# How to Punish?
# The Deontology of Punishment in the Enlightenment Philosophy

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**Abstract**

The article faces the penal problem in the Enlightenment philosophy, proposing a three-step approach: 1) detection of the normative principles elaborated in the debate on the right to punish; 2) clarification of the theoretical foundation and the political scope of such principles; 3) examination of the relationship between these principles and different types of penalties.

## I. Introduction

The 'Beccaria moment' is now! With these words, Gianni Francioni highlighted the recent flourishment of studies on Beccaria's work and its historical importance.[1] Looking from a different perspective, we could argue that the 'Beccaria moment' has returned. Indeed, in recent decades, discussions of the power to punish have reached the same level of radicalism, critical vigour and reformatory impetus as in the Enlightenment era. Today, as then, the penal problem puzzles us as it imposes itself upon the philosophical culture, the legal science and the civic conscious with the urgency of its intrinsically political set of questions. How can we conciliate liberty and security? How do we prevent crimes without infringing rights? Where do we draw the line between the powers of penal agents, on the one hand, and the faculties that shape the individual's legal sphere, on the other hand? On what principles – and based on which rules – ought we model a procedure aimed at eliminating – to the extent possible – an innocent man's fear of conviction and the guilty man's expectation of impunity? Finally, what sanctions should be imposed on those who violate prohibitions?

Criminal law is today – just as much as it was in Beccaria's times – a field of tensions. Its balance is frail; its physiognomy deformed by contrasting impulses,

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[1] See G. Francioni's talk at the symposium 'Illuminismi. Attualità e limiti dell'età del Lumi' (Milan, Casa della Cultura, 16 February 2016), available at: https://tinyurl.com/yh7zzuwj (last visited 30 June 2021).

requirements and aims. Its concepts and institutes spark public debate and lead irreconcilable visions of society to clash – the securitarian ideologies vs liberal axiologies, the models of restorative justice vs incitements of revenge, the zero-tolerance policies vs recommendations for *cautela in poenam*.

In the current state of these conflicts, deprivation of freedom through incarceration – the typical punitive mechanism in contemporary systems – emerges as a fundamental and decisive issue. On the one hand, its apologists argue for its necessity, affirm its irreplaceability and advocate for its expansion; its critics, on the other hand, point out its inefficacy, denounce its injustice and foreshadow its overcoming. In short, the prison is today at the centre of a crucial dispute over the civility of law – just as the *supplice* was in the second half of the Eighteenth-century, when the *custodes iuris* and the *sacerdotes iustitiae* rallied in defence of the traditional criminal order against the reformatory demands of the Enlightenment movement.

In my view, this historical parallel renders the analysis of the Enlightenment thinkers' juridico-political discourses on the topic of penal sanctions especially interesting. In particular, it allows us to reflect upon the way in which they were able to discredit the dogmas of the dominant culture, contributing in this way to the extinguishing of the 'splendour of the supplice'. It seems useful to begin this investigation by analysing the original deontology of the punishment developed during the 'Beccaria moment'. A deontology that is complex, variegated and irreducible to a uniform paradigm, but which is – in all of its normative declensions – nevertheless polemically aimed at delegitimizing the punitive system of the time. Not, therefore, a deontology, but rather a set of doctrines on just punishment, characterized by a plurality of principles aimed at limiting and constraining the power to decide on how to punish.

Which are these principles? What are their doctrinal foundations and what their pragmatic function? Although highly relevant, these questions have not attracted the appropriate attention in penal Enlightenment studies. In principle, we know the Enlightenment philosophers' answers to the question 'what to prohibit?': their struggle for the secularization of criminal law and their defence of individual freedoms against the despotic prohibitions are well known even beyond the borders of specialist studies. We also have a fairly clear understanding of their theses on 'how to adjudicate': in the antithesis of the inquisitorial model, they directed the criminal trial towards the protection of innocence and the search for truth by way of a procedure based on the principles of publicity and orality, equality and contradictoriness between the parties, as well as the impartiality of the judge. However, what do we know about their doctrines on penal sanction? What types of punishment did they accept as legitimate? Within what limits did they restrict the power of the State to inflict harm upon those who violated some legal prohibition? In short, how did they respond to the question 'how to punish'?

## II. How to Punish?

### 1. The Enlightenment Thinkers' Reply According to Michel Foucault

Someone might object that we actually know the answer to this question as well. After all, Foucault explained it more than four decades ago in *Discipline and Punish*, on the pages dedicated to the new philosophy of punishment that was diffused in the second part of the Eighteenth century. The objection appears founded. Therefore, it seems worthwhile to return to Foucault's influential lesson, briefly illustrate its interpretative structure and evaluate the issues pertaining to the topic of our interest.

According to Foucault's reading, the Eighteenth-century penal reformism is a cultural expression of the disciplinary society. It promotes the development of a new policy of combating delinquency, one based on the criteria of preventive efficiency and repressive capacity. Foucault invites us to consider the reformers' discourse beyond their humanitarian rhetoric. Their goal was 'not so much to establish a new right to punish based on more equitable principles',[2] but rather to extend and strengthen the grip of punitive power on the social body, making it more effective, orderly, precise, pervasive and less costly.

> (T)o make of the punishment and repression of illegalities a regular function, coextensive with society; not to punish less, but to punish better; to punish with an attenuated severity perhaps, but in order to punish with more universality

– these are, argues Foucault, the 'primary objectives'[3] of the theorists of penal modernization – the strategists and architects of the 'generalized punishment'.[4]

Within the framework of this original representation of reformist ideology, the problem of the penal sanction stands out. Underlying the 'technology of the power to punish'[5] is a sophisticated 'semio-technique'[6] of the *modus puniendi*. Examining its normative scope, Foucault presents its 'major rules'.[7] The first is the rule of minimum quantity, according to which the harm threatened by the criminal law must be the minimum necessary to dissuade from the criminal act. The second is the rule of sufficient ideality, on the basis of which the legislator must pursue the goal of the effectiveness of prohibitions, relying more on 'the 'pain' of the idea of 'pain'' than on its 'corporal reality'.[8] The third is the rule of lateral effects, for which the sanction associated with the infringement must

