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FORUM A CURA DI
GIULIA BATTISTONI - CHIARA MAGNI

Punishment
between narrative dimensions and today's challenges

contributi di

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GIULIA BATTISTONI* - CHIARA MAGNI**

Punishment between narrative dimensions and today's challenges

This Forum seeks to explore, from an interdisciplinary perspective, key issues related to punishment, with a particular focus on the relationship between punishment and its narration – understood in a broad sense that encompasses multiple forms, including fictional narratives, biographical accounts, and worldviews conceived as theoretical frameworks shaping our practices of life. This approach allows for the identification, on the one hand, of the patterns of thought that have contributed to the normalization of certain entrenched critical aspects of punitive practices, and, on the other, of more recent conceptual frameworks that prompt philosophical and legal reflection on punishment to confront emerging challenges.

What follows is a summary of the central arguments and theses presented in the various contributions.

Giulia Battistoni and Chiara Magni (*The Right to Punish Today: Navigating Scientific and Cultural Shifts*) introduce the key conceptual tensions that run through the volume, offering a critical framework for the essays that follow, while underscoring the contradictions that continue to affect the meaning and legitimacy of the right to punish. Retributive justice, often equated with institutionalized revenge, has been widely challenged since the Enlightenment. Utilitarian approaches – centered on deterrence or rehabilitation – raise concerns about the weakening of individual responsibility. The intrinsic violence of punishment remains difficult to justify, fostering interest in alternatives like restorative justice. Narrative forms – like fairy tales and prison writing – reveal punishment's symbolic and emotional undercurrents. Foucault's account of punishment as biopolitical control offers a critical lens on the modern penal system. At the same time, neuroscience and forensic psychiatry increasingly question the foundations of legal responsibility and free will. Still, retributivism retains essential legal principles such as guilt and legal certainty. Rather than advocating the abolition of punishment, the authors propose a renewed approach that affirms human dignity, moral agency, and a reflective, ethically engaged role for judges.

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Building on this conceptual groundwork, the focus turns to a specific narrative tradition – European folk and fairy tales – in which ideas of responsibility and punishment are both reinforced and contested.

Elisabetta Orlandi (*It's only fair... It's only a fairy tale! A reflection on responsibility and punishment in European folk and fairy tales*) explores the intertwined themes of responsibility and punishment in European folk and fairy tales, highlighting their dual role as pedagogical instruments and vehicles for subversive critique. Drawing on both oral and literary traditions – from the Grimms and Sicilian folktales to the French salon tales of the 17th century – the author examines how these narratives shape individual and collective moral frameworks by presenting characters who must act – often in difficult circumstances – and face the consequences of their choices. Responsibility is approached on two levels: as the storyteller's duty to build and strengthen a sense of belonging, and as a process, a path that must be explored to disclose the character's full potential. This journey often leads to reward, while failure to meet communal or ethical standards results in spectacular and often grotesque forms of punishment. Although the retributive scheme prevails in folk and fairy tales, they also employ irony, sarcasm and theatricality to question authority and expose structural injustice: punishment is not merely “didactic”, but deeply embedded in issues of power, gender, and class. For Orlandi, folk and fairy tales thus function as cultural mirrors – sometimes upholding social norms, sometimes offering an imaginative space to resist and reimagine them.

From the moral and imaginative narratives of folk and fairy tales, the focus then shifts to personal and historical narratives, where lived experiences of punishment reveal the power of storytelling to challenge, expose, and rethink the structures of justice.

Sophie Rothé (*Punir le système carcéral? Des lettres de prison prérévolutionnaires au service d'une réflexion sur la punition contemporaine*) explores the punitive function of the prison system through a historical and literary lens, focusing on the prison letters of Mirabeau and the Marquis de Sade during the pre-revolutionary period in France. These writings offer a rare and critical perspective on the carceral institution at a time when Enlightenment thinkers such as Beccaria and Voltaire were calling for penal reform. Mirabeau and Sade, imprisoned by *lettre de cachet* without trial, denounce the arbitrariness, disproportionality, and cruelty of their punishment. Their letters, marked by vivid descriptions of inhumane conditions and rhetorical reversals of power, becomes both a personal defense and a political indictment, revealing the prison not as a place of

correction but as a site of physical and moral suffering. Their critiques anticipate many concerns raised in present-day discussions: the disproportionality of punishment, the inhumanity of prison conditions, and the need for systemic reform. Mirabeau and Sade, by challenging the justice of their time, offer an enduring critique that echoes today—urging us to rethink how we punish and whether we can do so in a way that preserves human dignity.

These historical and literary accounts invite a broader reflection on how narratives – both personal and cultural – continue to inform our understanding of punishment and justice.

Vera Moser (*The Influence of Worldviews on Criminal Policy. From Newtonian Mechanics to Forensic Psychiatry*) argues that worldviews – culturally shaped narratives – deeply influence how we understand criminal law, justice and morality. After contrasting Kant’s retributivism with Bentham’s utilitarianism, Moser highlights a contemporary shift toward crime prevention, rooted in Franz von Liszt’s call for a scientific criminal law capable of predicting crime. This led to practices like preventive detention, justified by psychiatric risk assessments or algorithms. Moser traces these to Enlightenment worldviews shaped by determinism (every act has a cause) and reductionism (complex behaviors explained by simpler components). Her main argument is that Voltaire imported Newton’s mechanical and physical worldview into morality, wrongly applying it to human behavior and that von Liszt embraced this view, seeing crime as scientifically predictable. Yet Moser critiques this as based not on empirical science but on a transposed worldview. Today’s forensic psychiatry inherits the idea that behavior can be assessed by dissecting the psyche into biological and social factors. Recognizing that criminal policy still rests on worldviews is a crucial point when it comes to measures like preventive detention.

This reflection on the influence of scientific worldviews in shaping criminal policy sets the stage for a closer examination of how scientific expertise operates within the courtroom itself.

Alessia Farano (*The legitimization of ius puniendi via science. The case of expert witness*) explores how scientific expertise – particularly genetic and neuroscientific evidence – is used in court to justify punishment, reflecting a truth-oriented, cognitivist model of justice. Rooted in Enlightenment ideals, especially Bentham’s notion of truth as a basis for just punishment, this model relies on expert knowledge, as also emphasized by Foucault. As confession alone becomes insufficient, science – especially psychiatry –

gains a central role in producing “judicial truth”. Neuroscientific evidence is used to demonstrate mental disorders and support insanity defense, challenging the concept of free will and destabilizing traditional theories of responsibility and punishment. This creates a paradox: the search for truth risks eroding responsibility, grounding *ius puniendi* in deterministic and consequentialist logic. Farano thus rejects deferentialism – the uncritical acceptance of expert testimony – and argues that judges must retain the responsibility to critically evaluate scientific input. This approach preserves the Enlightenment value of democratic truth-seeking while avoiding overreliance on science. Neuroscience may also foster a more human, individualized justice, promoting a rethinking of the philosophical foundations of *ius puniendi*.

Together, these contributions shed light on the narrative dimension of punishment, revealing it not only as a legal practice but also as a cultural, historical, and epistemological construct. From the moral worlds of fairy tales to the personal and political critiques in prison letters, punishment emerges as a story we tell – to educate, justify, or resist. These narratives shape collective understandings of responsibility, guilt, and justice, oscillating between conformity and critique. At the same time, legal systems today face major challenges. Advances in neuroscience and forensic psychiatry have reshaped our understanding of legal responsibility, calling into question the existence of free will and destabilizing traditional retributive frameworks.

The articles included in this Forum thus offer tools to problematize these tensions and raise awareness, while also suggesting possible pathways toward more just and reflective legal practices.



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The Right to Punish Today: Navigating Scientific and Cultural Shifts

ABSTRACT - The concept of punishment has developed over time to a rationalized legal form, yet it remains marked by unresolved tensions. Retributive justice, criticized since the Enlightenment, is often seen as legalized revenge, while utilitarian models might raise concerns about determinism and the erosion of personal responsibility. Punishment's inherent violence continues to elude full justification, leading to increased interest in alternatives like restorative justice. Narrative forms, such as fairy tales and prison writing, reveal its hidden dimensions. Prison letters, in particular, expose the harsh reality of incarceration and the disconnection between inmates and the outside world. Foucault's idea of punishment as biopolitical control highlights how modern penal systems replaced public torture with imprisonment. Neuroscience and forensic psychiatry have further complicated the notion of responsibility, challenging free will and traditional legal categories. Yet, retributivism preserves essential legal principles, such as guilt and legal certainty. While a rethinking of punitive practices seems essential, completely abolishing punishment remains problematic. A revised system should, on the one hand, take into account human dignity and recognize offenders as moral agents; on the other, it should require judges to critically engage with scientific knowledge, reaffirming their ethical and interpretive role in the administration of justice.

KEYWORDS - Right to Punish - Retributivism - Determinism - Science - Human Dignity - Prison

GIULIA BATTISTONI* - CHIARA MAGNI**

**The Right to Punish Today:
Navigating Scientific and Cultural Shifts*****

CONTENTS: 1. *The rationalisation of punishment* - 2. *Exploring the violent dimension of punishment through narrative forms* - 3. *Punishment as a disciplinary practice?* - 4. *Free will under scrutiny: legal and ethical implications of scientific advances* - 5. *Assessing legal responsibility: mental capacity and the new scientific frontiers of criminal justice* - 6. *Concluding remarks*

1. *The rationalisation of punishment*

As is well known, the concept of punishment is of ancient origin and, over time, has acquired increasing disciplinary autonomy. This development may be understood as a process of rationalisation of punitive practices, aimed at circumscribing the field of inquiry to the specifically juridical notion of penalty. Within this framework, the retributive theory of punishment (*punitur quia peccatum est*)¹ – which has been the subject of sustained critique since the Enlightenment – has traditionally been regarded as the most contested justification, often associated with a form of institutionalised revenge² that closely resembles the pre-legal, mythical conception of punishment³. The core objection raised against retributivism lies in its underlying axiological framework, according to which there exists a necessary link between guilt and punishment – a nexus understood to be

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¹ However, it would be simplistic to reduce Enlightenment penal humanism merely to the opposition between retributive and utilitarian theories of punishment. Rather, in «eighteenth-century criminal law thought, the tension between mildness and severity proves to be more structuring and decisive than the dichotomy between retributivism and utilitarianism» (P. AUDEGEAN, *Droit pénal et douceur des peines au XVIIIe siècle. Considérations sur quelques études récentes*, Rue Descartes, 93(3)/2017, pp. 148-160, here p. 160; our translation).

² See L. FERRAJOLI, *Diritto e ragione. Teoria del garantismo penale*, Laterza, Bari, 1989, pp. 239 ff.

³ See U. CURI, *Il colore dell'inferno. La pena tra vendetta e giustizia*, Bollati Boringhieri, Torino, 2019.

self-justifying, independent of any extra-judicial aims. Penal Enlightenment thought, by contrast – most notably in the writings of Cesare Beccaria – challenged any substantive conception of punishment, embracing instead a fundamentally negative view of punitive action as a “necessary evil”, justified solely by its preventive function (*ne peccetur*). More radically, Beccaria’s notion of punishment entailed a principle of “penal economy”: it was not only essential to regard punishment as a “necessary evil”, but also to ensure that it constituted the “minimum necessary evil”⁴. In contrast to the theoretical foundations of pre-Enlightenment criminal justice, Beccaria firmly rejected the idea that the deterrent power of punishment was proportional to the amount of suffering inflicted on the offender. This demand for the “mildness” of punishments, a defining feature of penal humanism, also led to a reduction in the scope of criminal sanctions. For Beccaria, punishment could only be justified in cases where an action posed a real threat to the social order – not when it contravened a moral or religious one. This, in turn, reveals that his principal aim was a forceful critique of the mechanisms that had enabled the jurisprudence of the Ancien Régime to exercise discretionary and arbitrary power.

In any case, the spectrum of utilitarian doctrines grounded in the principle of the greatest happiness for the greatest number encompasses a variety of distinct approaches, ranging from special to general prevention (both positive and negative): from theories of rehabilitation and social defence to those of general deterrence. This cluster of doctrines is not without internal contradictions. Utilitarian justification, in fact, involves challenging theoretical assumptions – such as the predominance of a reductionist, naturalistic-determinist conception of the person, common to both deterrent and correctional theories of punishment⁵ – and presents certain logical pitfalls. In the case of rehabilitative punishment, a futurological horizon is grounded in a system of values which, however, ought not to be absolutized. Such perspectives run the risk of conflating law and morality⁶ and are potentially aligned with models of maximal and

⁴ See P. AUDEGEAN, *Violenza e giustizia. Beccaria e la questione penale*, il Mulino, Bologna, 2023, especially pp. 21 ff.

⁵ This aspect will be discussed further below.

⁶ See L. FERRAJOLI, *op. cit.*, p. 263: «In correctional theories of prevention [...] the confusion between law and morality, or between law and nature, affects not only the conception of crime but also that of punishment: the latter is understood, either moralistically or naturalistically, as a beneficial instrument for the rehabilitation of the offender, guided by

tentially unlimited criminal law. However, even paradigms of negative general prevention, which do not adhere to rehabilitative aims but identify deterrence as the primary function of punishment, are potentially suitable to underpin models of maximal criminal law. This is especially true for those paradigms in which the deterrent effect lies not in the threat of punishment but in its actual infliction – an approach which could virtually legitimise punitive interventions marked by maximal severity and devoid of any certainty or legal safeguards. Indeed, the more modern paradigm of negative general prevention links the deterrent function of criminal law not to the exemplary character of the punishment’s imposition, but rather – indirectly – to its threat as expressed in the provisions of criminal legislation. Once again, however, such paradigms are not sufficient to serve as a criterion for limiting punishment within a model of minimal criminal law. The aim of ensuring the effectiveness of the legal threat of punishment does not, in fact, place any constraints on the quantity or quality of penalties: while it may «offer safeguards against judicial penal absolutism, it fails to provide protection against legislative penal absolutism»⁷.

Finally, a revised paradigm of negative general prevention has been proposed – one that takes into account not only the greatest possible well-being of the majority, but also the least possible suffering of those punished⁸. According to this view, the utilitarian calculus of welfare maximisation cannot ignore an intrinsic limit to punitive action: namely, that punishment must remain below the threshold of violence beyond

authoritarian projects of individual moralization or social orthopedics that conflict with the person’s right to be free from coercive practices of transformation». Our translation.

⁷ *Ivi*, p. 268.

