Short Symposium on the Punishment

Introduction

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The discussion on the justification and purpose of punishment is as old as philosophy but, like all genuine philosophical questions, no agreement has been reached in this regard – not even in the last decades, in which evolutionary theory, neuroscience, and cognitive psychology have been offering contributions in favour of all the various views at stake in the discussion. In this regard, it is surprising that, while how punishment is inflicted has significantly evolved over time, the categories used to justify it and explain its functions are very similar to those forged by past thinkers. In this light, our aim here is to offer some state-of-the-art reconstructions of the views on punishment held by some of the most prominent philosophers of justice, from Aristotle up to the contemporary times.

The first article is by Flavia Farina, who focuses on the Aristotelian concept of punishment. Although Aristotle did not discuss this topic in a systematic way, he offered some reflections on it that generated many discussions. By analyzing those reflections, Farina highlights the philosophical depth of the problem, which draws on some key concepts in Aristotle's practical philosophy, such as the distinction between deliberate and non-deliberate actions and that between voluntary and involuntary actions. A multifunctional account of punishment thus comes into view: punishment has multiple aspects and cannot be reduced to any one of them. These are the corrective aspect (aiming to restore equality within the community and to attain reparative justice), the repressive or deterrent aspect (aiming to instil fear in order to discourage socially unacceptable practices), and the educational aspect (aiming to form or reform the convict's conduct and dispositions). Aristotle's most interesting reflections concern the last of these aspects, especially in light of his view that acquired character is unchangeable. According to many interpreters, this view implies that if punishment may discourage morally bad actions, it cannot encourage virtuous ones. Against such a

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reading, Farina argues that, in addition to having an undisputed instrumental value for those who distribute the punishment (ie the whole community), the coercion connected with punishment also has a potential ethical value according to Aristotle, one that aims at the good of those who suffer it.

Luc Foisneau's article is dedicated to Hobbes's conception of punishment as it was developed between the Leviathan and the Dialogue between a Philosopher and a Student of the Common Laws of England. Foisneau begins by discussing the justification of a sovereign authority's right to punish its subjects. In particular, the primacy of self-preservation, on which Hobbes insists, may seem to prevent citizens from authorising the sovereign to inflict punishment on them or on their neighbours. However, Hobbes finds a solution to this problem by arguing that in the covenant the right to punish is left to the sovereign, so that it coincides with the *jus in omnia* characteristic of the state of nature as a state of war. On this basis, Giorgio Agamben has maintained that for Hobbes the concept of sovereignty is tied to the normalisation of a 'state of exception', in the sense that the sovereign right to punish, seen as a right to war, constitutes the heart of sovereignty and strips the subjects bare of all their rights. Against such an interpretation, Foisneau claims that the Hobbes's justification of the right to punish – which is compatible with his denial of free will – lies in its effectiveness as a deterrent, that is, in its ability to promote the subjects' obedience, ie, to promote the conformity of their will and conduct to the laws promulgated by the sovereign in order to safeguard social security. At the same time, Foisneau highlights Hobbes's insistence on the somewhat problematic distinction between punishment and acts of hostility: in addition to aiming at the production of obedience, punishment must be established via law by a sovereign authority and imposed by a judge in accordance with that law. From this perspective, which safeguards legal guarantees and aims at the efficiency of the legal system as a whole, Foisneau discusses a case that seems to confirm the reduction of punishment to war and the close relationship between sovereignty and the state of exception. This is the 'statues of Provisors', a case in which the criminal is deprived of any legal protection not as citizen, but as an enemy and is thus subject to a foreign sovereign power.

Francesco Toto's article focuses on a well-known difficulty in Rousseau's theory of punishment. Rousseau seems to ground the right to punish in the right of war (a view Hobbes also defended, with the difficulties we have just seen). Yet the idea that criminals are punished, possibly with the death penalty, not as citizens but as a 'public enemies' seems to contradict many aspects of Rousseau's political theory. On the one hand, the enemy is external to the state, and is punished without regard to considerations of utility or to the prospect of rehabilitation and reintegration. On the other hand, the application of the law to criminals should be carried out also in their own interest as a way of 'forcing them to be free' – of ensuring conformity their will to the 'General will', which is also their

own – in order to reintegrate them into the community. Toto indicates a way out of this problem by interpreting Rousseau's reference to the 'public enemy' in a restricted way. In accordance with the subject discussed in the Social Contract – that is, political law – the criminal punished as an enemy must be a political criminal, ie, an agent who undermines the foundations of democratic legitimacy (the most important case being that of individuals who, vested with some state authority, try to obtain despotic power by evading the control of the sovereign people).