[2] M. Foucault, *Discipline and Punish* (Middlesex: Penguin Books, 1991), 80.
[3] ibid 82.
[4] This is the meaningful title of the first chapter of the second part of M. Foucault, *Discipline and Punish* n 2 above.
[5] ibid 89.
[6] ibid 94.
[7] ibid 94.
[8] ibid 94-95.

aim at general deterrence. The fourth is the rule of perfect certainty, which prescribes a clear legal determination of punishments and requires that they be meticulously imposed upon those guilty of respective crimes. The fifth is the rule of common truth, which – regarding the discipline of evidence in the criminal trial – goes beyond the thematic perimeter of our discussion. The sixth is the rule of optimal specification, which requires (in addition to the codification of the types of crimes) the 'individualization of sentences' on the basis of 'particular characteristics of each criminal'.[9]

To overcome the confusion due to this unusual terminology and to provide a clearer picture of this new 'economy of the power to punish'[10] Foucault speaks of, let us attempt to order the elements of this catalogue. On the basis of its principles, (1) the punishment must be (1a) established by law and (1b) endowed with intimidating force; (2) the legislator must pursue the goal of having his prohibitive norms respected, not by increasing the punishment's cruelty, but through (2a) the maximization of their capacity of representing harm, (2b) the optimization of punitive reactions and (2c) the minimization of the area of impunity. Finally, (3) the punishment must be adjusted to the personality of the offender.

Before considering further features of 'the punitive city'[11] designed by the reformers, let us reflect on the characteristics of this layout. Certain features of the deontologies of the punishment inspired by Beccaria can undoubtedly be found therein. Indeed, with the international spread of the ideas contained in *On Crimes and Punishments*, the principles of legality in criminal law and of punitive economy had become the *tòpoi* of the debate on the right to punish. The same can be said of the thesis according to which the purpose of general prevention – ie the dissuasion of other members of society from committing crimes – is not achieved by increasing the severity of sanctions, but rather by increasing the effectiveness of sanctioning norms. In other terms, by increasing the efficiency of criminal justice.

On the contrary, the requirement of the individualization of the punishment appears utterly out of place in this cultural framework. Moreover, on a closer look, the heuristic procedure followed by Foucault in framing the rule of the optimal specification results somewhat distorted. The said requirement is related to two doctrinal positions: a) the idea that the law must establish punishments on the basis of subjective statuses, considering that the same threat of harm will not have the same deterring effect on individuals in different positions (for example, a shaming punishment may scare a nobleman, but not a commoner); b) the idea according to which in sanctioning the same kind of crime, the judge must impose punishments of different severity in view of the

[9] ibid 99.
[10] ibid 99.
[11] ibid 113.

different degree of guilt of the offender (eg one who steals due to hunger does not deserve the same punishment as one who steals out of greed).

It would be misleading to invoke these two claims in order to affirm that besides the requirement for a 'codification of the offences-punishments system'[12] there also appears that of the 'modulation of the penalty' in relation to the 'defendant himself, to his nature, to his way of life and his attitude of mind, to his past'.[13] The thesis *sub* a) does not relate the type of punishment to the individual identity of the offender, but rather to his social identity. It is rather a utilitarian justification of penal inequality in the context of a society of orders and not the germ of the doctrine of the individualization of punishment. Likewise, the thesis *sub* b) does not concern a 'precisely adapted code', in which the taxonomy of crimes and punishments is complemented by the 'modulation of the criminal-punishment'.[14] As clearly emerges from Marat's writings on which Foucault underpins his discussion, this thesis rather establishes a principle of equitable justice, related to the judicial conception of crimes:

> the judge must always be mindful of the circumstances in which the culprit is placed; depending on these circumstances, a crime can be more or less serious.[15]

It should also be noted that neither of the two theses can be considered fully representative of the reformist ideas circulating in the age of Enlightenment. The first is quite clearly a conservative thesis that endorses a typical feature of the *ancien régime*'s law, namely the importance of social differences in the legal regulation of social relations and of individual behaviour. This does not mean that it did not find support even among the exponents of the Enlightenment movement. However, it is precisely in the Enlightenment debate that its anti-thesis is affirmed – namely, the principle of equality before the criminal law. '(T)he punishments', writes Beccaria, 'ought to be the same for the highest as they are for the lowest of citizens'.[16] Pierre Louis de Lacretelle – whose *Discours sur le préjugé des peines infamantes* Foucault invokes precisely in relation to the connection between status differences and criminal laws – takes a resolute position with regard to the same: 'Where citizens are not equal before the

[12] ibid 99.
[13] ibid 99.
[14] ibid 99.
[15] J.-P. Marat, *Plan de la législation criminelle* (Paris: chez Rochette, 1790), 34. On this Marat's work, see J. Llobet Rodríguez, 'Jean-Paul Marat y la Ilustración penal' *Revista CENIPEC*, 275-306 (2005); and the book by L. Prieto Sanchís, *La filosofía penal de la Ilustración* (Lima: Palestra, 2007), 163-174.
[16] C. Beccaria, *On Crimes and Punishments* (Cambridge: Cambridge University Press, 1995), 51. On Beccaria's philosophy of punishment, see the fundamental studies by G. Francioni, 'Beccaria filosofo utilitarista', in S. Romagnoli e G.D. Pisapia eds, *Cesare Beccaria tra Milano e l'Europa* (Milano-Bari: Cariplo-Laterza, 1990), 69-87; and Ph. Audegean, *La philosophie de Beccaria. Savoir punir, savoir écrire, savoir produire* (Paris: Vrin, 2010).

criminal law, there can be neither safety nor happiness'.[17]

Although the meta-judicial principle *sub* b) expresses a widespread sensibility in the Enlightenment literature, it nevertheless conflicts – *de iure condendo* – with other contemporary issues which are far from negligible. These include the Beccarean doctrine which attaches the gravity of the penalty to the gravity of the social harm caused by the crime, excluding from consideration the subjective element of guilt; or the principle of the strict subjection of the judge to the law which – strengthened by the general preference of the reformers for the establishment of jury trials – was laid down in the first penal code of revolutionary France.[18]