⁸ Cfr. *Ivi*, pp. 325-326: «To establish an adequate doctrine of external justification, as well as the limits of criminal law, [...] it is necessary to invoke a second utilitarian parameter: alongside the maximization of well-being for the non-deviant subjects, there is also the minimization of the necessary suffering imposed on deviants. However, for this second parameter to serve as a justificatory – or, depending on the case, delegitimizing – purpose, it cannot be solely related to the goal of crime prevention. When referred to that purpose, as it is in the Enlightenment principle of the “minimum necessary punishment” [...], it amounts to a generic criterion of humanitarian common sense, entirely devoid of any limiting function [...]. Yet, there is another type of purpose to which the principle of minimal punishment can be measured: namely, the prevention not only of crimes but also of a distinct kind of harm, antithetical to crime itself, which is often neglected by justificatory theories [...]. This other harm is the heightened reaction – informal, wild, spontaneous, arbitrary, *punitive but non-penal* – that, in the absence of formal penalties, might arise from the victim or from social or institutional forces allied with them». Our translation.

which it would cease to be justified as a rational alternative to informal or extra-legal sanctions. This perspective aims to articulate a doctrine in which punishment serves not only a deterrent function with respect to crime, but also a limiting function against arbitrary sanctions. Even in this case, however, due to the pragmatism underlying all utilitarian approaches, the degree of violence that distinguishes rational punishment from disproportionate punishment is intrinsically dependent on the type of social welfare being pursued. If the preventive function is tasked with determining the minimum threshold of punishment, then the maximum limit that the limiting function seeks to establish will always depend on the level set by the former – offering, in itself, no intrinsic guarantee of a genuine minimisation of violence.

From this point of view, the “humanistic” perspective is constantly threatened by the central value assumed by the teleological projection, which in fact threatens to invalidate the possibility of «treating crimes that are identical in their formal aspect in an equivalent manner [...]. The *atypicality* necessarily inherent in any re-educative or curative process, as in any instrument of social defence, “infects” legal formalism *in any case*»⁹. Utilitarianism thus appears intrinsically incapable of providing a theoretical foundation for rights-based systems of minimal criminal law. Already for Hegel, the utilitarian logic «falls entirely under the common concept of one specific thing as against another, or of a piece of merchandise with which another commodity, namely the crime, can be bought. The state, as a judicial authority, runs a market in determinacies known as crimes, which it can buy in exchange for other determinacies [known as punishments], and the legal code is the list of current prices»¹⁰.

2. *Exploring the violent dimension of punishment through narrative forms*

Although jurisprudence has sought to provide justifications for punishment, these remain the subject of ongoing debate and contestation, due to the irreducible violence inherent in the act of punishing – violence

⁹ M. CACCIARI, *Due passi all'inferno. Brevi note sul mito della pena*, in U. CURI AND G. PALOMBARINI, *Diritto penale minimo*, Donzelli Editore, Roma, 2002, pp. 243-253, here p. 248. Our translation.

¹⁰ G.W.F. HEGEL, *On the Scientific Ways of Treating Natural Law, on its Place in Practical Philosophy, and its Relation to the Positive Sciences of Right (1802-1803)*, in ID., *Political Writings*, ed. by L. DICKEY AND H.B. NISBET, trans. by H.B. Nisbet, Cambridge University Press, Cambridge, 2004 [1999], pp. 102-180, here p. 139.

that inexorably escapes any comprehensive rationalisation¹¹. It is no coincidence, moreover, that a growing need has emerged to theorise and give greater space to alternative paradigms, such as that of restorative justice¹².

It is precisely in relation to the aporetic nature of punishment – as Kafka masterfully suggests in the opening line of *In the Penal Colony* («It's a peculiar [*eigentümlicher*] piece of machinery»¹³) – that certain forms of narrative offer a means to explore its imaginary. These narratives do not shy away from engaging with the repressive processes that underpin the modern conception of punitive action. A paradigmatic example, in this respect, can be found in folk and fairy tales¹⁴, where, as Propp notes, the punishment of the villain constitutes a structural function¹⁵. This narrative form is particularly well-suited to portraying punishment in a way that also reveals its unspoken, veiled, or hidden dimensions – especially when one considers that folk and fairy tales did not originate as oral or literary forms intended for a child audience¹⁶. In this sense, they belong to those forms of narration that «express not certainty but concern, not conviction but questioning: doubts and torments rather than answers. They bring to the

¹¹ G. CASADAMONT AND P. PONCELA, *Il n'y a pas de peine juste*, Odile Jacob, Paris, 2004.

¹² See, among others, T. GAVRIELIDES, *Routledge International Handbook of Restorative Justice*, Routledge, London, 2021; G. MANNOZZI AND G.A. LODIGIANI, *La giustizia riparativa. Formanti, parole e metodi*, Giappichelli Editore, Torino, 2017; S.L. MILLER, *After the Crime: The Power of Restorative Justice Dialogues Between Victims and Violent Offenders*, New York University Press, New York, 2011; A. GARAPON, F. GROS AND T. PECH, *Et ce sera justice. Punir en démocratie*, Odile Jacob, Paris, 2001. Restorative justice was formally established as an organic discipline for the first time with the so-called “Riforma Cartabia”, which sets out the rules governing this area by implementing the various provisions present at the European and international levels, as the “Directive 2012/29/EU” (<https://eur-lex.europa.eu/eli/dir/2012/29/oj>; last access: 19/05/2025) and the “CM/Rec(2018)8 – Recommendation of the Committee of Ministers to member States concerning restorative justice in criminal matters” (<https://search.coe.int/cm?i=09000016808e35f3>; last access: 19/05/2025). Restorative justice legislation is contained in Articles 42 to 67 of Legislative Decree 150/2022 (<https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2022-10-10;150>; last access: 19/05/2025).

¹³ F. KAFKA, *In the penal colony*, in ID., *Kafka's selected stories*, trans. by S. Corngold, W.W. Norton & Company, New York/London, 2007, pp. 35-59, here p. 35.

¹⁴ On this, see Elisabetta Orlandi's essay in this Forum.

¹⁵ See V. PROPP, *Morphology of the Folktale*, trans. by L.A. Wagner, University of Texas Press, Austin, 1968, p. 63.

¹⁶ See J. ZIPES, *Fairy Tales and the Art of Subversion. The Classical Genre for Children and the Process of Civilization*, 2nd edition, Routledge, New York/London, 2006, p. 3. See also M. WARNER, *Once upon a time: a short history of fairy tale*, Oxford University Press, Oxford, 2014, pp. 97 ff.

surface the unresolved part of what human societies must claim to have resolved in order for punishments to be carried out smoothly and without contest»¹⁷.

An even more explicit source for capturing the phenomenon of punishment in all its complexity is undoubtedly prison writing¹⁸, and more specifically, the practice of correspondence, which enables the articulation of inmates' first-person voices. This form of narration has demonstrated an extraordinary capacity to reveal how prisons are spaces haunted by a particular history – often repressed by the collective consciousness – imposing a double punishment: incarceration itself and the implicit sentence of oblivion. Prison writing, in fact, often bears witness to life within spaces of incarceration, the value of which should not lie in fostering spectacularized or instrumentalized voyeurism, but rather in offering crucial counterpoints to the certainties perpetuated by a growing “persecutory impulse”¹⁹ – a phenomenon testified to by the persistent problem of prison overcrowding²⁰: «Prisons are particularly intriguing in this sense because their “public” status, ubiquity and physical enormity sit alongside a common view of them as hidden and sealed spaces beyond the comprehension of those “outside”. Consequently, bridges between the “inside” and the “outside” are important for any conception of prison and its effects. Prison writing is one such bridge»²¹. Far from being a mere vehicle for the representation of prison life to an external readership, prison writing constitutes a multifaceted practice of subjectivation, resistance, and

¹⁷ P. AUDEGEAN AND V. GIANNETTI-KARSENTI, *Présentation*, in IID., *Scénographies de la punition dans la culture italienne moderne et contemporaine*, Presses Sorbonne Nouvelle, Paris, 2014 (digital version: <https://books.openedition.org/psn/7410>; last access: 15/05/2025).

¹⁸ See M. KELLY AND C. WESTALL, *Prison Writing and the Literary World. Imprisonment, Institutionalization and Questions of Literary Practice*, Routledge, New York/London, 2021.

¹⁹ See D. FASSIN, *Punir. Une passion contemporaine*, Le Seuil, Paris, 2017 (English translation: ID., *The Will to Punish*, Oxford University Press, Oxford, 2018).

²⁰ See A. CONYERS, V. LYNN, M. LEIGEY, *Mass Incarceration in the 21st Century. Realities and Reflections*, Routledge, New York, 2024. See also ANTIGONE, *I numeri della detenzione*, in EAD., *Nodo alla gola. XX Rapporto di Antigone sulle condizioni di detenzione*, 2024, pp. 17-26 (https://www.rapportoantigone.it/ventesimo-rapporto-sulle-condizioni-di-detenzione/wp-content/uploads/2024/05/Antigone_XXRapporto_NodoAllaGola.pdf) and S. SANTORSO, *The Politics of Prison Crowding. A Critical Analysis of the Italian Prison System*, Routledge, New York, 2023 and COUNCIL OF EUROPE, *Prison overcrowding remains a problem in Europe: Council of Europe's annual penal statistics for 2023*, 2024 (<https://www.coe.int/en/web/portal/-/prison-overcrowding-remains-a-problem-in-europe-council-of-europe-s-annual-penal-statistics-for-2023>; last access 19/05/2025).

²¹ M. KELLY AND C. WESTALL, *op. cit.*, p. 1.

counter-narration. In its various genres, prison writing functions simultaneously as an act of self-expression, a critique of the penal apparatus, and a documentation of existential perseverance within spaces designed to negate individuality and suppress agency. Moreover, the testimonial and affective dimensions of prison writing establish transversal solidarities: they connect incarcerated individuals not only within a given institution but across spatial and temporal boundaries. The written word thus becomes a locus of memory, critique, and humanization, interrupting the structural silence surrounding carceral institutions and defying the objectifying gaze of penal rationality²². It functions as an ethically and politically charged conduit, enabling the contestation of dominant narratives and the reconfiguration of carceral epistemologies. These concerns underscore the necessity of rethinking punitive practices through the interdisciplinary lenses of care studies, feminist theory²³, critical race theory²⁴, and disability studies – while also engaging in dialogue with adjacent fields such as architecture²⁵ and media studies.

3. *Punishment as a disciplinary practice?*

In addition to the already acknowledged issue of severe prison overcrowding – against which the call for the decriminalisation of minor offences and, where possible, a preference for alternative measures to incarceration is advanced (with a deflationary intent)²⁶ – the prison system

²² On this, see Sophie Rothé's essay in this Forum.

²³ See for example S.X. PEMBERTON, *Prison*, in L. DISCH AND M. HAWKESWORTH, *The Oxford Handbook of Feminist Theory*, Oxford University Press, Oxford, 2015, pp. 721-740; A. DAVIS, *On Teaching Women's Prison Writing: A Feminist Approach to Women, Crime, and Incarceration*, in *Women's Studies Quarterly*, 32(3/4)/2004, pp. 261-279.

²⁴ See J.L. JEFFERS, *Justice Is Not Blind: Disproportionate Incarceration Rate of People of Color*. In *Social Work in Public Health*, 34(1)/2019, pp. 113-121.

²⁵ See K.V. ENGSTROM AND E.F.J.C. VAN GINNEKEN, *Ethical Prison Architecture: A Systematic Literature Review of Prison Design Features Related to Wellbeing*, in *Space and Culture*, 25(3)/2022, pp. 479-503; E. FRANSSON, F. GIOFRÈ AND B. JOHNSEN, *Prison, Architecture and Humans*, Cappelen Damm, Oslo, 2018; M. SANTANGELO, *In prigione. Architettura e tempo della detenzione*, LetteraVentidue, Siracusa, 2017.

²⁶ See for example L. MCGREGOR, *Detention and its Alternatives under International Law*, Oxford University Press, Oxford, 2023; A. STEVENS, C.E. HUGHES, S. HULME AND R. CASSIDY, *Depenalization, diversion and decriminalization: A realist review and programme theory of alternatives to criminalization for simple drug possession*, in *European Journal of Criminology*, 19(1)/2019, pp. 29-54.

exhibits a range of critical shortcomings that seriously compromise respect for human dignity. Chief among these is the alarming incidence of suicide and self-harm among prisoners²⁷, which fundamentally challenges the professed goals of recovery, rehabilitation, and social reintegration. This also brings into focus the pervasive issue of violence within prisons, including the risk of mistreatment and abuse of those deprived of their liberty. Such episodes of violence – particularly those targeting inmates – do not appear to be isolated incidents, but rather indicative of a deeper, systemic problem²⁸, which adds to the complex relationship – further exacerbated by the pandemic – between confinement, mental health²⁹, and, more broadly, prisoners’ access to adequate healthcare. Moreover, there exist more insidious forms of violence, such as the binary structure of the prison system, which does not take into account the complexity of gender identities³⁰; the insufficient attention paid to female incarceration, particularly in terms of the lack of dedicated services and resource shortages³¹; not to mention the oxymoron represented by parenthood – and especially motherhood – in prison: the simultaneous need to enforce punitive measures while accommodating the early upbringing of children born to incarcerated women creates a paradoxical and often detrimental system, particularly in terms of the children’s emotional and developmental well-being³².

In light of this, fifty years on, Foucault’s insight may still hold significant relevance: the long process of the “rationalisation” of punitive

²⁷ See A.P. MUNDT, P.A. CIFUENTES-GRAMAJO, G. BARANYI AND S. FAZEL, *Worldwide incidence of suicides in prison: a systematic review with meta-regression analyses*, in *Lancet Psychiatry*, 11/2024, pp. 536-544 (digital access: <https://www.thelancet.com/action/showPdf?pii=S2215-0366%2824%2900134-2>; last access: 28/05/2025).

²⁸ See ANTIGONE, *È vietata la tortura. XIX rapporto di Antigone sulle condizioni di detenzione, 2023* (digital version: <https://www.antigone.it/upload/Antigone.XIX.Rapporto.pdf>; last access: 28/05/2025).

²⁹ See A. MILLS AND K. KENDALL, *Mental Health in Prisons: Critical Perspectives on Treatment and Confinement*, Springer, Cham, 2018.

³⁰ See M. MAYCOCK, S. O’ SHEA AND V. JENNESS, *Transgender People Involved with Carceral Systems: International Perspectives*, Routledge, Oxon/New York, 2025.

³¹ See ANTIGONE, *Dalla parte di Antigone. Primo rapporto sulle donne detenute in Italia, 2023* (digital version: https://www.rapportoantigone.it/primo-rapporto-sulle-donne-detenute-in-italia/wp-content/uploads/2023/06/ANTIGONE_PrimoRapporto_Donne.pdf; last access: 28/05/2025); J. HECTOR, *Women and Prison*, Springer, Cham, 2020.