Dario Ippolito's article investigates some Enlightenment approaches to the deontology of punishment by both comparing the views of Montesquieu, Beccaria, Filangieri, Genovesi, and Kant, and analysing some of the most influential readings of 18th century criminal reformism such as those of Michel Foucault and Giovanni Tarello. From a historical-critical point of view, Ippolito shows how Foucault cannot reduce the heterogeneity of the *philosophes'* positions to a unitary economic rationality and their humanitarianism to the ideological mask of discipline required by this rationality, if not at the price of distorting their specificities and mixing together incompatible theoretical commitments. A discussion of Tarello's proposed distinction between three main 'schools' or 'ideologies' (humanitarianist, utilitarianist, and proportionalist or retributivist) highlights, instead, an inverse distortion. In the 18th century, utilitarianist and retributivist principles could not only coexist in the same authors, but each of them could lead to opposing positions belonging to different ideologies (for example, utilitarian justifications could be offered both for and against the death penalty). From a more strictly conceptual point of view, Ippolito dwells on two meta-legal principles, the 'principle of proportionality' (which prescribes a quantitative correlation between the gravity of the penalty and that of the crime) and the 'principle of homogeneity' (which prescribes a qualitative correlation between the type of crime and the type of penalty). He shows that the first principle, introduced with a view to mitigating penalties, is based on utilitarian considerations: proportionality has a deterrent function, and is premised on a view of the correlation between crime and punishment as a political artifice, an institution, a human responsibility. By contrast, the second principle considers the correlation between crime and punishment in the naturalistic and retributivist terms of a 'natural correspondence'.

Francesca Fantasia discusses Kant's philosophy of punishment, focusing on Kant's views on legitimacy on punishment, on the conditions under which an action may be punishable, on the modalities of punishment, and more generally on the relation between pure practical reason and pragmatic reason. With regard to the first point, Fantasia shows how for Kant the legitimacy of punishment is analytically contained in the idea of law: there is no right without authorisation to coercion, and therefore without punishment of violation. On the second point, Fantasia argues that for Kant an action can only be punished if it is carried out

voluntarily against public law. This retributivist conception of punishment is doubly linked to the theme of humanity, the characteristic of humans as ends in themselves. First, humanity dictates that punishment is not imposed in a merely instrumental way, with a view to something other than retribution for a crime committed. Second, humanity imposes proof in trial as a requirement for punishment, specifically proof that an autonomous subject inflicted harm on another equally autonomous subject in a way that breaks a law. Thus, either the lack of a law or trial or a violation of the principle of equality (both between the parties involved and between them and the judge), is sufficient to invalidate punishment. When it comes to the modalities of punishment, Fantasia discusses the well-known assimilation of the necessity of punishment to a categorical imperative. The proper necessity of punishing a crime committed by a sane agent and proven in trial is unconditional, independent of any utilitarian considerations. The *lex talionis* is the only criterion, independent of empirical considerations and consistent with the principle of equality between parties, by which punishment can be made commensurate with the crime. Yet because it recognises the lexical priority of the principle of humanity with respect to the principle of equality, the *lex talionis* also imposes internal limits on commensurability. Not even the most heinous of crimes can authorise a punishment that violates the dignity of the criminal. After discussing Kant's rebuttal of Beccaria's criticism of the death penalty – and showing that it is not so much a defence of the death penalty as a defence of the coercive and anti-utilitarian character of law – Fantasia ends by clarifying Kant's conception of punishment as a categorical imperative, which issues from pure practical reason. This conception does not aim to rule out all justifications of the instrumental value of the punishment, as considered by pragmatic reason, but rather to subordinate the latter to the former, and therefore to attribute to the 'vindictive' value of punishment a primacy over all other kinds of value, such as deterrent or re-educational value.