These latter observations highlight what, in my view, is the greatest limitation of Foucault's analysis. By disregarding the dialectic polyphony of the Enlightenment movement, Foucault furnishes a unitary, compact and consistent image of the Eighteenth-century reform movement. His hermeneutical proposal, according to which '(t)he reform of criminal law must be read as a strategy for the rearrangement of the power to punish'[19] is translated into the construction of an ideological canon – a canon obtained by the selection and combination of principles held to be useful for the goal of 'regularizing, refining, universalizing the art of punishment'.[20]

Moreover, this mixture of principles is not always successful. Even when it does succeed, it produces uniformity at the price of distorting reality. An example for each of the two aporias can be useful for the further development of our discussion.

a) Incommixturable ingredients. Foucault includes two antinomic theses within the canon of the reformist thought. He expresses the first on the basis of Gaetano Filangieri's words:

> The proportion between the penalty and the quality of the offence is determined by the influence that the violation of the pact has on the social order'. But this influence of a crime is not necessarily in direct proportion to its horror; a crime that horrifies the conscience is often of less effect than an offence that everyone tolerates and feels quite ready to imitate. There is a scarcity of great crimes; on the other hand, there is the danger that everyday offences may multiply. So one must not seek a qualitative relation between the crime and its punishment (…) One must calculate a penalty in

[17] L. de Lacretelle, *Discours sur le préjugé des peines infamantes* (Paris: Cuchet, 1784), 143-144.

[18] Cf L.M. Le Peletier, 'Rapport sur le projet de code pénal fait au nom des comités de Constitution et de législation criminelle' *Archives parlementaires*, t. XXVI (the session of Monday, 23 May 1791), 322.

[19] M. Foucault, n 2 above, 80.

[20] ibid 89.

terms not of the crime, but of its possible repetition.[21]

Apart from the surprising discrepancy between Filangieri's thesis (according to which

> the crime that violates a pact more relevant to the social order must receive (…) a more severe punishment than the crime that violates a less relevant pact)[22]

and Foucault's interpretation of it (according to which the gravity of the penalty must be commensurate with the influence of the crime – or rather, to the imitative effect it produces), it is interesting to highlight the conclusion of the latter's reasoning: the rejection – attributed to the promotors of the new *ars puniendi* – of the principle of qualitative correspondence between the crime and the punishment.

I emphasize this conclusion because in the continuation of Foucault's examination this principle is rather included among the maxims of the new *ars puniendi*. 'To derive the offence from the punishment is the best means of proportioning punishment to crime',[23] writes Jean-Paul Marat echoing Montesquieu. 'Exact relations are required between the nature of the offence and the nature of the punishment',[24] affirms Louis-Michel le Peletier before the *Assemblée nationale*. Foucault summarizes: 'The punishment must proceed from the crime'.[25]

Whereas the idea that we should 'calculate a penalty in terms not of the crime, but of its possible repetition' has no place in the *République des Lumières*, both the affirmation of the principle of typological correspondence between the punishment and the crime as well as its rejection, are present in the debate on the right to punish. If the rejection of that principle is very rare, its affirmation in widely shared: it is easy to find it both in the natural law doctrine and in the psychological conjectures of utilitarians. This confirms the inadequacy of a homogenizing representation of the Enlightenment.

b) Distortion as the price of uniformity. In the 'techno-politics of punishment'[26] – to which Foucault reduces the science of penal legislation fostered by the reformers – there is no place for values different from those

[21] ibid 92-93.

[22] G. Filangieri, *La Scienza della legislazione*, in V. Ferrone ed (Venezia: Centro di Studi sull'Illuminismo europeo 'G. Stiffoni', 2009), Book III, Part II [1783], XXXIX, 141. Indispensable with regard to Filangieri's criminal doctrine are F. Berti's, *La ragione prudente. Gaetano Filangieri e la religione delle riforme* (Firenze: Centro Editoriale Toscano, 2003) 473-502; and 'Diritto penale e diritti dell'uomo: il garantismo di Gaetano Filangieri', in D. Ippolito ed, *La libertà attraverso il diritto. Illuminismo giuridico e questione penale* (Napoli: Editoriale scientifica, 2014), 115-147.

[23] Quoted in M. Foucault, n 2 above, 105.

[24] ibid 105.

[25] ibid 106.

[26] ibid 92.

inherent in an orderly government of society: efficiency, legality, discipline, obedience etc. Once established that the goal of the reforms is 'to insert the power to punish more deeply into the social body',[27] any axiological criterion that is *prima facie* foreign to the logic of this governmental project must be cleansed of its rhetorical cosmetics.

Hence, the Enlightenment struggle against inhumane punishment is interpreted by Foucault in a purely utilitarian perspective and explained in function of the interests of the one exercising social domination:

> The pain that must exclude any reduction in punishment is that felt by the judges or spectators with all the hardness of heart that it may bring with it, all the ferocity induced by familiarity, or on the contrary, ill-founded feelings of pity and indulgence (…) What has to be arranged and calculated are the return effects of punishment on the punishing authority and the power that it claims to exercise.[28]

In short, cruel punishments are counterproductive due to the effects they generate – that is, they are counterproductive for the administrators of the public order. 'It is this 'economic' rationality that must calculate the penalty and prescribe the appropriate techniques'.[29] It is here that – due to the necessity to regulate the exercise of power in order to ensure its regulative capacity – the principle of the humanisation of punishment is rooted: ' 'Humanity' is the respectable name given to this economy and to its meticulous calculations'.[30]

Demystified and re-semanticised, the evaluative reference to humanity is thus reabsorbed into the ideology of punitive optimization. Punishing cruelly is not worthwhile as it accustomises to violence and produces connivance. As reform theorists have repeated time and again, cruel punishments are harmful and criminogenic. However, we ought to ask ourselves whether they keep repeating this to increase the performances of the penal enterprise ('to punish better')[31] or to support a demand for justice (the mitigation of punishments)?