³² See J.M. EDDY AND J. POEHLMANN-TYNAN, *Handbook on Children with Incarcerated Parents: Research, Policy, and Practice*, Springer, Cham, 2019, especially pp. 85 ff.

practices could be seen as corresponding to a historical shift from exemplary punishments to «punishment without torture»³³ (i.e., imprisonment), marking a possible transition from the paradigm of “sovereignty” to that of “biopolitics” and suggesting a latent connection between punishment and power. This evolution casts doubt on the still unresolved effort to establish a truly “modern” conception of punishment, as the prison system remains deeply compromised by distorted mechanisms that raise serious ethical and human rights concerns. But can this critique be extended to all the disciplines the penal system has assimilated – most notably forensic psychiatry, which, particularly through the lens of contemporary neuroscience, seems to question the traditional categories of punishment and, by extension, responsibility? In what follows, the aim is to problematize this question and to bring to light the underlying conceptual tensions it entails.

*4. Free will under scrutiny: legal and ethical implications of scientific advances*³⁴

A fundamental question arises about the role of the recent scientific discoveries in the legal domain. Paradoxically, scientific developments have revealed both determinism at the macroscopic level and indeterminism at the quantum level – each with profound consequences for how we understand human actions. If we adopt a deterministic framework, viewing human actions as natural events embedded in a causal chain, then they are seen as effects determined by prior causes. They are, in a sense, predetermined. This perspective has two major implications for law and the theory of punishment:

1. One option is to accept the validity of determinism – i.e., that any human action x is caused by a prior natural cause y –, to assume that moral responsibility requires free will and that this one is not compatible with a

³³ M. FOUCAULT, *Discipline and punish. The Birth of the Prison*, trans. by A. Sheridan, Vintage Books, New York, 1995, p. 74.

³⁴ From this point onward, the essay is part of the project *Collective Responsibility towards Nature and Future Generations* (ReNa), that has received funding from the European Union’s Horizon Europe Research and Innovation Programme under the Marie Skłodowska-Curie. Grant agreement No 101064728. Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Research Executive Agency (REA). Neither the European Union nor the granting authority can be held responsible for them.

deterministic worldview, from which it follows that: if x is entirely determined by y , then the agent lacks alternative possibilities³⁵ (\neg free will); if there is no free will, then moral responsibility cannot be assigned (\neg free will \Rightarrow \neg responsibility); if there is no responsibility, then retributive punishment – which depends on the concept of desert – is unjustified (\neg responsibility \Rightarrow \neg justified punishment), which means that retributivism fails. According to this argument, determinism leads to the collapse of the retributive justification for punishment and in light of this, alternative models to retributive justice (e.g., consequentialist, rehabilitative or preventive approaches) are proposed³⁶. However, it remains debatable whether such alternatives can offer a more just or effective legal system.

2. Alternatively, the very premise of the argument – the adoption of a deterministic framework – can be critically reconsidered and discussed, prompting a rethinking and reconceptualization of key concepts. This reassessment must also take into account the practical needs of legal systems and ethical praxis, which cannot easily function without the

³⁵ The ability to make alternative choices (in German, *Hätte-anders-Können*) is what underpins *Willensfreiheit* (freedom of the will), which is distinct from *Handlungsfreiheit* (freedom of action). The latter is far less problematic and refers to the capacity to act without external obstacles or constraints. When we attribute responsibility, we are mostly presupposing the first type of freedom. On this, see at least M. QUANTE, *Einführung in die Allgemeine Ethik* (6. Auflage), WBG, Darmstadt, 2017, especially chapter X (*Freiheit, Verantwortung und Determinismus*), pp. 165-180.

³⁶ Derk Pereboom is among the proponents of free will skepticism, from which he derives a rejection of retributivism based on basic desert. He argues that this model is morally flawed, as it relies on vindictive emotions. Consequently, he seeks alternative theories of punishment that do not depend on the existence of free will. One such alternative is deterrence theory, which justifies punishment as a means of preventing future harm and protecting public safety. As is evident, this approach reflects a form of utilitarianism rooted in Bentham's earlier vision of justice. See D. PEREBOOM, *Free Will Skepticism and Prevention of Crime*, in E. SHAW, D. PEREBOOM AND G.D. CARUSO (eds.), *Free Will Skepticism in Law and Society. Challenging Retributive Justice*, Cambridge University Press, Cambridge, 2019, pp. 99-115. See also F. FOCQUAERT, *Free Will Skepticism and Criminal Punishment: A Preliminary Ethical Analysis*, in E. SHAW, D. PEREBOOM AND G.D. CARUSO (eds.), *op. cit.*, pp. 207-236. Focquaert argues that «it is extremely unlikely, both theoretically and scientifically, that we possess the kind of free will that legitimates desert-based punishment». In light of this, she explores alternative models, such as the non-retributive account of moral responsibility. *Ivi*, p. 209. For a highly fruitful reconstruction of the debates surrounding free will and a critical examination of the various positions, see the work of Mario De Caro, to whom I am also grateful for encouraging me to actively engage with these issues. See, at least, M. DE CARO, *Liberio arbitrio e imputabilità oggi*, in *La legislazione penale*, 6.12.2024, pp. 1-22 (<https://www.lalegislazionepenale.eu/wp-content/uploads/2024/12/De-Caro.pdf>) and M. DE CARO, *Azione*, il Mulino, Bologna, 2008.

ascription of responsibility and some form of punitive justice. This argument may develop along the following line.

If the adoption of a deterministic worldview – and its opposition to indeterminism – are critically examined, it becomes clear that both positions hold some truth and some limitations, and that neither is necessarily incompatible with the concept of freedom. Determinism, demonstrated at the macroscopic level through empirical studies, remains contested. Experiments often rely on artificial settings and largely overlook complex, higher-order cognitive processes such as distal intentions – long-term goals and planning – as opposed to proximal intentions, which are more immediate and typically targeted by current methodologies. As a result, certain forms of authorship and agency – such as long-term planning, intervention control (i.e., the ability to interrupt or modify habitual or preplanned actions), and character formation – resist meaningful denial and cannot be conclusively falsified through current scientific methods³⁷. At the quantum level, indeterminism appears to be empirically supported. However, it remains unclear whether such findings are applicable to human agency at the neurological or behavioral level³⁸. Even if they were, it would be limiting, if not even wrong, to base freedom exclusively on indeterminism³⁹.

³⁷ For further exploration of these issues, see C. BAGNOLI, *Teoria della responsabilità*, il Mulino, Bologna, 2019, especially chapter four (*Argomenti scettici: la volontà libera*), pp. 91-122.

³⁸ Gerhard Roth argues that, in no case, can quantum indeterminism serve as the basis for the *alternativist* notion of free will (*alternativistischer Willensfreiheitsbegriff*). See G. ROTH, *Verantwortung, Determinismus und Indeterminismus*, in L. HEIDBRINK, C. LANGBEHN AND J. LOH (eds.), *Handbuch Verantwortung*, Springer, Wiesbaden, 2017, pp. 295-313, especially p. 310. By contrast, there are positions – like that of Roger Penrose – that argue free will may in fact derive from quantum indeterminism. See R. PENROSE, *The Emperor's New Mind: Concerning Computers, Mind s and the Laws of Physics*, Penguin Books, NY, 1991. Elizabeth Shaw highlights that, according to free will skeptics, even if quantum phenomena were proven to impact human behavior, they would still fall short of offering a credible basis for retributive responsibility. See E. SHAW, *The Implications of Free Will Skepticism for Establishing Criminal Liability*, in E. SHAW, D. PEREBOOM AND G.D. CARUSO, *Free Will Skepticism in Law and Society*, cit., pp. 192-206, especially p. 195.

³⁹ As Michael Quante writes: «We all know that mere indeterminism, by itself, is not sufficient for a person to be autonomous and capable of acting responsibly» (my translation). M. QUANTE, *Antropologia pragmatista. Padova Lectures*, edited by A. MANCHISI, Padova University Press, Padova, 2020, p. 107. For a deeper exploration of the various positions that have emerged within the rich and complex debate on free will – ranging from determinism in its various forms (such as soft and hard determinism), to indeterminism, and from there to compatibilism and incompatibilism – see at least J. SCHÄLIKE, *Verantwortung, Freiheit und Wille*, in L. HEIDBRINK, C. LANGBEHN AND J. LOH

Therefore, current scientific accounts – whether deterministic or indeterministic – do not provide a definitive answer⁴⁰. They may inform, but not resolve, the enduring debate over free will, which perhaps cannot be conclusively settled. As Quante states, «autonomy and responsibility (as well as the evaluative practices tied to our being autonomous persons and responsible agents) are in fact compatible with both determinism (as such) and indeterminism»⁴¹.

If the uncertainty surrounding free will is acknowledged, it is still possible to avoid the implications of the first position – which leads to the rejection of responsibility altogether – by upholding free will as a normative fiction. For instance, German criminal law needs this approach to preserve the coherence of its legal framework⁴². Alternatively, it is possible to abandon the notion of free will without abandoning responsibility altogether. In this view, responsibility has been grounded in other foundations – such as practical reasoning, the agent’s capacity to give reasons for their actions⁴³, and the notion of ethical freedom, understood as a socially embedded and contextually developed capacity. This does not

(eds.), *op. cit.*, pp. 277-293. See also M. QUANTE, *Einführung in die Allgemeine Ethik, cit.*, chapter X.

⁴⁰ On this, see C. BAGNOLI, *op. cit.*, chapter four.

⁴¹ M. QUANTE, *Antropologia pragmatista, cit.*, pp. 107 ff.

⁴² In German criminal law, punishment is fundamentally grounded in the concept of *Schuld* (guilt). Consequently, abandoning the notion of free will – as the basis of *Schuld* – would profoundly destabilize the entire legal system. If the possibility of having acted otherwise were denied, punishment could no longer be legitimately justified within this framework. Nikolaos Pavlakos argues that free will can still be upheld, exactly because it has not been conclusively falsified by science. In this light, free will may be still admitted as a necessary condition for guilt, not as an empirically proven fact, but as a normative fiction, or a Kantian regulative idea, that enables the very functioning of legal practice and serves as a safeguard for individual freedom. Without free will, Pavlakos warns, the result would be a form of legal dystopia, in which punishment could no longer be proportionate to personal guilt. Instead, he maintains that punishment must always be determined in accordance with the degree of culpability. See N. PAVLAKOS, *Willensfreiheit und normativer Schuldbegriff. Eine interdisziplinäre Untersuchung zwischen Naturwissenschaften, Philosophie und Strafdogmatik*, in *ARSP*, 110(4)/2024, edited by K.Y. ALBRECHT, G. BATTISTONI AND S. ZUCCA-SOEST, pp. 536-550.

⁴³ As Quante writes: «What is required in our ethical practice for the attribution of responsibility is the capacity to decide and act for reasons» (my translations), denoting the human ability to orient action in accordance with values and norms that one can acknowledge and offer as reasons. M. QUANTE, *Einführung in die Allgemeine Ethik, cit.*, pp. 176-177. This shows that the concept of rationality operates intrinsically within the law itself. See A. FARANO, *Legal Responsibility between Morality and Mind*, in *RPhR*, 1/2025, edited by G. BATTISTONI, C. WIRSING AND S. ZUCCA-SOEST, pp. 21-32.

mean that cognitive capacities are not recognized as necessary; rather, they are *preconditions* for our practice of attributing responsibility, enabling preconditions for being rational decision-makers⁴⁴. While this alternative may appear more feasible from an ethical standpoint, it might still present challenges when applied to the domain of criminal law. In any case, the notion of free will seems to remain a metaphysical presupposition underpinning both ethical and legal practices, despite ongoing efforts to reconcile it with scientific explanations.

5. *Assessing legal responsibility: mental capacity and the new scientific frontiers of criminal justice*

Consequently, some form of mental capacity is generally recognized as essential to the practices of attributing responsibility and determining punishment – even within frameworks that embrace free will skepticism or endorse revisionist theories. The requirement of *mens rea* – the guilty mind – continues to be a cornerstone of criminal law, even in models that attempt to move beyond retributivism⁴⁵. For decades, science – especially forensic psychiatry – has contributed to assessing defendants’ mental states. However, recent applications of neuroscience risk significantly transforming, if not distorting, the original purpose of forensic psychiatry.

⁴⁴ Quante argues that our practice of attributing responsibility is *ascriptivist* in the sense that «when we hold someone responsible for a given action, we do not refer – through a theoretical attitude – to properties or capacities of a subject that precede our practice. [...] It is only through our practice of ascribing responsibility that the essential facts relevant to that practice are constituted» (my translation). M. QUANTE, *Antropologia pragmatista*, cit., pp. 160-161. See also M. QUANTE, *Einführung in die Allgemeine Ethik*, cit.: «It is only our ethical practice that gives the concept of freedom a philosophically demonstrable content» (my translation). *Ivi*, p. 175.

⁴⁵ Shaw attempts to preserve the requirements of *actus reus* and *mens rea* within a legal framework that abandons retributivism. She thus proposes alternative justifications for these principles, emphasizing values such as liberty and moral communication, rather than relying on the traditional concepts of free will and retribution. See E. SHAW, *op. cit.* However, maintaining these legal principles without the foundational framework that originally supported them presents significant challenges. Shaw makes, however, an important point: even for free will skeptics, it is still possible to acknowledge the agent’s capacity to give reasons for their actions. This, in some way, preserves the possibility of attributing responsibility without the need to account for libertarian free will as suggested above. *Ivi*, p. 199.

This discipline developed in the 19th century, particularly in Germany, as part of a broader transformation in criminal law: the increasing focus on the agent's subjectivity in determining both the nature of the crime and the corresponding punishment. Central to this transformation was the assessment of guilt (*Schuld*) and the evaluation of the offender's cognitive and volitional capacities. Gradually, the involvement of experts became indispensable – professionals capable of evaluating the defendant's mental state at the time of the offense⁴⁶. This marked a significant advancement in criminal law, as it finally allowed for the individual's mental condition, intentions, and abilities to be taken into account, enabling a more just form of punishment that respected the rights and the dignity of the person. This shift, along with the emphasis placed on *mens rea* in determining criminal liability, paved the way for the application of neuroscience and other scientific discoveries in the legal domain, particularly in two main areas: assessing the defendant's mental capacity and evaluating the potential risk of reoffending.

1. As already argued, mental capacity remains essential both for the attribution of legal responsibility and for determining a proportionate punishment. In this context, neuroscience plays a growing role in identifying brain abnormalities or genetic factors that might impair behavioral control, thereby diminishing or even nullifying culpability. Consequently, it aims at refining and better defining the insanity defence⁴⁷, based on the agent's mental capacity.

2. The predictive use of science introduces new challenges, as it shifts the focus from judging past actions to managing future risks, raising ethical concerns about the limits of state intervention and the presumption of individual autonomy. Currently, algorithms are being used to assess and prevent the potential dangerousness of offenders, determine the appropriateness of the sentence, and estimate the likelihood of reoffending. However, this approach risks reviving the logic of criminal anthropology, promoting a reductionist view of the human being – one that judges

⁴⁶ For a more in-depth exploration of these aspects, which are only briefly mentioned here, as well as of the role played by philosophy – particularly the thought of Kant and Hegel – in this process, may I be permitted to refer to my own work on this matter: G. BATTISTONI, *Il privilegio della follia. Hegel tra diritto, morale e antropologia*, Il Mulino, Bologna, 2024.