Sabina Tortorella examines Hegel's theory of punishment as it is developed in the Elements of the philosophy of right, paying particular attention to the difference in perspective between the section on 'abstract law' and that on 'ethics'. She underscores both the specificities of these different perspectives – ie the way in which one aims to delineate a purely rational foundation of punishment and the other to make explicit its historically determined aims and conditions of applicability – and their convergence within a unitary framework. Within this framework, the first perspective is at once the logical presupposition and historical result of the second, since the internal logic of law emerges in its truth only with the formation and stabilisation of the modern state. Indeed, for Hegel, the state is the only entity entitled to publicly establish laws governing the relations between private individuals and punishments for their violation. Tortorella also shows how, on both perspectives, punishment necessarily fulfils a function of universalisation of particular wills and realisation of the idea of law. In this

sense, punishment cannot be reduced, along retributivist lines, to the simple compensation of wrong, since it cannot mend the tear between reality and justice caused by the wrong without at the same time contributing to the *Bildung* of the criminal as an ethical subject, to repairing the laceration between his particular will and universal will, and thus to his consequent reintegration within the community. In the same way, punishment cannot simply be considered a violence that the state must inflict on the criminal in fulfilment of a duty towards the injured party, because it is always, at the same time, a right of the criminal himself, and in this sense less a limitation of his freedom than its realization.

Marco Piazza's work examines the theories of punishment of La Mettrie and Nietzsche, as illustrated in *Discourse on happiness*, on the one hand, and in *Human, all Too Human* and *On the Genealogy of Morality*, on the other. His aim is twofold. From a historical point of view, Piazza tests the hypothesis that Nietzsche's conception of punishment develops in a critical dialogue with the French philosopher and physician. Piazza concludes that Nietzsche certainly had indirect knowledge of La Mettrie – through Albert Lange's *History of Materialism*, at the very least – and it is plausible (though not provable) that he also had direct access to La Mettrie's texts, or to their translations. From a theoretical point of view, Piazza frames the two philosophers' conceptions of punishment in the broader context of their respective metaphysics, anthropologies and moral philosophies, highlighting both convergences and divergences. Among the views that Nietzsche and La Mettrie share are some general theses that constitute the background of the concept of punishment: determinism, the arbitrariness of the ideas of good and evil, the birth of these ideas within a project of domination, and the unsustainable price that they require the individual to pay in terms of the sacrifice of his or her natural drives. More specifically, and more immediately connected to the theme of punishment, the two share the ideas of a merely socio-political and non-philosophical foundation of justice and criminal law, of the merely social function of punishment, and of the uselessness of remorse. Where Nietzsche and La Mettrie diverge, on the other hand, they reveal differences in their respective conceptions of materialism, with Nietzsche further radicalizing La Mettrie's views. These differences concern the understanding of the fundamental motive of human action (the search for pleasure in La Mettrie, the search for power in Nietzsche); the evaluation of this motive (the selfishness which, for La Mettrie, is not morally reprehensible but rightly punishable inasmuch as socially harmful, and which Nietzsche proposes to free from the repression to which it is subjected by prejudice and morality); and the evaluation of the legal-moral sphere itself (which La Mettrie considers philosophically unfounded but practically or socially necessary, and which Nietzsche on the contrary hopes to leave behind).

Finally, Patrizio Gonnella's article proposes a critique of the reeducation paradigm of punishment that combines a plurality of themes and sources, from

memorialism to philosophical reflection, from jurisprudence to anthropology. Gonnella draws attention to the ambivalence of this paradigm and the easy abuses to which it lends itself. He calls into question the centrality that the Italian penal system continues to accord to prison, noting that the opening to alternative penal measures has not succeeded in slowing the growth of the prison population, which is no longer linked to the growth (or decrease) rates of crime. At the same time, he underscores the incompatibility of prison reality with the rhetoric of re-education: following Massimo Paravini, a multiplicity of functions (punitive, programmatic, expressive, strategic) can be attributed to prison, but in reality prison remains today, as it was during the Fascist period, a place of suffering, humiliation and exclusion, governed by asymmetrical and at best paternalistic relations of power. These relationships are based on unwritten and often arbitrary rules, removed from any democratic control and largely extra-legal if not explicitly illegal. Today prison remains a factory of recidivism. Faced with the risk that the reeducation paradigm is the mask of revenge and arbitrariness – when not also of the particular interests that in the United States have, for example, transformed the prison into a real business – Gonnella proposes to bring the value of human dignity – ethical but constitutionally recognised – back to the forefront. The primacy of human dignity, the author argues, can limit the arbitrariness of the power to punish and help avoid the correctionalist degeneration of rieducational 'treatment'.[1]

[1] The papers collected here derive from a seminar held at Roma Tre University in January 2019 as a part of the project '*Dinamiche pubbliche della paura e cittadinanza inclusiva*' financed by the same university in the framework of the call '*Azione 4: azione sperimentale di finanziamento a progetti di ricerca innovativi e di natura interdisciplinare*'.