In Foucault's interpretation, he who says 'humanity' is a skilful manager of the 'theatre of punishments'.[32] However, it seems to me that to look at the reformist discourse as a sort of *speculum principis* is to obliterate the whole political discourse – *ex parte civium* – which goes from Beccaria – according to whom 'a society cannot be called legitimate where it is not an unfailing principle that men should be subjected to the fewest possible ills'[33] – to Kant, whose retributivist rigor, at the moment he justifies the capital punishment, requires

[27] ibid 82.
[28] ibid 91.
[29] ibid 92.
[30] ibid 92.
[31] ibid 82
[32] ibid 106.
[33] C. Beccaria, n 16 above, 48.

that its execution 'be freed from any mistreatment that could make the humanity in the person suffering it into something abominable'.[34] The humanity, that is, of the one found guilty, not of his judges; of the one suffering the punishment, not of those assisting in the penal spectacle.

These principles of the deontology of the punishment are not considered in the ideological canon constructed by Foucault. Instead, what finds its place therein is the whole penal arsenal advocated by François-Michel Vermeil in his *Essai sur les réformes à faire dans notre législation criminelle*, which is a typical expression of the new 'technique of punitive signs':[35] from humiliation for crimes of pride, the stakes for arson, all the way to the punishment devised for parricide:

> blinded, locked in a suspended cage, naked (…), exposed to all the rigors of the seasons, (…) covered in snow, (…) burned by the sun, he would be fed on bread and water until the end of his life.[36]

Putting in the same ideological framework the creator of this 'torment', expressly conceived as a 'prolongation of a painful death',[37] and writers like Filangieri and Marat is an inadmissible operation. Not all reform proposals are aimed at the same goals. In order to understand, we must first distinguish. Thus, if we wish to know the Enlightenment thinkers' reply to the question 'how to punish', we cannot be satisfied with Foucault's interpretative paradigm.[38]

## 2. The Enlightenment Thinkers' Reply According to Tarello

Even after more than forty years following its publication, Giovanni Tarello's *Storia della cultura giuridica moderna* continues to tower above other studies on the juridico-political doctrines of Enlightenment thinkers.[39] By combining an extraordinary knowledge of the sources with interpretative rigour and conceptual clarity of analytical legal philosophy, the founder of the so-called 'Genovese school' was able to shed light on the reasons for the emergence of the Eighteenth-century 'penal problem' as well as on the multiplicity of its aspects. Among the series of questions in which the penal problem is articulated, the question of punitive sanctions occupies a prominent position alongside the problem of the qualification of crimes. According to Tarello, the normative theses corresponding to these questions stem from three main doctrines of punishment: namely, utilitarianism, humanitarian ideologies and the

[34] I. Kant, *Metaphysics of Morals* (Cambridge: Cambridge University Press, 1991), 142.

[35] M. Foucault, n 2 above, 94.

[36] F.-M. Vermeil, *Essai sur les réformes à faire dans notre législation criminelle* (Paris: Savoye et Delalain, 1781), 148-149.

[37] ibid 149.

[38] For an acute critique of the foucaultian paradigm, see A. Punzi, 'Sorvegliare per non punire? Note su sicurezza e garanzie' *Rivista internazionale di filosofia del diritto,* 621-636 (2014).

[39] G. Tarello, *Storia della cultura giuridica moderna* (Bologna, il Mulino, 1997).

proportionalist ideology. While the former primarily concerns prohibitions, the latter two refer directly to the punishment.

'Humanitarian' is the adjective attributed to the ideology of the mildness of punishments. As Tarello remarks, 'it appears to derive, in part, from the utilitarian ideology'.[40] Indeed, the latter prescribes to the sovereign not to 'impose punishments more severe than required by utility'[41] as well as to abolish punishments that are useless by nature. 'Proportionalist', on the other hand, is the name ascribed to the ideology according to which 'the penalty must be commensurate (…) with the crime'.[42] Tarello sees its origins in two distinct traditions of thought: one – philosophical – dating back to the 'Pythagorean doctrines of retribution'[43]; the other – religious – rooted in the Old Testament. In other terms, we are dealing with a 'retributivist conception of punishment', whose Enlightenment renewal is related to the 'Eighteenth-century legal rationalism'. Accordingly, 'if the punishment is the (exact) retribution',[44] then for each crime its measure has to be (exactly) established by the legislator.

With regard to the legitimacy of prohibitions, Tarello demonstrates how both utilitarianism and retributivism advocate for the exclusion

> of matters regarding the conscience and religion, from the sphere of issues worthy of penal sanction by the secular sovereign.[45]

On the one hand, the utilitarian argument in favour of the secularization of criminal law affirms the indifference of religious attitudes regarding the goal of safeguarding the civil order. The retributivist argument, on the other hand, is found in the thesis according to which sanctions for offences against God belong to God itself, not to the State.

As for the deontology of the punishment, Tarello highlights how the three ideologies are attuned in challenging punitive cruelty. In the face of 'terrible 'deterrents' ' of the *ancien régime,* the different components of legal Enlightenment marched together under the same banner, fighting for the moderation of repressive orders.

In his effort of historical understanding, Tarello arrives at a solid conclusion:

> The opposition between the three schools is in the principles, not in their historical expressions along the Eighteenth century; it is only at (…) the beginning of the Nineteenth century that the principles will be discussed in their crystalline purity, and conflicts will emerge on a theoretical level; nevertheless, at that time, those principles had already been absorbed into

[40] ibid 388.
[41] ibid 388.
[42] ibid 388.
[43] ibid 388.
[44] ibid 388.
[45] ibid 389.

the institutional realities and the conflicts were mainly academic.[46]

However, not even this conclusion fully satisfies the interests propelling our investigation. It is, therefore, necessary to first understand this conclusion's limits to then overcome them. To do so, we should first note that just as disputes about principles and theoretical conflicts developed in the Nineteenth-century criminal law are foreign to the Enlightenment culture, the image of the 'three schools' or 'ideologies (…) that characterize the Eighteenth century'[47] also appears to be an anachronistic distortion of reality. Indeed, if we can find no doctrinal contrasts between utilitarian and proportionalist conceptions of punishment in the philosophy of the Enlightenment thinkers, it is because those conceptions are not constructed as ideologies and even less so as schools. They are simply conceptions that – for the most part – coexist within the same normative discourse.