⁴⁷ This, once again, reflects a retributive understanding of justice and punishment. See A. FARANO, *op. cit.* Accordingly, the use of neuroscience in this context continues to rely on foundational assumptions rooted in retributivist thought.

individuals based on who they are, rather than on what they do⁴⁸. Furthermore, these algorithms often reflect the biases and subjective frameworks of their programmers, making their outputs potentially arbitrary and, as a result, unreliable.

That said, despite the various challenges to retributivism and the proposals for alternative models, it still seems difficult to entirely abandon its fundamental paradigm and requirements – like the *mens rea* and the agent's ability of self-determination on the basis of responsibility. To do so would risk treating all human beings as if they were innocent by default – something that, in fact, applies only to animals, since even children possess the potential to develop their mental capacities, and individuals with mental disorders can, in many case, regain them – or distributing punishment arbitrarily, in a manner resembling a juridical dictatorship or a system of preventive control.

6. Concluding remarks

Despite its limitations, retributivism thus preserves essential legal principles that cannot be easily discarded. Among them is the *nulla poena sine culpa* principle, which grounds the legitimacy of punishment in guilt and responsibility⁴⁹. Equally crucial is the *nullum crimen, nulla poena sine lege* principle, which ensures that crimes and punishments must be defined by law, thus safeguarding legal certainty and proportionality. Rather than calling for the complete abolition of punishment, efforts should focus on reforming how it is understood and implemented. Prisons, for instance, raise serious concerns due to inhumane conditions that often worsen rather than rehabilitate criminal behavior. Yet, if we were to reconceive incarceration not as mere confinement – as in the early psychiatric hospitals of the late eighteenth century – but as a process aimed at restoring the humanity and dignity of offenders as persons – just as Philippe Pinel started to see hospices as places of care rather than mere confinement⁵⁰ –

⁴⁸ For a deeper examination of this compelling insight, drawing on the tools offered by Hegelian philosophy to critique the application of algorithms for such preventive purposes, see C. MAGNI, *Investigating the Algorithmic Sentencing with Hegel*, in F. IANNELLI AND K. VIEWEG (eds.), *Hegel und die Herausforderungen unserer Zeit/Facing the challenges of our time with Hegel*, Brill/Fink, Paderborn, 2025, pp. 65-79.

⁴⁹ See N. PAVLAKOS, *op. cit.*

⁵⁰ See G. BATTISTONI, *op. cit.*

punishment itself could become part of a rehabilitative pathway⁵¹. In this way, it may remain compatible with a revised, hybrid retributive framework⁵².

The complete elimination of punishment and retributivist requirements appears highly problematic, both because, as Hegel argued, punishment also “honors” the rational agency of the wrongdoer – recognizing their capacity to act and take responsibility for their actions – and because, in light of contemporary challenges such as environmental harm, a functioning system of punishment still seems not only useful but necessary, particularly for its deterrent effect⁵³. While many problems remain to be addressed and many paths remain open, it seems clear that the practices of responsibility attribution and guilt assessment are indispensable in democratic societies, which aim at recognizing all individuals as capable of acting according to – or against – legal and ethical norms and reasons. Finally, in response to the challenges posed by scientific expertise and the frameworks it imposes⁵⁴, the role of the judge must be reaffirmed. Judges must not passively defer to expert knowledge⁵⁵, but instead engage in critical reflection, asserting a form of moral subjectivity

⁵¹ Caruso and Pereboom propose a non-punitive alternative to retributive punishment, which they identify as the public health-quarantine model, grounded in public health ethics and oriented toward rehabilitation and reintegration. This model focuses on the social conditions that contribute to criminal behavior, aligning with a broader vision of social justice. According to the authors, such an approach would avoid what they see as the excessive and morally problematic forms of punishment associated with retributivism. See G.D. CARUSO AND D. PEREBOOM, *A Non-Punitive Alternative to Retributive Punishment*, in F. FOCQUAERT, E. SHAW AND B. N. WALLER (eds.), *The Routledge Handbook of the Philosophy and Science of Punishment*, Routledge, New York and London, 2021, pp. 355-365.

⁵² For the main theories and justifications of punishment, see R. CANTON, *Theories of Punishment*, in F. FOCQUAERT, E. SHAW AND B. N. WALLER (eds.), *op. cit.*, pp. 5-17. On the attempt to revitalize a hybrid theory of punishment, drawing on the insights of H.L.A. Hart, see Z. HOSKINS, *Hybrid Theories of Punishment*, in F. FOCQUAERT, E. SHAW AND B. N. WALLER (eds.), *op. cit.*, pp. 37-48.

⁵³ In such contexts, punishment may also serve a deterrent function, thus resulting in a hybrid framework that combines retributive and utilitarian elements. See, for instance, M. FAURE AND M. VISSER, *How to Punish Environmental Pollution? Some Reflections on Various Models of Criminalization of Environmental Harm*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 4/1995, pp. 316-368. More recently, Y. WANG, Y. LI, Z. MA AND J. SONG, *The Deterrence Effect of a Penalty for Environmental Violation*, in *Sustainability*, 11/2019, pp. 1-19.

⁵⁴ See Vera Moser’s article in this Forum.

⁵⁵ See Alessia Farano’s article in this Forum.

both of the defendant and of the judge which found its full legitimacy – already in the Hegelian vision of justice⁵⁶.

Consequently, rather than abandoning retributivism entirely, it may be more productive to reconsider and to critically integrate its core principles into a broader and more flexible framework. In doing so, the role of narrative remains central: whether legal, literary, or scientific, it continues to define how we understand human conduct and how we seek to respond to it justly in a changing world.

⁵⁶ See G.W.F. HEGEL, *Elements of the Philosophy of Right*, edited by A.W. WOOD, translated by H.B. Nisbet, Cambridge University Press, NY, 1991, especially the part on The Administration of Justice (§§ 209 ff.).



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ELISABETTA ORLANDI

It's only fair... It's only a fairy tale!
*A reflection on responsibility and punishment in
European folk and fairy tales*

ABSTRACT - Through the lens of oral and literary folk and fairy tales and grounded in literary analysis, folk studies, and the neurosciences, this study aims to explore the complex relationship amongst storytelling, responsibility, and social mores. Supported by a wide number of sources – from the Parisian *salonnières* to the Grimm Brothers, from Giuseppe Pitrè to Italo Calvino –, the paper intends to draw attention on how both the notion of responsibility – with all its various implications and nuances – and the act of telling a tale have had a pivotal role in the construction of communities and societies all over the world, as the structure of most folk and fairy tale mirrors the process of learning to “be” in real life: like every human being, also fictional characters of folk and fairy tales face challenges that demand empathy, thoughtfulness, moral agency, and the capacity to imagine – and respond to – unpredictable outcomes. Such a process is inextricably intertwined with the embracing and shaping of personal and social responsibility. The issue of punishment, particularly salient in folklore, is also closely analysed, as is the responsibility of both the storyteller and the audience in co-constructing a common ground.

KEYWORDS - Folk tales - Fairy tales - Storytelling - Responsibility - Punishment

1/2025

ELISABETTA ORLANDI*

It's only fair... It's only a fairy tale!

A reflection on responsibility and punishment in European folk and fairy tales**

CONTENTS: 1. Introduction. Storytelling Animals - 1.1 Once upon a time. Folk and fairy tales - 2. Responsibility and folktales - 2.1 On learning to be - 2.2 Tell me lies. Storytellers, the audience and responsibility - 3. Faber es suae quisque fortunae? Tales, responsibility and punishment - 3.1 Punishment in fairy tales and literary tales - 3.1.1 Punishment in oral folktales. The Grimm brothers - 3.1.2. The village voice - 4. All is well that ends well. Concluding reflection

«The universe is made of stories,
not of atoms».

(MURIEL RUKEYSER)

1. Introduction. Storytelling Animals

Stories are everywhere: in newspapers, in fashion, marketing, songs, tv commercials, video games, in ordinary conversations and on social media – just think of what is at the top of our Facebook wall and Instagram homepage: *stories*. We have fun through stories told in movies and books. We learn through stories. Stories make us think, allow us to imagine a different version of our personal history, describe and define our posture *vis-à-vis* the world, and have always been a powerful tool for shaping, sharing, changing, and disseminating ideas, concepts, beliefs, and values. In more than one occasion, they have had a lot to answer for. But where do stories come from and why are they so important?

«The universe is made of stories, not of atoms»¹. So writes poet Muriel Rukeyser, and I cannot but agree. This is not to deny the existence of atoms or physical laws, but rather to recognise the role of narrative structures of meaning in mediating human access to the world². Rukeyser's statement

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** Contribution subject to anonymous evaluation.

¹ M. RUKEYSER, *The Speed of Darkness*, stanza 9, originally published in *The Speed of Darkness*, Random House, New York, 1968, now in ID., *The Collected Poems of Muriel Rukeyser*, University of Pittsburgh Press, Pittsburgh, 2009, p. 486.

² See also P.J. ZAK, *Why Inspiring Stories Make Us React: The Neuroscience of Narrative*, in *Cerebrum*, 2015, https://pmc.ncbi.nlm.nih.gov/articles/PMC4445577/#_sec3title. From the editor's note, *ibidem*: «The man behind the discovery of the behavioral effect of a neurochemical in the brain called oxytocin wondered if the molecule might motivate

aligns with a long-standing tradition, stretching from Aristotle to contemporary hermeneutic thought, which sees narrative as essential for understanding and shaping reality. The poet challenges the idea of literature as mere entertainment, suggesting instead that stories are cognitive tools that help us explore the world, ourselves, and the potential for transformation. In this view, stories are not just an escape, but a way to deepen our understanding of existence.

In addition, neurosciences and evolutionary psychology³ have demonstrated that our brain is a «story processor, not a logic processor»⁴: metaphors, suspension of disbelief and sub-creation⁵ make stories the ideal sandbox – as in computer security – where human beings can experiment with ideas and possibilities on both an individual and societal level. Stories and storytelling are the most powerful tool we have ever had to face and control change⁶, to gather and organise information, to build (and dismantle!) society, to fit in and to control inner and outer chaos. In other words, and quoting the title of Jonathan Gottschall's book, we are *storytelling animals*, and what make us human are stories⁷. Whether true or invented.

people to engage in cooperative behaviors. In a series of tests using videos, his lab discovered that compelling narratives cause oxytocin release and have the power to affect our attitudes, beliefs, and behaviors».

³ W. STORR, *The Science of Storytelling*, William Collins, London, 2019. Quoting the works by Robin Dunbar, Louise Barrett, and John Lycett (*Evolutionary Psychology*, Oneworld Publications, London, 2007) the author explains how «language evolved principally to swap 'social information' back when we were living in Stone Age tribes. In other words, we'd gossip» (W. STORR, *op. cit.*, p. 2).

⁴ J. HAIDT, *The Righteous Mind: Why Good People Are Divided by Politics and Religion*, Allen Lane, London, 2012, p. 281.

⁵ The idea of «suspension of disbelief» was formally presented by poet Samuel Taylor Coleridge in 1817. «Sub-creation» and the «Secondary World» are ideas advocated by both J.R.R. Tolkien and C.S. Lewis: according to these theories, the Sub-creator fashions a Secondary World, which is taken as true by the reader (J.R.R. TOLKIEN, *On Fairy-Stories*, Ballantine Books, New York, 1966).

⁶ According to neurosciences, change is what makes our perceptual system work. Unexpected change can bring extreme danger, but is also the door through which positive opportunities pop in. Therefore, the ability to detect, react to and control change is strictly linked to survival: in this sense, folk tales – with their plots made of twists and turnings – seem to provide a catalogue of possibilities that could work as a sort of «training course».

⁷ J. GOTTSCHALL, *The Storytelling Animal. How stories make us human*, Mariner Books, Boston, 2012.

1.1 *Once upon a time. Folk and fairy tales*

From this point onwards, we will focus on a peculiar sort of stories: folk and fairy tales.

The presence of folk and fairy tales is a phenomenon that can be observed in every culture worldwide⁸ and has been present since time immemorial: comparative phylogenetic analyses have been able to trace the origin of some tales, which appear to be several millennia old⁹. Their telos-driven nature shows not only the evolution and growth of the characters from their initial situation¹⁰, but also a wide spectrum of possibilities that allow to avoid any potential ossification in terms of characters' development, plot twists, and interpretive frames.

Folk and fairy tales (also called *wonder tales*) can be divided into two branches belonging to the same tree, intertwined, and equally important: oral tales, anonymous in origin and passed down through successive generations by face-to-face communication, and literary tales, signed by their author, written and printed in a specific historical and social context, which, of course, influences many aspects such as language, style, topics, plot, and characters¹¹. Both oral and literary tales take place in an imaginary

⁸ Suffice it to mention the renowned works of Antti Aarne, Stith Thompson and Hans-Jörg Uther, now available in H.-J. Uther, *The Types of International Folktales: A classification and bibliography based on the system of Antti Aarne and Stith Thompson*, Suomalainen Tiedeakatemia, Helsinki, 2011. In this contribution, we will refer to European versions of some well-known tales and will provide the ATU (Aarne-Thompson-Uther) tale-type number according to the classification.

⁹ S.G. DA SILVA AND J.J. TEHRANI, *Comparative phylogenetic analyses uncover the ancient roots of Indo-European folktales*, in *Royal Society Open Science*, 3/2016, <https://doi.org/10.1098/rsos.150645>. Their analyses «show that these oral traditions probably originated long before the emergence of the literary record and find evidence that at least one tale (*The Smith and the Devil*) can be traced back to the Bronze Age». The research also showed that *Jack and the Beanstalk* was rooted in a group of stories classified as *The Boy Who Stole Ogre's Treasure* and could be traced back to when Eastern and Western Indo-European languages split more than 5,000 years ago, whereas *Beauty and the Beast* and *Rumpelstiltskin* seem to be about 4,000 years old.

¹⁰ See V. PROPP, *Morphology of the Folktale*, University of Texas Press, Austin, 1968; J. CAMPBELL, *The Hero's Journey. Collected works of Joseph Campbell*, New World Library, Novato (CA), 2014.

¹¹ According to Jack Zipes, «the genre [of literary tales] originated within an oral storytelling tradition and was created and cultivated by adults, and as the fairy tale became an acceptable literary genre first among adults, it was then disseminated in print in the Eighteenth century to children. Almost all critics who have studied the emergence of the literary fairy tale in Europe agree that educated writers purposely appropriated the oral

land at an imaginary time, in both we find magic and wonders, both are characterised by perilous adventures, harsh punishment for the evildoers and a happy ending for the protagonists. Metaphors are a common feature: Harold Bloom sees metaphor as a figure of desire rather than a figure of knowledge¹², and it is evident that desire serves as the primary catalyst for all narratives¹³.

