicted criminal pays a thousand dollars fine to the State the cost to him, which is what gives the punishment its deterrent effect, is a thousand dollars but the net cost is zero. Every dollar the criminal loses the state collects. Punishment cost, defined as the difference between the cost the punishment imposes on the criminal and the benefit it provides to others, is zero.

So we can try to match the harshness of the sentence with the possibility of punishment: if a certain criminal category is punished in the 20 per cent of the cases with a ten thousand Euros, we can try to lower the percentage to 10 per cent fixing the fine at twenty thousand Euros. If we repeat this process even only twice, it results clear that there is a basic problem: the criminal who pays ten thousand Euros could have difficulties in paying twenty thousand Euros.
Therefore, an efficient system have to choose among those combinations of punishment and probability that are equivalent because they have the same deterrent effect, an efficient system should choose the combination able to minimize the total costs, formed by the sum of the necessary costs to inflict a conviction and those used to capture the suspects. The deterrence level selected could be found in the less expensive combination between punishment and probability.

At this point it is necessary to analyze the ideal level of deterrence. In general, we can consider valid the principle which states that it is suitable to prevent a crime only when the net cost of the crime is higher than the cost linked with its prevention. But we should also consider that a high level of deterrence prevents from future crimes and lowers the costs; therefore, increasing the level of deterrence can be considered a direct investment and it can lower the number of crimes.

The following step is, than, that of detecting how the level of efficient punishment should be calculated for every criminal category. We will use as an example a crime that causes a damage of a thousand Euros and we will try to increase the punishment from 900 Euros to 901 Euros (this implies, at the same time, an increase of the costs of capture and punishment of 50 Euros). In order to determine the increase of the punishment, we need to consider the reasoning of the criminal. He or she will commit the crime only if its value for him or her is superior to the value of the punishment he or she expects to receive for the crime.

If the benefit was lower than 900 Euros, he would already have an effective deterrent effect before the increase of the punishment; on the other hand, if it was higher than 901 Euros, he would not even be discouraged by a stronger punishment: obviously, in this case, the crime assumed a value between 900 and 901 for the criminal. Thanks to this deterrent effect, we are able to remove a complete damage of 100 euro (1000 – 900), with only 50 Euros: therefore the change was clearly appropriate. The logic that we should follow is that we have to keep on increasing the extent of the expected punishment until the assured benefit would exceed its cost. That is to say:
Net damage = a damage for the victim – a benefit for the criminal

A benefit for the criminal = an expected punishment

Net damage = a damage for the victim – an expected punishment

Cost of the deterrence from a further crime = net damage = damage for the victim – expected punishment

Precisely 1000 – 99 = 901.

In order to obtain a suitable level of punishment we need to combine two different intuitions: the first one which enables a punishment equal to the damage caused and the second one which dictates to go for a punishment sufficiently suitable as a deterrence. If the cost of the criminal’s capture is convenient and cheap, the maximum level will amount nearly to the provoked damage and so it is advisable to impose a norm concerning responsibility, by collocating the level of compensation for damages next to the provoked damage. Otherwise, the level of the punishment should be placed at a point that, if exceeded, it would have only a trivial deterrent effect which would counterbalance the cost; in this case we should prefer a rule concerning the property, by establishing a damage compensation fairly high in order to discourage nearly all the automatic transactions, by eliminating all the costs.

Until this moment, criminals’ costs and benefits have been put at the same level of those of any other person; we should remark that costs and benefits are supposed to have an ethical and a qualitative dimension beside an economic and quantitative one. We should not forget that one of the key points of the economic analysis of the law is that it gives us an instrument to answer the questions about regulatory content and their collocation within the legal system. If we start our argument with the economic efficiency, we will reach some conclusions which agree both with the current regulations and our ethical dispositions. If we do not want to assess the benefits of every person at the same level by dividing them between honorable and not, fair and unfair, victims and criminals, we would make a mistake by thinking backwards, justifying the basis of our logic by starting from the conclusion. Actually, our theory should be able to indicate the categories in real life that we should consider as
criminal, by distinguishing them from those categories that we analyze differently. The economic analysis let us use a set of conceptual instruments capable of answering to these questions.

There is also another reason that lead us to include also the subjective conditions of the criminals within the cost-benefit computation: the conviction of petty thief requires the same cost of the conviction of a pyromaniac, but the crime committed by this one is a serious waste. This is the reason why an economically severe logic, beside taking into account the benefit assured to the criminal by committing the crime, lead us to a more scrupulous exam about our moral believes and suggest us that the benefits for the criminals are important to assess our moral values. The logic that we have adopted until now could not be considered wrong because it appeals to the economic analysis, by giving equal importance to the costs and benefits of the murderer and his/her victim. It leads to a deeper result, hence more complete.