The notion of 'ideology' appears inadequate in relation to the conceptions of punishment distinguished by Tarello. We may, of course, argue that this is only a matter of semantics. However, if by ideology we refer to a set of evaluative and normative theses expressing a particular value system, and use it to characterize the position of the one professing them in the face of the reality to which they refer to, then neither penal utilitarianism nor the proportionalist conception of punishment can properly be called ideologies. For instance, Cesare Beccaria's condemnation of the death penalty is utilitarian, and so is its apology by Ferdinando Facchinei. Can we thus argue that Beccaria and Facchinei are exponents of the same ideology? On closer inspection, it rather appears that utilitarianism and retributivism cut across ideological camps of Eighteenth-century criminal law, as they are two axiologically flexible conceptions of criminal law. They can be grounded in different value systems and lend themselves to the support of the most diverse normative theses.

On the other hand, the humanitarian doctrine of the mildness of punishments is ideologically saturated. Unsurprisingly, it is here that we find one of the main issues dividing Beccaria's supporters and his opponents. Based on this simple observation, we may highlight another aporia in Tarello's analysis. Since utilitarianism does not, of itself, imply any mandate regarding the *modus puniendi* – neither concerning the type nor the extent of punishment – it is an error of perspective to represent the issue of penal mitigation as its derivative. The *philosophe* who employs utilitarian arguments in the debate against cruel punishments does so on account of an ethico-political option – namely, a moral attitude marked by a set of values which the Enlightenment vocabulary epitomizes in the word 'humanity'. It is precisely humanitarianism that directs the utilitarian discourse in favour of the mildness of penalties. Thus,

[46] ibid 390.
[47] ibid 387.

the 'derivation scheme'[48] proposed by Tarello should actually be inverted. The Enlightenment renewal of penal utilitarianism depends on the diffusion of unprecedented humanitarian sensitivity and the promotion of the person as an end in itself.

Put briefly, in our attempt to understand the Enlightenment juridico-political doctrines, we must commit ourselves to experiment with new instruments of observation and analysis. In this direction, I wish to propose a three-step approach to the problem of the criminal harm in the Enlightenment philosophy: 1) The discovery of meta-legislative principles related to the punishment, present in the reformist debate on the right to punish; 2) The clarification of theoretical foundations and of the normative scope of the identified principles; 3) A review of the relationship between these principles and the accepted or rejected punitive typologies.

## III. Crimes and Punishments

### 1. The Canons of Criminal Justice

Two fundamental documents in the history of modern legal culture facilitate the realization of a first, approximate outline of the normative principles underlying the deontologies of punishment developed in the age of Enlightenment. Following their chronologic order, we being by opening – on its last page – Beccaria's 'miraculous booklet',[49] where the author argues:

> In order that punishment should not be an act of violence perpetrated by one or many upon a private citizen, it is essential that it should be public, speedy, necessary, the minimum possible in the given circumstances, proportionate to the crime, and determined by the law.[50]

*On Crimes and Punishments* ends with this connotation of the just punishment. To appreciate its revolutionary effects, we should travel from Milan to Paris – from the *Accademia dei Pugni* to the *Assemblée nationale*. It is here that on 23 May 1791, Louis-Michel Le Peletier presented the draft of the penal code, drawn up by the Constitutional and the Criminal Legislation Committees. Summarizing the list of principles of the 'penalty theory'[51] underlying the text, he declared:

> The punishments must be humane, properly graduated, in an exact relation to the nature of the offence, equal for all citizens, free from any

[48] ibid 389.
[49] P. Calamandrei, 'L'inchiesta sulle carceri e sulla tortura' *Il Ponte*, 229 (1949).
[50] C. Beccaria, n 16 above, 113.
[51] L.M. Le Peletier, n 18 above, 321.

> judicial arbitrariness. It is necessary that they not be distorted in the manner of their execution. They must be repressive, mainly by embarrassment and deprivation, (...) by their publicity, by their proximity to the place where the crime was committed. It's important that they correct the moral inclinations of the condemned, through the habit of work. (...) Finally, they must be temporary.[52]

The confrontation of these two passages clearly reveals the growing scope of the Enlightenment debate on the right to punish. In the summary of the canons of the punishment's legitimacy with which Beccaria concludes his *pamphlet*, we find only one regulative principle regarding the correlation between the offences and punishments, namely that of proportionality. On the other hand, in Le Peletier's compendium of the penal code's principles, we find two, namely, that the punishment must be a) 'properly graduated', b) 'in an exact relation to the nature of the offence'.[53] The normative connotation *sub* a) corresponds to the principle asserted by Beccaria – that is, that the correct graduation of the punishment consists in 'establishing the proportion between severity of the punishment and the seriousness of the crime'.[54] On the other hand, the directive *sub* b) prescribes that the type of punishment must depend on the type of crime committed –

> physical pain will punish the offences causes by ferocity; hard work will be imposed on the culprit whose crime has its source in laziness; infamy will punish actions inspired by an abject and degraded soul.[55]

Here, then, we find the first important difference between the two principles: on the basis of the first, a quantitative relationship between crimes and punishments must be established, whereas on the basis of the second, the relationship is qualitative. Both principles apparently satisfy the requirements of retributive justice. However, to reduce them both, *sic et simpliciter*, to the sphere of penal retributivism would be to misunderstand and confuse them.

If we analyse them individually, it becomes easy to see their different philosophical consistency as well as their different normative implications. In order to avoid ambiguity, let us first of all name and define them. I propose to call 'the principle of homogeneity' the canon of legislation according to which the punishment must typologically correspond to the crime. Also, I propose to restrict the extensional meaning of the expression 'principle of proportionality' to the prescriptive thesis according to which the harshness of the punishment must be commensurate to the gravity of the crime.

[52] ibid 323.
[53] ibid 323.
[54] ibid 322.
[55] ibid 322.