Both types of narratives deal with and set up paradigms for social behaviour, but at the same time – as a kind of deceptive mirror – show examples of extreme subversion and deep transgression.

The reason is simple: they are built on one of the most subversive and crucial questions ever: «What if...?».

2. Responsibility and folktales

According to the Merriam-Webster Dictionary, «responsibility» is the «quality or state of being responsible», that is «capable of providing a response». A response is a reply, an answer which may be constituted of either verbal or physical elements. Etymologically, the Latin word «*responsus*» originates from the past-participle stem of «*respondere*», meaning «respond, answer, promise in return». The latter originates from the prefix «*re*» («back, again») and «*spondere*», meaning «to pledge, to give assurance, to promise solemnly, to engage oneself by a ritual act»¹⁴.

On the other hand, «tale» is defined by the dictionary as «a usually imaginative narrative of an event» and «a series of events or facts told or presented», but also «falsehood, an intentionally untrue report». Etymology confirms such definitions: the Middle English word «tale»¹⁵ is derived from the Old English word «*talū*», meaning «piece of information, story,

folktale and converted it into a type of literary discourse about mores, values, and manners so that children and adults would become civilized according to the social code of that time» (J. ZIPES, *Fairy Tales and the Art of Subversion. The Classical Genre for Children and the Process of Civilization*, 2nd edition, Routledge Classics, New York/London, 2006, p. 3).

¹² H. BLOOM, *Introduction*, in ID., *Bloom's Literary Themes: The Hero's Journey*, Infobase Publishing, New York, 2009, p. ix.

¹³ See V. PROPP, *Morphology of the Folktale*, University of Texas Press, Austin, 1968, and J. CAMPBELL, *The Hero's Journey. Collected works of Joseph Campbell*, New World Library, Novato (CA), 2014.

¹⁴ *Responsibility*, in *Online Etymology History* <https://www.etymonline.com/word/responsibility>.

¹⁵ *Tale*, in *Online Etymology History*, <https://www.etymonline.com/word/tale>.

narrative, fable; statement or relation of events alleged to be true», and later, surprisingly, «story known to be untrue». It also means «series, calculation»: as a matter of fact, the Proto-Germanic form **taljan* is understood to mean «mention in order».

Responding, answering, promising, mentioning in order, lying: we are walking through the incredibly rich semantic field where the act of talking is rooted, together with communication, response, and the co-construction of a shared text – a common ground. As a matter of fact, both the notion of responsibility – with all its various implications and nuances – and the act of telling a story – a tale – have had a pivotal role in the construction of communities and societies all over the world, and at times they appear to be inextricably interlaced. A brief analysis of their interactions can therefore highlight some intriguing aspects.

2.1 *On learning to be*

In my opinion, responsibility in folk and fairy tales takes two main forms: *reliability* (as in *trustworthiness*) and *carefulness* (in the sense of *attention* but also of *loving thoughtfulness*). Such attitudes are also among the traits that define and mould the characters and their actions while they «learn to be»¹⁶, as Italo Calvino says.

The process of «learning to be» is developed around a series of significant steps: the acquisition of self-awareness, the understanding of one's place in the world, and the acquisition of competencies that are nowadays commonly referred to as «soft skills». In this sense, it is inextricably linked to the embracing and shaping of personal and social responsibility: the protagonists of the tales evolve by overcoming obstacles and usually earn the much sought-after reward once they have proved capable of taking care of themselves and of others. Responsibility can then be seen as an *answer* in terms of attitude and posture towards a specific set of values, but also as a *process*, a path that must be walked and explored to disclose the character's full potential and make them aware of possibilities that had not been considered – or imagined. Such an answer is always embodied in an action (Propp and Campbell *docent*), but that specific action

¹⁶ I. CALVINO, *Il cavaliere inesistente*, Einaudi, Torino, 1959; for the English version, see I. CALVINO, *The Nonexistent Knight*, Houghton Mifflin Harcourt, Boston, 2012, p. 90.

seems to be strongly rooted in an attitude of active listening¹⁷ (which in folktales bears a striking resemblance to the tenets of narrative medicine): the character needs to overcome prejudice and pay close attention to all the details of the context in order to – responsibly – choose when to act and how. The option of inaction is also available, as well as the option to take a less direct path involving dishonesty. However, such choices will invariably result in severe repercussions, as we will see further on.

It is an established fact that all tales commence with a negative situation, and the characters must find a way to overcome it. The list of examples could be endless¹⁸: from Cinderella and her male counterpart Ashlad, to Snow White, to the miller's son in *Puss in Boots*, to Hansel and Gretel – whose parents have chosen to get rid of the burden of their parental responsibility –, to the many versions of *Beauty and the Beast*. The characters in question are all depicted as responding to a «call to adventure»¹⁹ and undertaking some form of action to attain a specific aim or to escape a grim context: in short, to engender a change in a negative situation. But the desired change only occurs when characters choose to become the protagonists of their own history, when they choose to be or to become reliable, trustworthy, careful, thoughtful (or when they actively choose a *mors tua, vita mea* posture against their antagonists). That is, when they embrace full responsibility for themselves – and sometimes for the world around them, including the natural world and objects – by developing a capacity for empathy and by actively committing to caring for themselves and for others through choices that may sometimes be incorrect (for instance, outfoxing or killing the antagonists), but that contribute to the development of experience and wisdom and often bring an unexpected reward. A good example comes from *The Old Witch*, an English tale published by Joseph Jacobs in his 1894 book, *More English Fairy Tales*²⁰. The tale belongs to tale-type ATU 480 (*The Kind and the Unkind Girls*) and

¹⁷ The term “active listening” was introduced in 1957 by Carl Rogers and Richard Farson and is one of the pillars of narrative medicine as developed by Rita Charon in the following years.

¹⁸ Suffice it to say that there are there are approximately 345 known – versions of *Cinderella*, which is tale-type 510 (ATU 510) or *The Persecuted Heroine*. This tale-type has two variant types, ATU 510A, *Cinderella* tale-type and ATU 510B *Catskin* tale-type. See *Library Research Guide for Folklore and Mythology*, in *Harvard Library Guides*, in *Harvard Library*, https://guides.library.harvard.edu/folk_and_myth/indices.

¹⁹ J. CAMPBELL, *The Hero with a Thousand Faces*, Princeton University Press, Princeton (NJ), 1968, p. 30.

²⁰ J. JACOBS, *The Old Witch*, in *More English Fairy Tales*, D. Nutt, London, 1894.

tells the story of two sisters seeking their fortune after their father loses his job. The first girl encounters an oven, a cow, and an apple tree, each of which needs help. She assists them all and later meets an old witch who forces her to clean the house but forbids her from looking up the chimney. When the girl disobeys and peeks, bags of money fall down. She gathers them and flees, with the witch chasing her. However, the oven, cow, and apple tree help her hide from the witch. Eventually, the oven tricks the witch into entering it and traps her, allowing the girl to escape. With her newfound wealth, she marries a rich man. The second sister tries to repeat the journey but refuses to help the oven, cow, and apple tree. When she steals the money, none of the helpful characters come to her aid. The old witch catches her, punishes her, and takes back the gold. A similar situation happens in *La finta nonna* (*The False Grandmother*), the Abruzzi version of *Little Red Riding Hood* (tale-type ATU 333), as retold by Italo Calvino in his *Italian Folktales*²¹.

One could object that change often occurs thanks to a magic object. While this may be the case, a more crucial question remains: how does a magic object function?

Magic objects show a crack in the wall of impossible. Garments, sticks, rings, hazelnuts, combs, spinning wheels, spindles, bowls, ovens, gates, and even apple trees: they may seem to be ordinary items of everyday use, but in tales there is always more than meets the eye. Those everyday objects have been enchanted: a secret magic spell has been chanted or whispered over them²². Therefore, they carry a special power, as they can change the course of events despite their plain aspect. But the crucial aspect is their utilization, which is never an anodyne practice: it implies profound attention, active listening, deep trust, thoughtfulness, self-awareness, and accepting that there is a price to pay – that is, again, responsibility²³. The repertoire of narratives regarding «the village fool» might provide a compelling illustration of this idea, as such fool is often characterised by a sense of blissful ignorance and a total lack of reliability as well as self-awareness²⁴, and therefore cannot but misemploy or waste magic objects.

²¹ I. CALVINO, *Fiabe italiane*, Einaudi, Torino, 1956; English translation: I. CALVINO, *Italian Folktales*, Penguin Group, London, 1982, pp. 412-413.

²² It may be interesting to remind here that in Nordic languages the etymology of the word *rune* means both «to cast a spell» and «to whisper a secret».

²³ Examples can be found in the tales devoted to the Baba Yaga character, but also in literary tales like *L'oiseau bleu* (*The Blue Bird*, tale-type ATU 432) by Marie-Catherine d'Aulnoy.

²⁴ See ATU tales 1200-1349 (*Tales About a Fool*).

2.2 *Tell me lies. Storytellers, the audience and responsibility*

As I have noted, communication and mutual care are crucial when it comes to building a community. And so are tales: telling a story to an audience is surely a way of sharing innovative and subversive narratives as well as a tool for reinforcing values or perspectives, but it is also an extraordinary opportunity to build and strengthen a sense of belonging, as we learn from social neuroscience and folk psychology²⁵. In this sense, we could define the (great) responsibility of the storyteller as a matter of respect and care. Such responsibility extends to the act of storytelling – for instance, by selecting a repertoire of tales, choosing the version to be told, fine-tuning the language to be used, focusing or not on specific social issues –, to the audience that entrusts the storyteller with their time, attention, and sometimes money or other forms of reward, and to the folktale – a cultural artefact of inestimable value, built up over millennia but kept alive by constant and varied retelling.

At the beginning of this chapter, we briefly examined the etymology of the words «responsibility» and «tale» to discover how both words are semantically related to the act of talking, which is also connected to the idea of dialogue and therefore implies a sender, a receiver, a message, and finally the presence – or the co-construction – of a reliable common ground, in order to build a secure network of interpersonal connections that can be designated «society». Curiously, the extraordinary peculiarity of tales – be it due to sub-creation or to suspension of disbelief – makes a common ground appear even when the tale tells an explicit lie, as in the so-called «lying tales», or self-contradictory tales (ATU 1965). I would like to briefly examine what happens when we are told one of these stories to highlight some of the implications of responsibility in and of tales. In this regard, I have chosen to share here *The Lying Tale*:

«There were once five men. The one had no eyes, the second had no legs, the third was dumb, the fourth had no arms, the fifth was naked. The blind man exclaimed, “Eh, lads, I see a bird!”.

²⁵ Among others, see D.D. HUTTO AND M.D. KIRCHHOFF, *Looking beyond the brain: Social neuroscience meets narrative practice*, in *Cognitive Systems Research*, vols. 34-35, 2015, pp. 5-17, <https://doi.org/10.1016/j.cogsys.2015.07.001>.

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The dumb man said, "I'll shoot it!"
The man without legs said, "I'll run after it!"
The man without arms said, "I'll pick it up!"
And the naked man said, "I'll put it in my pocket!"
Chorus of Yorkshire children: "Eh! That is a lie!" »²⁶.

The very title of this short tale is revelatory and intriguing at the same time. Like a sort of mirror game, the audience has been warned about the true nature of a story that is a lie in more than one sense: with all probability it has never happened, and all the characters declare that they will do things that are visibly impossible for them. By revealing the title – or simply by pronouncing opening formulas as «Once upon a time, in a faraway land...». When? Where? We shall never know – the teller has put a sort of security distance and has abdicated all responsibility, passing it on to the audience. Drawing on my own experience as a professional storyteller, I can easily imagine that despite knowing that the tale will be a series of lies, the audience will insist to be told that tale anyway, trusting – what a magnificent paradox! – the teller with their time and attention.

With all probability, the last line of *The Lying Tale* will be greeted with a burst of laughter. Here, the mechanism involved is based on a neurophysiological reaction and not on a voluntary action: humour is not intended to be taken at face value, and we could therefore affirm that there is no basis on which to ground the moral relevance of laughter or of what provokes it. But here, I believe, both the teller and the audience have specific responsibilities. On the one hand, the teller will have chosen to tell a precise version²⁷ of a certain tale after assessing whether it would be suitable for that specific audience and to achieve a specific aim – to amuse or to shock;

²⁶ See S. BARING-GOULD, *Appendix*, in W. HENDERSON, *Notes on the Folk Lore of the Northern Counties of England*, Longmans, Green, and Company, London, 1866, no. 12, p. 337.

²⁷ Indeed, all versions (the tales as they are told at a certain time to a specific audience by a particular storyteller) are a product of a peculiar context and carry a concrete set of values and intentions: Walt Disney's *Snow White* was released in 1937 and has very little in common with *Lalla Khallalt El Khoudra*, her Moroccan sister, even though both tales belong to tale-type ATU 709: while Disney's *Snow White* seems happy to marry the charming prince and spend the rest of her life with him, Lalla leaves the sultan (who brought her back to life and then became her husband), and goes back to where she was happiest.

to consolidate shared values or to show a possibility of change, subversion, and transgression. As for the audience, the final laughter can be regarded as the natural response to a funny punchline but also as a sort of negligent omission, as humans have the power to avoid laughing or suspend laughter when circumstances and shared values prove to require a different attitude, more prone to inclusiveness and respect. It is not a mere question of being politically correct: the analysis of reactions to a narrative gives rise to a series of questions concerning cultural patterns and the boundaries of acceptability in a given context. The answer to these questions contributes to building or dismantling the common ground called «society».

3. *Faber es suae quisque fortunae? Tales, responsibility and punishment*

We have mentioned carefulness as a possible embodiment of the notion of responsibility. In folk and fairy tales, carefulness means both attention to details – in order to use good judgment when needed – and an attitude of loving thoughtfulness and empathy towards the others, may they be human beings (old ladies, children in distress: in general, the weak, the poor, and the outsider), natural elements or even objects. Christian values may have played a part in the formation of such a perspective in the modern European versions of the tales. However, it is evident that the same structures and patterns can be identified in folktales throughout the world, regardless of the prevailing religion. I would go as far as to say that learning to take care of the *other* is often the real magic object and a path to sure reward²⁸, as it is one of the fundamental components of community life. This might also be the reason why the issue of punishment is particularly salient in folklore and deserves closer examination.