We will now consider the case of somebody that illicitly steals money to his employer. Once released, this person will be forced to face many difficulties in finding a new job, because this kind of crime entails a strong social reprobation. John Lott’s studies prove that the social stigmatization is a real factor: if we consider the situation of a public company, we can easily notice how social reprobation can surpass greatly the extent of the punishment decided by the verdict of conviction. Moreover, even if we manage to convince an employer to hire us, we will surely have to content ourselves to a pay lower than the one we would have received in normal conditions: so, we would be victims of a stigmatization that produces a transfer of money from us to the employer. All this without taking into account those cases in which the convicted is innocent: in this situation the social reprobation is inefficient, because it is based on a false information.

Having considered, in this paper, the concept of the sanctions of criminals’ properties, we should now analyze if the amount of these sanctions should always be
the same or if it should change according to the economical condition of the guilty one. Namely, must the wealthy be treated differently from the poor?

In this case, too, we should consider John Lott’s point of view: he noticed that wealthy people who commit some crime have less probability of being condemned than the poor ones, because they are helped by the best lawyers. Therefore, the ideal solution would be the one of a law assuring a punishment of the same money amount in a world where both the capture and the punishment of criminals had no costs at all; but we know far too well, that reality is different. In fact, if we consider the costs needed to bring criminals to justice and to condemn them, the best punishment would depend not only on the damage caused, but also on the difficulty of obtaining a good deterrent effect. Sometimes, however, can be more efficient to punish the poor one and not to check out on the wealthy one, since, in some cases, a sanction hard enough to show its deterrent effect on the wealthy person will cost more than its real value. As a conclusion, an efficient system of criminal law should always take into consideration both aspects.

We need to take a step backwards and point out once more that the purpose of criminal law is, above all, that of creating an effective deterrent effect, by bringing potential criminals to reason and showing them the possibility of not committing any crime. However, in my opinion, some typologies of criminal penalties, i.e. safety measures, strive to achieve a different objective: the prevention of committing further criminal behaviors, so that the cost of the capture, the punishment and provoked damage will be saved. Moreover, in general, the detention aim at the rehabilitation of criminals, even if this point is not analyzed by the economic analyses.

But more than focusing on the difference between custodial penalties and not, recent statistical studies focus on another important element: the effect on the level of crime produced by the range of possibilities of the criminal of getting arrested. They also show that the percentage of crimes committed is influenced more by the variation of the possibilities than by the entity of the punishment. For example, the increase from
10 to 20 per cent in the possibility of being arrested and condemned is reducing the percentage of crimes committed, and it seems that this aspect is more convincing than the increase of the penalty punishment from one to two years. Most of the time this situation takes place because the hypothetical punishment includes also the time spent, waiting for the process. This is the way of thinking of a guilty man.

Possibility of 10 per cent of two years of prison. 0,1 years
2 years in prison and one more costs = 0,3 years
Possibility of 20 per cent spent (one year in the prison) = 0,2
(One year in prison, another year with other costs = 0,4 years.

Even if it is a general scheme, it shows that the murderer will choose the first option. A special discourse is needed to be done with the death penalty: from a strict point of view it is more efficient than a simply custodial sentence, because it eliminates the need to invest in new resources, in prison. From this point on, we should create a legal system in which they would not use the detection: criminals who will be able to pay their bills they will have to be, the others will be sent to the scaffold, with a probability depending on the severity of the crime (in this sense it would be in the interest of the murderer to be sure about the conditions previous to his/her capture.). Moreover the death penalty would be even more efficient if it would be allowed the explantation of an organ. Obviously this is not tolerated in one of the actual systems. Consequently, it could be that the analysis does not describe the main characters of an efficient punitive system or the actual systems are not efficient at all. For example, in the United States, in the actual penalty system the custody is used a lot, the capital execution is not so used and the explantation of organs is almost unknown. It is important to say that the capital execution is very expensive and this is not an argument in its favor. Moreover, we should bear in mind that actual regulations are the clear result of a major sensibility of the population for this kind of themes. Despite this, the actual regulations concerning penal sanctions are efficient. Actually, en economic theory which could delete the anomalies assigned to the single person, would not be verifiable and would have a low predictive power.
Finally, we should take into account a last aspect: in a world full of efficient punishments, it must exist a person who receive most of what is lost by the convicted person; this person has interest in the conviction of the accused persons, despite the fact that they would be guilty or not. In this way, the legal system becomes a sort of mechanism employed by some persons to deprive other persons, which in their turns will react by adopting expensive precautions in order to fight against this. Thus, the society could take advantage in the case lower punishments. We find an example of this kind of situation in the modern civil law, where we find a lot of legal procedures which are not well-founded. The lawyers use these sort of legal procedures to enrich themselves at the extent of big societies. Moreover, just to give another example, a lot of states have created a legislative body about confiscation, some of which aim at receive confiscated goods through the agency which have undertaken a confiscation reform. This kind of work could lead to a sort of confusion in what are jobs of this agency: there is a risk to have the confiscation of goods as the final purpose, instead of the crime prevention. There are other examples which sow that the problem which arise is a war in which everyone has his own enemy, there are different persons caught up which try, through the legal bodies, to deprive the other persons in order to prevent being exploited.