**2. Utilitarianism and the Principle of Proportionality**

The affirmation of this principle of proportionality in the Enlightenment discourse rarely rests on the retributivist moral postulates. Rather, for the most part, it pertains to the utilitarian logic of general prevention. All too known are the pages of the *On Crimes and Punishments*' Chapter VI to lay them out as proof of this observation. All too numerous are the repetitions of the Russian example – with which Montesquieu denounced the harmful consequences of the lack of proportion between crimes and punishments[56] – to be able to mention them without resulting tedious. Rather, it is worthwhile to return to Le Peletier, whose *Rapport* to the Constituent Assembly results exemplary in this respect as well. Says Le Peletier,

> The effectiveness of a penalty depends less on its severity than on its proper place in the scale of penalties. It's important that each crime is punished in proportion to the punishments associated with the other crimes. It's important that there is a fair relationship between the various degrees of the scale.[57]

Substantiated in this way, the principle of proportionality is the result of a utilitarian conception of punishment: *punitur ne peccetur*, and not *quia peccatum est*. However, precisely for this preventive purpose, *punitur proportionabiliter ad peccata*. In short, the respect for the principle in question is recommended to the legislator as the key factor of deterrence:

> If a great distance separates the punishment for one crime from the punishment for another crime, the bad man who cold-bloodedly meditates upon a bad action will stop where a great danger begins for him.[58]

On the other hand, the absence of an escalation in the sanctioning reaction – one corresponding to the scale of offensiveness of the prohibited actions – incentivizes the delinquent to maximize profit:

> It was a great absurdity of our laws to punish the thief on the high road (…) with the same punishment as the murderer. The law itself invited (one) to murder since murder did not aggravate the punishment (…) and could suppress the proof of the crime'.[59]

We can, therefore, say that in the context of Eighteenth-century reformism,

[56] 'In Russia, where the punishment of robbery and murder is the same, they always murder (footnote omitted). The dead, say they, tell no tales.' See Montesquieu, *The Spirit of the Laws* (Kitchener: Batoche Books, 2001), 107.

[57] L. M. Le Peletier, n 18 above, 321.

[58] ibid 322.

[59] ibid 322.

a utilitarian doctrine of a normative relation between crimes and punishments, based on the criterion of quantitative proportion, begins to take shape. The clearest confirmation of the removal of proportionalism from retributivism comes from Jeremy Bentham's philosophy of punishment.[60]

In its utilitarian version, the principle of proportionality appears as a norm on the production of norms. As such, it is clearly an extra-legal norm, addressed at the legislator. More specifically, as far as it affects the relationship between prohibitions and sanctions, it is a norm on (the production of) penal norms. It is, therefore, a substantive meta-norm, seeing how it concerns the content of normative production. If it has been specified that this deontic configuration regards the utilitarian version of the proportionality principle, it is because the latter can be – within a retributivist framework – loaded with a different prescriptive meaning. Whoever believes that we ought to punish by looking at past behaviour is led to conceive the canon of proportionality between crimes and punishments as a principle of equity; that is, of justice in a concrete case and, thus, as a meta-jurisprudential principle. In this perspective, it is up to the judge to proportion the crime to the punishment.

It is with the innovative doctrines of penal deterrence, proposed by Enlightenment thinkers, that the principle of proportionality emerges as a prescription addressed at the legislator. It imposes upon the latter the duty to define a scale of punishments tailored to the hierarchy of the goods protected by prohibitive norms. This – in consequence – also requires the criminal law to be ordered in a unitary and systematic *corpus* of norms. In this sense, the principle of proportionality is constantly invoked in the struggle for codification.

Moreover, within the scope of this struggle, the principle of proportionality reinforces the requirement for the mitigation of punishments. Demonstrating the usefulness of proportionality against a repressive system that introduced severe punishments even for minor crimes and indiscriminately imposed death for deviant behaviour of diverse gravity, allowed for a defence of penal humanitarianism – not in terms of philanthropy, but of political rationality. Utilitarianism (*punitur ne peccetur*), proportionalism (*punitur iuxta gravitatem criminis*) and humanitarianism (*punitur temperate*) thus formed the rings of a single argumentative chain.

### 3. Natural Law and the Principle of Homogeneity

'Civil liberty flourishes when the laws deduce every punishment from the peculiar nature of every crime'. Citing this maxim from Catherin II of Russia's *Nakaz,* Foucault points out that the empress takes 'almost word for word' 'Beccaria's lesson on the specificity and variety of penalities'.[61] This remark,

[60] J. Bentham, *Traités de législation civile et pénale* , in J. Bentham ed, *Œuvres de Jérémie Bentham* (Bruxelles: Société Belge de Librairie, 1840), Book I, Part III, Chapter II, 156.

[61] M. Foucault, n 2 above, 117.

however, is philologically and conceptually inaccurate. As is well known, that maxim derives from Montesquieu's *opus maior*[62] and expresses a principle that cannot be related to Beccaria's penal philosophy – namely, the principle of homogeneity.

The idea of a 'natural correspondence between punishment and crime' – writes Luigi Ferrajoli – is the 'oldest answer' to the question 'how to punish' and is 'closely linked to the penal retributivism and the doctrines of natural law'.[63] Its Enlightenment reformulation fully confirms this connection. Montesquieu elevates the moral postulate – according to which 'an intelligent being who has done harm to another intelligent being deserves the same harm in return' – to the level of 'relation of justice antecedent to the positive law'.[64] The power to punish is thus justified in its retributive function. The legitimacy of its exercise is conditioned to the respect for the principle of homogeneity, which imposes the qualitative conformity of the punishment to the crime.

As the basic principle of criminal justice, *lex talionis* is arguably the most rigorous and consequential expression of the above-mentioned requirement. A prominent example is found in the Antonio Genovesi's philosophico-juridical thought. In what is considered to be the first natural law treaties in Italy,[65] this admirer of Montesquieu, proposes the identification of a naturally-derived rule which renders a punishment just.[66] The normative proposal of his cognitive investigation is a complex penology,[67] based on the talionic principle:

> whoever violates a right, loses one himself, and of the same kind;[68] every punishment that is equal to all violated rights, is always a *talion*. If it is not a *talion*, it is not equal, and therefore not just; in consequence, it is a crime punishable by another talionic law.[69]

Those who position penal Enlightenment within the philosophical framework of utilitarianism cannot but leave outside of it those Enlightenment thinkers who, following in Montesquieu's footsteps, accepted and revitalized the idea of a punishment that is congenerous, isomorphic, or 'equal' to the crime. Those who see the talion as nothing more than an archaic criminal rule, supported by

[62] Cf Montesquieu, n 56 above, 207-208: 'Liberty is in perfection when criminal laws derive each punishment from the particular nature of the crime'.