In his *Morphology of the Folktale*, Russian folklorist Vladimir Propp identified their simplest irreducible structural units: 31 basic elements, or functions, that occur in a specific order. «Punishment» is function n° 30 and Propp defined it as follows: the villain suffers the consequences of their actions, perhaps at the hands of the hero, the avenged victims, or as a direct result of their own ploy. That is true for what we call «cautionary tales», tales whose purpose is to intimidate the audience by showing the outcomes of failing to take social or personal responsibilities and breaking societal

²⁸ By way of example, we could recall here Charles Perrault's tale known as *The Fairies* (tale-type ATU 480 – *The Kind and the Unkind Girls*).

rules or laws²⁹. But in «exemplary tales» punishment hits characters who have done nothing wrong or disobedient to deserve their ill-treatment, like Hansel and Gretel or Snow White. As a matter of fact, these tales aim at teaching endurance and appropriate behaviour by showing the rewards obtained by these well-behaved, honest, clever characters. We could say that in both cases «you reap what you sow». But when we talk about tales, there's more than meets the eye.

3.1 *Punishment in fairy tales and literary tales*

The history of European fairy and literary tales begins in Italy in 1550 with the publication of *The Facetious Nights* or *The Pleasant Nights*³⁰ by Giovan Francesco Secchi, called Straparola. Almost a hundred years later, Giovan Battista Basile (1566-1632) puts together a collection that includes the oldest recorded forms of many European tales: *Il Pentamerone. Lo cunto de li cunti (The tale of tales)*³¹. Both writers filter the oral tales through an educated sensibility, turning them into literary works intended for adult readers.

Punishment in their tales follows the rules dictated by the Baroque literary tradition: keywords here are wonder, terror and ecstasy. With respect to how punishment is carried out, in these tales we find a certain taste for medieval tortures and Inquisition methods: evildoers are burned or skinned alive, turned into disgusting creatures or farm animals

²⁹ It is interesting to note that three of the most renowned authors of literary tales had significant family and cultural connections with the legal sphere. The writers are Charles Perrault and the Grimm brothers, Jakob and Wilhelm. Charles Perrault was born in Paris in 1628 into a wealthy family, although not a noble one. His father was a lawyer and member of parliament. After studying law, Charles Perrault entered the civil service, following the family tradition. He was secretary to Minister Jean-Baptiste Colbert, the finance minister to King Louis XIV. Jakob and Wilhelm Grimm, born in Hanau respectively in 1785 and 1786, were a jurist's orphaned children and were admitted at the University of Marburg. Their law professor was Frederich Von Savigny, who awakened in them an interest in history, philology and medieval German literature. Savigny's circle of friends included German romantics such as Clemens Brentano and Ludwig Achim von Arnim. Through them the Grimms were introduced to the idea of *Volkspoesie* (natural poetry) – as opposed to *Kunstpoesie* (artistic poetry).

³⁰ G.-F. SECCHI, called STRAPAROLA, *Le piacevoli notti di M. Giovan-Francesco Straparola da Caravaggio*, Comin da Trino, Venezia, 1551-1553 and 1556.

³¹ G.B. BASILE, *Lo cunto de li cunti, ovvero lo trattenimento de' peccerille*, Ottavio Beltrano, Naples, 1634 (posthumous publishing).

(generally, pigs), rolled in a barrel full of spikes and other amenities of the kind. All this is close to an Old Testament notion of recompense: an eye for an eye, which reminds us of Dante's *legge del contrapasso* (law of retaliation), also known as «poetic justice» – an outcome in which vice is punished and virtue rewarded usually in a manner peculiarly or ironically appropriate.

Literary tales and fairy tales as we know them today were shaped by a group of French women writers at the end of XVII century: the term *conte de fées* – in English, «fairy tale» – was coined by the most popular among Parisian *salonnières* of the time, storyteller and writer Baroness Marie-Catherine D'Aulnoy. The author we all remember is Charles Perrault, but the real protagonists of what we would now call the underground literary scene were women writers. Fairy tales quickly gained great popularity and soon became a powerful tool that allowed their authors to contribute to the shaping (and dismantling) of society: through them, new models of behaviour could be presented as well as, of course, consolidated social norms and manners. The pedagogical function of fairy tales was highly appreciated to codify and transmit the values of the bourgeoisie and the society that was taking shape in XVII and XVIII centuries. Fairy tales worked as a sort of cultural meme, and fictional characters were actual influencers in many ways.

In such a context, the issue of punishment in fairy tales is linked to what was considered morally acceptable, fair, *civilisé*: a way to define justice, to reestablish balance, to show fairness, but also to highlight desirable, appropriate behaviour – «appropriate» according to the moral and social standards of that time.

In Perrault's fairy tales, punishment is often used as a veiled threat to show consequences of inappropriate choices: a sort of «you made your bed, now you lay in it» expressed through a highly refined language, elegant images, and two short poems placed at the end of each fairy tale, with two versions of the takeaway moral lesson. Examples are easy to find: poor Little Red Riding Hood steps out of the prescribed path and ends up eaten by the wolf, Bluebeard's wives are burned alive because of their curiosity.

At a superficial glance, we can say that the abovementioned landmarks of the *civilité* are recognisable also in the *salonnières'* fairy tales. Nevertheless, their stories are deeply subversive, both for the language and the topics treated. As a matter of fact, the rococo language of the fairy tales served an important function: disguising the subversive subtext of the stories and sliding them past the court censors. As for topics and characters, this was a time when women were barred from schools and universities,

when arranged and underage marriages were the norm, divorce virtually unheard of, birth control methods primitive, and death by childbirth common. Women were alienated from the traditional legal process, just like children – and women and children are those who suffer abuse in most fairy tales. In this sense, fairy tales appeared to be a sort of Promised Land where freedom was granted, where women had a voice, and children could imagine a different future.

In this sense, fairy tales offered the opportunity to make a mockery of the abuse of power and to question the régime and the so-called *civilité*. As a consequence, many of those *salonnières* who wrote and published fairy tales were at some point ostracized or exiled for their subversive views. It is also important to remember that their fairy tales were first told orally – in private *salons* and for a female-only audience – and it was only subsequently, at a second stage, that they were disseminated in print: consequently, we may infer that those oral versions might have been slightly – or very – different from the printed ones.

As for punishment in the *salonnières'* published fairy tales, we find derision, disdain and dismissive attitudes towards evil doers, but also summary trials and a subtle taste for revenge. Revenge is certainly not an expression of *civilité*, but we are talking about women writers: what other option but revenge has one got if their voice will never be heard or listened to?

A similar situation can be found in Victorian fairy tales, and above all in oral folktales.

3.1.1 *Punishment in oral folktales. The Grimm brothers*

Jakob and Wilhelm Grimm had a relevant role in linking folk tales, society, and the law. Jacob Grimm's well-known 1816 essay *Poetry in Law* (*Von der Poesie im Recht*) presented a comprehensive Romantic philosophy of law. The Grimm's collection of fairy tales and folktales offer a privileged insight on «the law of the people» and on what André Jolles called «die naïve Moral».

As I have mentioned, on a social level, tales may contribute to disseminating norms, rules, standardised behaviours: what happens in folktales is both a prescription and a testimony of a specific tradition, especially if, as in Grimm's case, the stories are the literary version of folk tales and therefore, as all literary tales, have gone through a process of

sanitation: if tales are intended to mirror society as its truest expression, it's probably more acceptable to have evil stepmothers rather than wicked mothers, and maybe Little Red can be saved by a brave hunter and learn her lesson anyway. This process of sanitation is especially evident when we look at the different editions of the Grimm's tales: one for all, Little Red Riding Hood dies gobbled up by the wolf in the first edition of 1812, but in 1857 manages to escape death thanks to a brave hunter. Again, tales like *Puss in Boots*, *Bluebeard* or *The Smith and the Devil* are part of the first edition but were later removed *tout court*, probably because the plot twist leading to the happy ending is linked to cheating and outfoxing the evildoers (or the Devil in person), and cheating – even if the victim is the wicked antagonist – is not included in the set of Christian values, whether they be Protestant or Catholic. As for *Bluebeard*, also excluded from the latest edition: how can Bluebeard's wife get a reward if her sin was curiosity? After all, Pandora and Eve did the same and the result is there for all of us to see. So, double punishment: one for the evildoer and one for the tale, erased from the collection.

3.1.2. *The village voice*

Wilhelm and Jakob Grimm's tales belong to what we call «literary tales», as the two brothers did not collect the stories directly from the folk but transcribed and adjusted literary sources. To find the real voice of the people in folktales we must fly to Sicily, jump on a buggy and follow the general practician and folklorist Giuseppe Pitrè around Palermo, in the second half of the XIX century. Pitrè dedicated his life to the treatment of the poor, a commitment that was perhaps inspired by his own humble origins. In exchange for medical assistance, he would ask to be told a tale, which he would then faithfully transcribe, maintaining the local dialect used by the tale teller, while traveling to the next patients on his horse-trained buggy³².

The three hundred tales collected in *Il pozzo delle meraviglie* tell us about a world in which stories have a consolatory function, rather than a pedagogical one: in an underprivileged social context such as that of Sicily

³² See J. ZIPES, *Introduction*, in G. PITRÈ, *Il pozzo delle meraviglie. 300 fiabe, novelle e racconti popolari siciliani*, Donzelli Editore, Roma, 2013.

at the time³³, happiness is just a word, and tales are probably the only way to imagine a different outcome to a hard life. They seem to have the responsibility to give a glimmer of hope without forgetting to keep one's feet on the ground, as the expected happy ending is always followed by a wealth of dour closing formulas. In the tale *Dattero-beldattero*, the Sicilian variant of Cinderella, the protagonist Ninetta comes from a humble background and marries a king. Happy ending? Yes, but not for everybody: «They were as happy as happy could be, while here we sit grinding our teeth»³⁴.

The poor, the folk, have no say in society. Just like women and children: as Frances Power Cobbe pointed out in her clever essay, «criminals, idiots, women, and minors» were identical in the eyes of the law³⁵. In such a perspective, prevaricators and all those who acted carelessly or only for their own benefit disregarding social and personal responsibilities clearly deserve to be punished.

Wit, humour, irony, social criticism, anticlericalism, poetic justice, and revenge are the ingredients used to concoct funny and melodramatic forms of punishment. Here are some examples, similar to those found in Italo Calvino's *Italian Folktales*: the wicked King's sisters-in-law are thrown down from the balcony or boiled in a cauldron, the evil queen is turned into a sow, the mean step-mother dies in a fit of rage; evildoers and antagonists can be cursed into the form of an animal (a bear, a toad, a sow, a pig), condemned to permanent deformity, forced to dance all night (or eternity) in a faraway realm or in burning hot iron shoes; they can be having insects or reptiles spill from their mouth when they talk, or can be burned alive, rolled in a barrel with spikes, hit by enchanted sleep. Alternatively, they may have their eyeballs pecked out, or be danced to death, until they beg the local executioner to chop their feet off. Then they die.

The lowest common denominator of all these forms of punishment seems to be a combination of desire for revenge and sarcasm, with theatrical elements that elicit robust laughter from the audience. Author of *Law and Literature. A Misunderstood Relationship* Richard Posner³⁶ affirms that revenge is one of the great themes of literature and contributes to shape the

³³ See, among others, S. FENOALTEA, *L'economia italiana dall'Unità alla Grande Guerra*, Laterza, Bari, 2006.

³⁴ Pitre, *op. cit.*, pp. 189-197.

³⁵ F.P. COBBE, *Criminals, Idiots, Women and Minors. Is the classification sound? A Discussion on the Laws Concerning the Property of Married Women*, A. Ireland & Co., Manchester, 1869.

³⁶ R.A. POSNER, *Law and Literature: A Misunderstood Relation*, Harvard University Press, Cambridge/London, 1988, p. 25.

notion of retribution in punishment. Revenge represents an alternative to the conventional legal system, or perhaps even a manifestation of private law or justice. Jurist Kimberly J. Pierson notes that «calling revenge “private law” seems only appropriate, as the Elizabethans referred to what we would now call our legal system as “public revenge”»³⁷, and Kate Saunders, author of *Revenge: Short Stories by Women Writers* writes: « Francis Bacon defined revenge as “a kind of wild justice”, and condemned it, because it was beyond the law. This probably explains why it belongs particularly to women [...] Bacon’s “wild justice” is often the only justice available»³⁸.

The work of the folklorist Pitrè shows a cross-section of a society in which responsibility towards others is limited to horizontal mutual aid, as those in positions of power generally abuse their authority and show no consideration for the disadvantaged conditions of the poorer classes. Change only occurs when the characters take responsibility for themselves, (as we have seen above), even acknowledging and accepting their own feelings towards people who do not belong to the same social class. Only in this way can a king marry a commoner and change the course of history.

4. *All is well that ends well. Concluding reflection*

Time has come to move towards the end of this story. We have walked along the paths of the fictional woods, and we have seen as storytelling and tales are never innocuous, nor anodyne, despite being an act of care. Storytellers have been held responsible for the transmission and dissemination of values and ideas, and tales have been alternatively praised and blamed for carrying meanings and patterns that may wound or heal, foster change or consolidate roles and attitudes. In some cases, a tale has changed a destiny³⁹, and the end has become a new start.

Have we come full circle? I’m not sure. Every time a tale is finished, we just need to turn the page and get ready for another one to begin.

³⁷ K.J. PIERSON, *Revenge and Punishment: Legal Prototype and Fairy Tale Theme*, in *Circles: Buffalo Women’s Journal of Law and Social Policy*, 6(4)/1998, p. 4, <https://digitalcommons.law.buffalo.edu/circles/vol6/iss1/4>

³⁸ *Revenge. Short Stories by Women Writers*, ed. by K. SAUNDERS, Faber and Faber, Winchester (MA), 1990, quoted by K.J. PIERSON, *op. cit.*, p. 6.

³⁹ Here is a little tale within the tale. In 1830, damaged by weather and the Revolution, Notre-Dame cathedral threatened to collapse. Thanks to the surge in popularity following the publication of Victor Hugo’s *The Hunchback of Notre Dame* in 1831, the State decided to carry out restoration work.



«In an African village, when a storyteller comes to the end of his tale, he places the palm of his hand on the ground and says, “I put my story here”. Then he adds, “So that someone else may take it up another day” .»⁴⁰

⁴⁰ P. BROOK, *Threads of Time*, Counterpoint Press, Washington, 1998, p. 198.



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SOPHIE ROTHÉ

Punir le système carcéral ? Des lettres de prison prérévolutionnaires au service d'une réflexion sur la punition contemporaine

ABSTRACT - «Punishing the Prison system? Pre-revolutionary prison letters serving reflexions about contemporary punishments». While prison overcrowding persists in France, there is a contemporary debate on the meaning of punishment and prison conditions. In this context, the prison letters of Sade and Mirabeau offer valuable insights into current questions about prisons, this «dark side of modern democracy»: imprisoned in the Vincennes dungeon during the pre-revolutionary period, these letter writers bear witness to the torments of punishment, question their validity and convey a unanimous penal ethic at the end of the Age of Enlightenment. Influenced by Beccaria's thinking, they raise a fundamental question: if imprisonment neutralises deviants and protects society for a time, can it make prisoners better people when the conditions of incarceration are inhumane? Is there ultimately a way to punish better and to improve the penal system? First, the letter writers describe excessive violence against a citizen, showing how cruel and disproportionate the punishment is. Secondly, they portray their sentence as a family vendetta: their imprisonment is a private revenge, not a sentence based on natural law. Finally, they highlight the ineffectiveness of the judicial system by threatening their «executioners».