[63] L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale* (Roma-Bari Laterza, 2011), 384.

[64] Montesquieu, n 56 above, 1.

[65] I. Birocchi, 'Genovesi, Antonio', in Id et al eds, *Dizionario biografico dei giuristi italiani (XII-XX secolo)* (Bologna: il Mulino, 2013), I, 964.

[66] A. Genovesi, *Della Diceosina o sia della filosofia del giusto e dell'onesto*, in N. Guasti ed (Venezia: Centro di Studi sull'Illuminismo europeo 'G. Stiffoni', 2008), Book I, XX, para IV, 270.

[67] On Genovesi's philosophy of punishment, see D. Ippolito, *Diritti e potere. Indagini sull'Illuminismo penale* (Roma: Aracne, 2012), 105-127.

[68] A. Genovesi, n 66 above, 273-274.

[69] ibid I, 274-275.

religious authority, will be surprised to see it elevated to the position of the supreme principle of justice by the exponents of the cultural movement that symbolizes modernity and secularism. Some may even transform their amazement into a perplexity about the representation here provided.

The facts, however, are well-established and it would be superfluous to linger in exemplifications. It was already Michel Foucault, who in his 1972-1973 *Collège de France* course, recognized the talion as one of the 'models of punishment' proposed by the Eighteenth-century reformers. He explains its 'reappearance' in relation to the desire to prevent any abuse of power: indeed, where the penalty is, in its nature and strength, exactly correlative with the offence itself,[70] the arbitrariness of the penal agents is annihilated. In the Foucaultian lesson, it is precisely Beccaria that becomes the champion of *ius talionis*.

This paradoxical result (partially corrected in *Discipline and Punish*) is, in my view, the consequence of a fallacious identification between the regulative idea of retaliation (the paradigmatic version of the homogeneity principle) and a different model of penal normativization – namely, the principle of analogy.

With this, I mean the thesis according to which the legislator must establish punishments able to reflect the crime to which they are associated. The same as with the principle of homogeneity, the prescription here regards the relationship between the type of violation and the type of punishment. However, unlike the natural law and retributivist versions of homogeneity principle, the analogy criterion is dictated by a utilitarian *ratio* – it is in order to increase the deterrent efficacy of penal norms that the punishments have to be tailored to the nature of crimes:

> This sort of fit – argues Beccaria – greatly eases the comparison which ought to exist between the incentive to crime and the retribution of punishment, so that the latter removes and redirects the mind to ends other than those which the enticing idea of breaking the law would wish to point out.[71]

By reinforcing the infringement-punishment ideas, 'his criminal mimesis'[72] helps to dissuade potential offenders. By acting on the dynamics of psychological movements, it transforms the impulses into inhibitions; it activates – against themselves – passions that prompt one to commit a crime; it pits – with the utmost urgency – the idea of advantages achievable through a crime against the mirror image of the consequences that follow it.[73]

[70] M. Foucault, *The Punitive Society. Lectures at the Collège de France* (Basingstoke: Palgrave MacMillan, 2015), 69.

[71] C. Beccaria, n 16 above, 49.

[72] ibid 59.

[73] See the illuminating pages by Ph. Audegean, 'Dei delitti e delle pene: significato e genesi di

At this point, one might object that I am contradicting the axiom of analytical economy according to which *entia (et nomina) non sunt moltiplicanda sine necessitate*. After all, aren't the normative contents of the theses under examination identical? Are we not perhaps dealing with the same meta-legislative principle justified with different doctrinal arguments? Indeed, this is what I also thought until recently.[74] On the contrary, I now believe it is necessary to emphasize the difference between one absolute principle of justice, which is ontologically based on the natural order – ie the principle of homogeneity – and a different principle of criminal law policy – the principle of analogy – whose value is relative to its instrumental function. This is not a negligible difference. Indeed, it is a crucial one, as the Beccarian delegitimization of the death penalty proves.

The doctrines of isomorphic punishment – particularly the one on the identity between the criminal harm and the punitive harm (*talio esto*) – may appear to us as archaic and repugnant. Contemporary criminal guarantism dismisses them as the 'result of an illusion',[75] pointing to its 'deleterious effects' in obstructing the 'process of formalization and legalization' of sanctions and in the support for 'corporal and capital punishment'.[76] Only by casting aside these theoretical and moral evaluations, can we properly understand the normative implications of the homogeneity principle in the Enlightenment penal philosophy.

First of all, the requirement for the legal limitation of political power in light of individual freedom finds its expression precisely in this principle. When 'the type of punishment' derives from 'the nature of offences' – Marat echoes Montesquieu – liberty triumphs with justice, 'since the punishment comes not from the will of the legislator, but from the nature of things; thus, it is not man who does violence to man'.[77] In this version of criminal natural law, the punitive arbitrariness is annihilated as sanctioning norms are subtracted from the sovereign's will. The naturalization of punishment protects individuals from the excessive use of force and the risk of despotic oppression.

Another normative implication of the principle of homogeneity ought to be emphasized. In the penal order of the *ancien régime*, built on the dogma of the connection between the harshness and intimidating vigour of the punishment, death was foreseen as a punishment for a vast and heterogeneous series of crimes, such as crimes against divinity, the sovereign, property etc. Raised to the level of a fundamental canon of natural justice, the homogeneity principle required the

un pamphlet giuspolitico', in D. Ippolito ed, *La libertà attraverso il diritto. Illuminismo giuridico e questione penale* (Napoli: Editoriale scientifica, 2014), 71-92.

[74] D. Ippolito, *Lo spirito del garantismo. Montesquieu e il potere di punire* (Roma: Donzelli, 2016), 37-42.

[75] L. Ferrajoli, n 63 above, 384.