KEYWORDS - Literature - 18th century - Sade - Mirabeau - Beccaria



1/2025

SOPHIE ROTHÉ*

Punir le système carcéral ? Des lettres de prison prérévolutionnaires au service d'une réflexion sur la punition contemporaine**

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1. L'éclairage de Sade et Mirabeau, captifs et défenseurs des droits du détenu au siècle des Lumières

En France, au 1^{er} mars 2025, d'après les statistiques du ministère de la Justice, 82 152 personnes sont écrouées et détenues pour 62 359 places opérationnelles ; la densité carcérale est au total de 131,7%; en Maison d'arrêt, elle est spécialement de 159,9%¹. Derrière ces chiffres de la surpopulation carcérale se cache une réalité: le traitement inhumain et dégradant des individus enfermés. En effet, d'après l'Observatoire International des Prisons (OIP), «66% des personnes détenues vivent aujourd'hui dans des établissements pénitentiaires où le taux de suroccupation atteint les 155%, voire dépasse les 200% dans plusieurs dizaines d'entre eux. Plus de 4 200 personnes dorment sur un matelas à même le sol»². En 2020 déjà, la Cour Européenne des Droits de l'Homme

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** Contribution subject to anonymous evaluation.

¹ DIRECTION DE L'ADMINISTRATION PENITENTIAIRE/MINISTERE DE LA JUSTICE, *Statistiques des établissements et des personnes écrouées en France*, 1^{er} mars 2025, p. 6 [pdf en ligne] [consulté le 17.05.2025] URL : https://www.justice.gouv.fr/sites/default/files/2025-03/statistique_etablissements_personnes_ecrouees_01032025.pdf

² OBSERVATOIRE INTERNATIONAL DES PRISONS, *Cinq ans après la condamnation de la France par la CEDH, l'indignité carcérale perdure et s'aggrave près de chez vous*, in OIP [mis en ligne le 30.01.25] [consulté le 17.02.25] URL : <https://oip.org/communiqu/cinq-ans-apres-la-condamnation-de-la-france-par-la-cedh-lindignite-carcerale-perdure-et-saggrave-pres-de-chez-vous/>. Voir aussi l'article de la contrôlée générale des lieux de privation de liberté : D. SIMONNOT, *Le vrai scandale, ce n'est pas le karting mais l'état lamentable de nos prisons*, in *Le Monde*, 24 août 2022 [Mis en ligne le 24.08.2022] [Consulté le 01.11.2024] URL : https://www.lemonde.fr/idees/article/2022/08/24/dominique-simonnot-le-vrai-scandale-ce-n-est-pas-le-karting-mais-l-etat-lamentable-de-nos-prisons_6138927_3232.html#xtor

(CEDH) condamnait la France en raison de l'indignité des conditions d'incarcération dans ses prisons. Cette condamnation prend ses sources dans une réflexion antérieure aux événements révolutionnaires que les lettres de prison de Sade et Mirabeau éclairent particulièrement.

Peu avant la Révolution française, dans ce pays qui deviendra celui des Droits de l'Homme, la montée d'un discours humaniste et philanthropique³ préparait dès lors la dénonciation des conditions d'enfermement et une réforme du Droit pénal à l'échelle européenne. Durant la période prérévolutionnaire, et spécialement depuis les années 1740 règne un esprit réformateur unanime, qui prône une plus grande «douceur des peines»⁴. Durant ce «moment Beccaria»⁵, Montesquieu (*De l'Esprit des lois*, 1748), Beccaria (*Des Délits et des peines*, 1764) ou Voltaire (*Commentaire sur le livre des Délits et des peines*, 1766; *Prix de la justice et de l'humanité*, 1778) prônent l'unification⁶, la proportionnalité et la modération des peines⁷. Les principes beccariens sont ainsi résumés: «Pour que n'importe quelle peine ne soit pas un acte de violence exercé par un seul ou par plusieurs contre un citoyen, elle doit absolument être publique, prompte, nécessaire, la moins sévère possible dans les circonstances données, proportionnée au délit et déterminée par la loi»⁸. Dans cette perspective, Voltaire clamait: «Punissez: mais utilement»⁹ et n'incarcérez pas dans une prison qui «ressemble à un charnier»¹⁰. Plusieurs écrivains ont alors jugé nécessaire de témoigner de leurs observations de terrain dans

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³ Voir C. CARLIER ET J.-G. PETIT, *Avant-propos : le moment philanthropique : John Howard (1726-1790)*, in J. HOWARD, *L'État des prisons, des hôpitaux et des maisons de force en Europe au XVIII^e siècle*, C. Carlier et J.-G. Petit (trad. et éd.), Les éd. de l'Atelier/Éditions Ouvrières, coll. Champs pénitentiaires, Paris, 1994, pp. 33-40.

⁴ C. BECCARIA, *parag. XXVII. Modération des peines*, in ID., *Des Délits et des peines*, R. Badinter (préf.), Garnier-Flammarion, Paris, 1991, pp. 123-126.

⁵ P. AUDEGEAN ET L. DELIA, *Le Moment Beccaria. Naissance du droit pénal moderne*, Oxford University Press, Liverpool, Oxford Foudation et Oxford, 2018, p. 263.

⁶ Voir notamment M. PORRET, *Voltaire et le droit de punir. Un activiste du moment Beccaria*, in *Revue d'histoire moderne et contemporaine*, 3/2016, p. 102. [en ligne] [consulté le 17.02.25] URL : <https://www.jstor.org/stable/44987164>

⁷ M. COTTRET, *La Bastille à prendre. Histoire et mythe de la forteresse royale*, P. Chaunu (préf.), Paris, P.U.F., coll. Histoires, 1986, pp. 89-92 et J.-B. JEANGENE VILMER, *Sade moraliste*, M. Lever (préf.), Droz, coll. Bibliothèque des Lumières, Genève, 2005, p. 75.

⁸ C. BECCARIA, *Des Délits et des peines*, cit., p. 179.

⁹ VOLTAIRE, *Article II « Du vol »*, in ID., *Prix de la justice et de l'humanité*, Ferney, 1778, p. 11.

¹⁰ ID., *Article XXV «Des prisons et de la saisie des prisonniers»*, in ID., *Prix de la justice*, cit., p. 108. Cf. ID., *Articles I-III « Du vol »*, in ID., *Prix de la justice*, cit., pp. 4-18 et M. PORRET, *Voltaire et le droit de punir*, cit., p. 107.

les prisons pour mieux éclairer leurs lecteurs à l'égard de cette «part d'ombre» du siècle des Lumières, d'après l'expression de Philippe Combessie¹¹.

Dès les années 1720, Daniel Defoe, écrivain, journaliste, aventurier et espion qui a fait l'expérience de la prison pour dettes, atteste des souffrances des détenus londoniens. Dans son récit de voyage au Royaume-Uni (*A Tour through the Whole Island of Great Britain, 1724-1727*)¹², il «s'étend sur la description des lieux d'enfermement de Londres, la ville d'Europe où l'on trouve le plus de prisons, "bien que nous soyons un pays de liberté"¹³, remarque-t-il: 22 prisons publiques, et, sans compter divers asiles, 119 chartres privées pour la détention provisoire des dettiers, où les geôliers se livrent à des extorsions de fonds scandaleuses. Un demi-siècle plus tard, au temps de Howard, la situation ne semble pas s'être améliorée¹⁴. En effet, dans son *État des prisons*, après avoir visité de nombreuses geôles européennes, John Howard relate les conditions d'enfermement de ses contemporains pour mieux éclairer la face sombre et méconnue des lieux de privation de liberté du XVIII^e siècle. La phrase liminaire de son introduction expose son projet: «J'ai pris véritablement conscience de la détresse des prisonniers, dont la plupart de mes contemporains n'ont qu'une idée approximative, quand je suis devenu sheriff de Bedford [en 1773]. J'ai décidé d'agir en faveur de ces malheureux»¹⁵. Plus loin, évoquant les nombreux aliénés incarcérés, il se lamente pour «ces pauvres humains»¹⁶ et déplore que «l'humanité [...] semble avoir déserté l'espace des cachots»¹⁷. Daniel Defoe et John Howard montrent l'absolue nécessité de découvrir la réalité quotidienne des modalités de la punition judiciaire de leur époque.

Par conséquent, quel éclairage les hommes des Lumières et de la Révolution naissante peuvent transmettre à un lecteur actuel sur «cette part d'ombre de la démocratie» moderne¹⁸? Nos contemporains peuvent tirer des enseignements de la lecture de correspondances carcérales de cette époque. Faire connaître des témoignages d'anciens détenus, étudier la

¹¹ P. COMBESSIE, *Sociologie de la prison*, La Découverte, Paris, 2009 [2001], p. 112.

¹² D. DEFOE, *En explorant toute l'île de Grande-Bretagne*, J. Quéval (trad.), Payot, Paris, 1974.

¹³ *Ivi*, lettre V, pp. 143-145.

¹⁴ C. CARLIER ET J.-G. PETIT, *Avant-propos: le moment philanthropique: John Howard (1726-1790)*, in J. HOWARD, *L'État des prisons*, cit., p. 24.

¹⁵ J. HOWARD, *Introduction*, in ID., *L'État des prisons*, cit., p. 69.

¹⁶ *Ivi*, p. 77.

¹⁷ *Ivi*, p. 118.

¹⁸ P. COMBESSIE, *op. cit.*, p. 112.

correspondance de captifs¹⁹, conserver et dévoiler les archives de prison²⁰, permet de mettre au jour les effets pernicioeux de la réclusion et peut engager à mieux les prévenir et accompagner plus favorablement les reclus vers la réinsertion. Ainsi, les lettres de prison du comte de Mirabeau et du marquis de Sade sont nécessaires en ce qu'elles témoignent des affres de la punition et mettent en doute leur bienfondé. Elles engagent une question fondamentale: si l'enfermement neutralise le déviant, s'il préserve pour un temps la société, peut-il faire du détenu un être meilleur lorsque les conditions d'incarcération sont inhumaines?

Pour répondre à cette question, l'expérience des douleurs carcérales et la perception critique de la justice de Mirabeau et Sade sont particulièrement pertinentes et éclairantes. Ces épistoliers ont plusieurs points communs²¹: cousins éloignés, ces aristocrates et libertins auteurs d'ouvrages licencieux sont tous deux arrêtés pour mœurs dans des conditions similaires, l'un pour dettes, rapt et adultère, l'autre pour rapt, empoisonnement et sodomie²². Afin d'étouffer l'affaire, leur famille recoure à la lettre de cachet, qui permet de faire discrètement enfermer un proche pour inconduite, d'éviter un procès public et ainsi l'opprobre familial²³. Les deux hommes ont été incarcérés au donjon de Vincennes. Mirabeau y est enfermé de juin 1777 à décembre 1780; Sade de février 1777 à février 1784. Ils ont ainsi été emprisonnés au même moment et au même endroit et ont eu affaire au même lieutenant général de police, Lenoir, en fonction de 1776

¹⁹ Voir par exemple E. GENARD, *Familles de papier : liens épistolaires sous le regard de l'administration pénitentiaire (France, années 1910-années 1930)*, in *Le Mouvement Social*, 2/2022, pp. 49-65.

²⁰ LE FIGARO AVEC AFP, *La Bibliothèque de l'Arsenal redonne vie aux archives de la prison de la Bastille*, in *Le Figaro*, 13 juillet 2021 [en ligne] [consulté le 17.02.25] URL : <https://www.lefigaro.fr/culture/la-bibliotheque-de-l-arsenal-redonne-vie-aux-archives-de-la-prison-de-la-bastille-20210713>

²¹ Voir M. VOVELLE, *Sade et Lacoste, suivi de Mirabeau et Mirabeau. Réflexion sur le déclassement nobiliaire dans la Provence du XVIII^e siècle*, in *Provence historique*, Aix-en-Provence, 68/1967, pp. 160-171. [en ligne] [consulté le 17.02.25] URL : http://provence-historique.mmsh.univ-aix.fr/Pdf/PH-1967-17-068_07.pdf

²² Voir SADE, *Lettre écrite entre le 7 et le 28 sept. 1778*, in ID., *Lettres à sa femme*, M. BUFFAT (éd.), Actes Sud, coll. Les épistolaires, Arles, 1997, p. 31, note 1. À partir de cette note, l'ouvrage sera indiqué comme suit: *Buffat*.

²³ Voir A. FARGE ET M. FOUCAULT, *Le Désordre des familles, Lettres de cachets des Archives de la Bastille au XVIII^e siècle* [1982], Paris, Gallimard, coll. Folio histoire, 2014, p. 485 et C. QUETEL, *Les Lettres de cachet. Une légende noire*, Perrin, Paris, 2011, p. 372.

à 1785. Les archives elles-mêmes en témoignent: le 13 décembre 1780, le comte signe son procès-verbal de sortie au verso de l'écrou du marquis²⁴.

Leurs souffrances légitiment leurs critiques du système²⁵, au moment même où s'élabore une réflexion visant à réformer le Droit pénal. Imprégnés de culture réformiste, Mirabeau et Sade ont lu Beccaria: le premier le cite dans son traité consacré aux lettres de cachet²⁶; le second, s'il ne cite jamais explicitement le traité dans sa correspondance carcérale, possède cet ouvrage à Vincennes²⁷.

Dans quelle mesure ces deux écrivains, réputés grands libertins et débauchés, peuvent juger leur propre punition et éclairer nos contemporains? Estiment-ils leur condamnation juste et leurs juges respectables? Parviennent-ils à l'amendement?

²⁴ Voir G. LELY, *Vie du marquis de Sade*, Y. Bonnefoy (postface), Tête de feuilles, Paris, 1973, t. II, p. 78.

²⁵ Sur les conditions d'incarcération, voir S. ROTHE, *L'écriture de la vulnérabilité en institution carcérale : l'exemple de Mirabeau*, in N. COMBALBERT ET S. ROTHE, *Incarcération, vulnérabilités et intervention sociale*, L'Harmattan, coll. Logiques sociales, Paris, 2019, pp. 93-116.

²⁶ Voir MIRABEAU, *Des Lettres de cachet et des prisons d'État*, in ID., *Œuvres de Mirabeau* [Hambourg, 1782], M. MERILHOU (éd.), Leconte et Pougin, Paris, 1835, t. VII, p. 341. [Disponible sur Gallica.bnf.fr] À partir de cette note, l'ouvrage sera indiqué comme suit : *Des Lettres de cachet*.