[76] ibid 385.

[77] J.P. Marat, n 15 above, 31-32.

illegitimacy of the existing sanctioning system to be denounced; the ideological buttresses of the penology of deterrence cruelty to be overthrown, and the ambit of application of the capital punishment to be drastically restricted. Tarello is therefore right when he observes that, in the Enlightenment re-elaboration, 'the ancient idea of punishment as retribution (...) appears profoundly innovative and humane'.[78]

## IV. Criminal Law Principles and Types of Punishment

In the previous section, I sought to achieve the goals – limited to the principles of proportionality and homogeneity – indicated in point one and two of the work plan proposed at the end of the first section. I conclude my analysis by dealing with point three of the plan, namely the problem of the relationship between the theorized principles and the punitive methods.

First, a preliminary observation of a general nature: not all canons of the punishment's legitimacy that characterize Enlightenment doctrines involve indications regarding the composition of the penal arsenal. The principle of legality (*nulla poena sine lege*), for example, is compatible with any kind of sanction. The same can be said of the principles of equality, (temporal) promptness and (spatial) proximity. Not even the principle of necessity – or punitive economy – provides an answer to the question of 'which punishment'.

We should add that in the Enlightenment penal deontologies, the indicated sanctions are not always consistent with the professed principles. Take, for example, one of the most interesting characterizations of the just punishment, established by Le Peletier:

> A punishment must be and remain what the fairness of the law has made it, not what the severity or leniency of the executor of the judgment makes of it.[79]

Note that the prescription does not regard the relationship between the punishment established by the legislator and the one imposed by the judge, but rather the one between the penal norm and the penal execution. According to this perspective, the law ought to provide sanctions that, 'once imposed by the judge, cannot be distorted by the arbitrariness of those who execute them'.[80] Well, the prison does not pass the legitimacy test of this principle.[81]

[78] G. Tarello, n 39 above, 389.

[79] 'Any punishment which due to its nature can be either aggravated or attenuated according to the disposition of the one who imposes it on the convicted person, is essentially bad.' (L.M. Le Peletier, n 18 above, 322).

[80] ibid 323.

[81] See L. Ferrajoli, 'Il carcere: una contraddizione istituzionale', in L. Ferrajoli ed, *Il Paradigma garantista. Filosofia e critica del diritto penale*, D. Ippolito and S. Spina eds (Napoli: Editoriale

As for the homogeneity principle, what we already determined with regard to its importance in the defence of life against the abuse of the State's power to kill, ought to be here integrated with considerations regarding the flip side of the coin. Planted upon the ontological structures of law, the retributivist canon of *malum passionis propter malum actionis* corroborates and prescribes the capital punishment. Whoever 'has committed murder, (…) must die', writes Kant, for '(h)ere there is no substitute that will satisfy justice'.[82] 'Life is the only good without equivalent', argues Marat, '(…) thus, justice wants that the punishment for murder be capital'.[83]

Capital punishment aside, the principle of homogeneity justifies any kind of sanction that is equivalent to the type of infringement. If the punishment is 'the loss of a right' for a violation of a right, then – argues Filangieri – 'different kinds of rights will indicate (…) different kinds of punishment':[84]

> Life, honour, real property, personal property and the prerogatives depending on citizenship are the general objects of all social rights. We shall thus have (…) capital punishments, infamy punishments, pecuniary punishments, punishments depriving or suspending personal liberty, punishments depriving or suspending civic prerogatives.[85]

Only by abandoning this strictly retributivist conception of punishment does it become possible to conceive the punitive system *qua* political artifice, *qua* legal institution, *qua* the product of decisions for which men bear full responsibility. From this point of view, the distance between the natural law principle of homogeneity and the utilitarian principle of proportionality can be fully grasped. It is among the theorists of the latter that the awareness of the conventional character of criminal law and of the inexistence of natural relationships between crimes and punishments begins to grow in the Enlightenment period.

> As there is no relation between the pain of the punishment and the malice of the action, it is obvious that the distribution of the punishments, relative to the greater or lesser gravity of the offence, is an arbitrary matter,[86]

writes Diderot in the *Encyclopédie*. The modulation of the severity of punishments along the scale of crimes is therefore based upon a legislator's choice. 'There is always a first punishment, which is arbitrary; once this is fixed, it conditions all the others'.[87]

scientifica, 2016), 179-187.

[82] I. Kant, n 34 above, 142.

[83] J.P. Marat, n 15 above, 63

[84] G. Filangieri, n 22 above, Book III, Part II, Cha XXVIII, 17.

[85] ibid 18.

[86] D. Diderot, 'Châtiment' *Encyclopédie*, 1753, III, 250.

[87] D. Diderot, 'Osservazioni sull'Istruzione dell'Imperatrice di Russia ai deputati per

Compared to the strict principle of homogeneity, the proportionality criterion thus expands the power to decide on how to punish. How to, and how not to punish. If the punishments do not derive from natural law, it is then possible to criticize them, reform and abolish them. Thus, in this way, Diderot can challenge Montesquieu's retributivism (via his comment of Chaterine II's *Nakaz*), stating that one need not criminalize 'acts contrary to (…) good customs', as punishing them with infamy would indeed 'be a terrible atrocity'.[88] In this way, free from the idols of natural justice, Beccaria begins his fight against capital punishment.[89]

l'elaborazione delle leggi', XXII, in Id ed, *Scritti politici*, F. Diaz ed (Torino: UTET, 1967), 390. This work, never published by the author, was first printed in 1920.

[88] ibid 394.

[89] Cf Ph. Audegean, n 16 above, 152-170; P. Costa, 'Beccaria e la filosofia della pena', in R. Davis and P. Tincani eds, *Un fortunato libriccino. L'attualità di Cesare Beccaria* (Milano: L'Ornitorinco, 2014), 33-50; D. Ippolito, 'Contratto sociale e pena capitale. Beccaria vs. Rousseau' *Rivista internazionale di filosofia del diritto,* 580-620 (2014); G. Francioni, 'Ius e potestas. Beccaria e la pena di morte' *Beccaria. Revue d'Histoire du Droit de Punir,* 13-50 (2016).