²⁷ Voir *Traité des délits et des peines, trad. de l'italien, à Amsterdam, 1766, in-12*, in *Liste des livres que Sade a fait faire. Catalogue de livres choisis*, in *Correspondance du marquis de Sade et de ses proches enrichies de documents, notes et commentaires*, A.M. LABORDE (éd.), Slatkine, Genève, 1993-2007, vol. XVIII, p. 123. Chez Sade, la compréhension de la justice pénale serait antérieure à l'expérience de la prison. Le traité «figurait dans ses bibliothèques successives»: «il possédait, dès 1769 à La Coste, la troisième édition de 1766, première traduction française (par l'abbé Morellet) publiée à Amsterdam et, en 1778, la sixième de 1773, augmentée du commentaire de Voltaire de 1766 et publiée à Paris (la première traduction française autorisée)» (J.-B. JEANGENE VILMER, *op. cit.*, pp. 340-341). Voir l'inventaire d'A. MOTHU, *La bibliothèque du marquis de Sade à La Coste*, in *Papiers de famille. Tome second: Le marquis de Sade et les siens (1761-1815)*, M. LEVER (éd.), Fayard, Paris, 1995, p. 651.

Il s'agira de montrer dans quelle mesure la correspondance carcérale de Mirabeau et Sade²⁸, dont l'immoralisme est parfois fondé en axiome²⁹, transmet paradoxalement une éthique pénale unanime en cette fin de siècle: si le droit naturel établit qu'un homme ne doit sous aucun prétexte faire souffrir un autre homme³⁰, ils soutiennent qu'en aucun cas l'on ne peut défendre les excessives cruautés de l'incarcération d'un détenu, même coupable³¹. Réclamant justice pour eux-mêmes, les deux épistoliers imprégnés de l'esprit réformiste se montrent utiles à une cause plus générale en ce qu'ils illustrent, par le témoignage, les nécessités d'une amélioration du système pénal. La légitimité de leurs revendications se fonde alors sur leur expérience intime de souffrances jugées iniques³².

Tout d'abord, forts d'une expérience intime de la torture carcérale, les épistoliers dépeignent une violence de la punition qu'ils jugent injustifiée: ils dénoncent plusieurs formes d'abus judiciaires et font des prisonniers des victimes (oubliant toutefois de considérer les conséquences de leurs actes sur leurs propres victimes). Ensuite, ils montrent dans quelle mesure la punition est cruelle et disproportionnée, s'appuyant ainsi sur les principes beccariens. Puis ils dépeignent leur condamnation comme une vendetta familiale: leur enfermement est une vengeance privée, non une condamnation fondée par la loi naturelle. Enfin, ils soulignent l'absolue inefficacité du système judiciaire en menaçant leurs «bourreaux» de se faire justice eux-mêmes, justifiant ainsi la violence individuelle: dans un

²⁸ Officiellement, cette correspondance s'adresse le plus souvent à Sophie de Monnier, amante de Mirabeau, et Renée Pélagie, épouse de Sade. Toutefois, les deux captifs s'adressent généralement non seulement au destinataire affiché de la lettre mais encore et surtout, implicitement ou non, au censeur et aux autorités. Sur les conditions de vie de ces deux femmes, voir J.-P. DESPRAT, *Mirabeau. L'excès et le retrait*, Perrin, Paris, 2008, pp. 160-161 et plus généralement R. DE LA CROIX DUC DE CASTRIES, *Mirabeau ou l'échec du destin*, Librairie Arthème Fayard, Paris, 1960, p. 594 et G. BADOU, *Renée Pélagie marquise de Sade*, Payot & Rivages, coll. Petite bibliothèque Payot, Paris, 2008 [2004], p. 203.

²⁹ Voir par exemple J. DOMENECH, *L'immoralisme sadien. Aux antipodes de la morale des Lumières*, in ID., *L'Éthique des Lumières. Les Fondements de la morale dans la philosophie française du XVIII^e siècle*, Librairie philosophique J. Vrin, Paris, 1989, p. 214.

³⁰ Sur le plan moral, Sade, comme bien d'autres contemporains, laïcise son propos (voir J. DOMENECH, *L'Éthique des Lumières*, cit., pp. 11-12): il s'écarte «des catéchismes» pour préférer un «traité de morale» (SADE, *Lettre du 20 sept. 1783*, in Buffat, p. 404).

³¹ M. COTTRET, *op. cit.*, p. 89 et J. DOMENECH, *L'Éthique des Lumières*, cit.

³² SADE, *Idée sur les romans*, in ID., *Crimes de l'amour*, M. DELON (éd.), Gallimard, coll. Folio, Paris, 1987, pp. 43-44 et SADE, *Lettre du 30 avril 1781*, in Buffat, p. 258 et *Lettre du 2 déc. 1779*, in Buffat, pp. 120-121. Nous proposons donc une «lecture politique» de Sade, à la manière de ce que propose F. OST, *Sade et la loi*, Odile Jacob, Paris, 2005, pp. 81-95.

retournement rhétorique somme toute traditionnel et selon leur logique, punir ses juges devient légitime.

2. *Une violence abusive à l'égard d'un citoyen: «Je suis un libertin, mais je ne suis pas un criminel ni un meurtrier»*

À Vincennes, Mirabeau et Sade s'insurgent contre «une injuste prison»³³, «si tellement contraire[s] à toutes les lois du bon sens et de l'équité»³⁴. Dans une perspective beccarienne, ils dénoncent en premier lieu l'arbitraire des motifs d'incarcération, ensuite l'inadéquation entre l'erreur commise et la peine infligée, enfin l'absence de procès.

En avocats de leur propre cause, leur premier argument consiste à mettre en question de façon systématique la légitimité des motifs de leur enfermement par lettre de cachet.

Considéré comme un jeune débauché notamment parce qu'il fait des dettes, mène une vie libertine et se bat en duel, Mirabeau connaît à plusieurs reprises l'incarcération par lettre de cachet à la demande de son père. Enfermé au fort de Joux, il fait la rencontre de Sophie de Monnier, qui deviendra son amante et la mère d'une fille illégitime. Mariés l'un et l'autre, ils décident de fuir à Amsterdam en 1775 et seront retrouvés et arrêtés en 1777.

Énumérant les propos de ses calomniateurs, qui le disent «scélérat, [...] intéressé, sans honneur, sans discrétion, sans générosité», Mirabeau prend, dit-il, «un vrai plaisir à coudre toutes ces absurdités, parce qu'il [lui] semble [qu'il les entend] parler et [qu'il veut] laisser un modèle de leurs beaux propos»³⁵. Dans une prosopopée, il reproduit le tissu de mensonges qui a permis sa réclusion et tente de modifier les termes de l'accusation.

Tout d'abord, il est enfermé pour le «rapt» de Sophie de Monnier. Selon lui, il s'agit plutôt d'un sauvetage³⁶: il est périlleux pour une jeune femme d'une vingtaine d'année d'être mariée à un septuagénaire. Elle était d'ailleurs éprise du libertin et donc parfaitement consentante. À ce sujet,

³³ MIRABEAU, *Lettre du 1^{er} août 1777 à Lenoir*, in ID., *Lettres écrites du donjon de Vincennes (1777-1778)*, B. DIDIER (éd.), Actes sud, Arles, 1998, p. 33. À partir de cette note, l'ouvrage sera indiqué comme suit: *Didier*.

³⁴ SADE, *Lettre écrite entre le 7 et le 28 sept. 1778*, in *Buffat*, p. 32.

³⁵ MIRABEAU, *Lettre du 14 sept. 1777 à Sophie*, in *Didier*, p. 134.

³⁶ MIRABEAU, *Lettres de juillet 1777 et du 1^{er} août 1777 à Lenoir, et du 27 août 1777 à Sophie*, in *Didier*, pp. 29, 35, 98.

Voltaire rappelle au demeurant que «la loi anglaise n'ordonne la mort [pour rapt] qu'en cas que la fille se plaigne d'avoir été ravie»³⁷.

Ensuite, admettant avoir contracté des dettes, il indique toutefois combien elles sont surévaluées par son père: «il prétend que je dois plus de cent mille écus, ce qui n'est exagéré que des trois quarts»³⁸. L'ironie du fils, qui perce dans la négation restrictive, est une façon de ridiculiser cette accusation qui n'a, selon lui, pas «l'ombre du bon sens»³⁹. D'une façon générale, il reprend systématiquement ce qu'il croit être les causes de son enfermement pour mieux les dénoncer; son père a abusé du pouvoir que lui confère la lettre de cachet. Ce qu'il qualifie d'«erreur de jeunesse»⁴⁰ l'a condamné à plusieurs années de souffrances carcérales à la demande de son propre père.

En juin 1772, Sade, lui, est condamné par le parlement d'Aix pour l'«affaire de Marseille»: il aurait maltraité, sodomisé et empoisonné des prostituées. Le marquis s'insurge qu'on lui fasse «un procès de rapt et de viol!»⁴¹ et affirme n'être «coupable de rien de grave»⁴² sauf, dit-il, «d'aimer un peu trop les femmes»⁴³. Dans sa grande lettre du 20 février 1781, le syntagme «Je suis un libertin, mais...» en emploi anaphorique ponctue chacune de ses phrases pour mieux rétablir la vérité: «Je suis un libertin, mais je ne suis pas *un criminel* ni *un meurtrier*»⁴⁴. Cette requalification écarte le caractère criminel de ses pratiques sexuelles pour les transformer en une forme mineure et ordinaire d'immoralité: «M. de Sade, rappelle-t-il, a fait tout ce que l'univers fait»⁴⁵.

De surcroît, il déclare que l'accusation d'empoisonnement n'est qu'une «calomnie»⁴⁶: la poudre de cantharide placée dans des dragées, qu'il a lui-même mangées, était en effet utilisée pour ses vertus aphrodisiaques; un mauvais dosage a fort probablement provoqué des vomissements⁴⁷. En 1778, l'avocat de Sade, maître Gabriel, présente d'ailleurs une requête au

³⁷ VOLTAIRE, *Prix de la justice*, cit., p. 76. L'orthographe est modernisée.

³⁸ MIRABEAU, *Lettre du 1^{er} août 1777 à Lenoir*, in *Didier*, p. 37.

³⁹ MIRABEAU, *Lettre du 9 août 1777 à Sophie*, in *Didier*, p. 47.

⁴⁰ MIRABEAU, *Lettre du 29 sept. 1777 à Lenoir*, in *Didier*, p. 143.

⁴¹ SADE, *Lettre du 20 février 1781*, in *Buffat*, p. 217.

⁴² SADE, *Lettre écrite entre le 7 et le 28 sept. 1778*, in *Buffat*, p. 35.

⁴³ SADE, *Lettre du 20 février 1781*, in *Buffat*, p. 216.

⁴⁴ *Ivi*, p. 229. L'auteur souligne.

⁴⁵ *Ivi*, p. 222.

⁴⁶ SADE, *Lettre du 26 oct. 1781*, in *Buffat*, p. 295.

⁴⁷ A. BOUËR, *Lacoste, laboratoire du sadisme* » et M. PARRAT, «Sade, l'affaire de Marseille et le parlement d'Aix», in *Le Marquis de Sade*, A. Colin, Paris, 1968, p. 20 et p. 52.

Parlement qui relaie les arguments épistolaires de l'accusé. À la lecture de ces éléments, le parlement d'Aix casse son arrêt de 1772 et le transforme en une simple admonestation⁴⁸, prouvant ainsi que les chefs d'accusations initiaux étaient abusifs. Pourtant, Sade, qui se croyait libre, est «cependant reconduit [à Vincennes] en vertu de la lettre de cachet qui avait permis son arrestation»⁴⁹. Même s'il a déjà démontré l'injustice qui lui est faite, le captif est donc contraint de renouveler, en vain, l'expression de sa plaidoirie épistolaire. Dans les premières lettres envoyées de Vincennes en septembre 1778, il s'insurge par conséquent contre un système «si tellement absurde, si tellement contraire[s] à toutes les lois du bon sens et de l'équité», qu'il semble être «l'ouvrage d'une main ennemie qui ne cherche qu'à [le] perdre»⁵⁰. D'après son expérience, prouver son innocence, tout du moins la faiblesse des arguments de l'accusation, ne suffit pas à le libérer.

Loin de le soumettre, l'institution nourrit ainsi les déviances de Sade, renforce son sens de la rébellion et voit ses propres armes se retourner contre elle-même: dans la logique de l'épistolier, vouloir le faire taire, c'est bien lui donner raison. Une citation attribuée par Sade à Dorat et épigraphe de ses «réflexions» sur sa pièce *Le Prévaricateur* résume cette idée: «En général, les hommes sont si méchants et ridicules, que leur intérêt le plus pressant est de s'élever contre le philosophe malin qui laisse entrevoir l'intention de le démasquer»⁵¹. Appliquée à sa situation carcérale, le captif devient cet être «malin» par opposition aux hommes de justice vicieux et tyranniques. Il refuse cependant d'être réduit au silence: «J'aimerais mieux qu'on me coupât les deux poings que de ne pas rendre à la nation le service de l'éclairer sur de tels abus...»⁵². Il dévoile donc en moraliste les «mœurs de l'homme public» dont les exactions mettent en péril l'État et refuse de sacrifier ses propres «goûts» et «principes»⁵³, en particulier être «athée jusqu'au fanatisme»⁵⁴ ou aimer «fesser quelques culs»⁵⁵.

Finalement, ces échanges épistolaires, en particulier la vaine répétition de leur défense, montrent le caractère selon eux illégitime des motifs d'incarcération et d'élargissement par lettre de cachet. Leurs auteurs

⁴⁸ *Ivi.*, pp. 54-56.

⁴⁹ M. BUFFAT, note 1, in *Buffat*, p. 31.

⁵⁰ SADE, *Lettre écrite entre le 7 et le 28 sept. 1778*, in *Buffat*, p. 32.

⁵¹ SADE, *Le Prévaricateur*, in ID., *Ceuvres complètes du marquis de Sade*, A. LE BRUN ET J.-J. PAUVERT (éd.), Pauvert, Paris, 1991, t. XV, p. 123.

⁵² SADE, *Lettre du 2 déc. 1779*, in *Buffat*, p. 120.

⁵³ SADE, *Lettre de début nov. 1783*, in *Buffat*, p. 413.

⁵⁴ SADE, *Lettre de fin nov. 1784*, in *Buffat*, p. 427.

⁵⁵ SADE, *Lettre d'avant le 18 juin 1783*, in *Buffat*, p. 382.

rejoignent ainsi Malesherbes, qui s'inquiétait «de la légitimité des raisons qui peuvent pousser les familles à demander l'internement de l'un des leurs»⁵⁶ et «avait [par conséquent] créé une commission chargée d'examiner, et au besoin de rejeter, les demandes de lettres de cachet»⁵⁷. L'expérience du comte et du marquis met de fait en lumière les excès d'une famille jugée tyrannique à qui la justice a donné les pleins pouvoirs.

3. *Une punition cruelle et immodérée: «J'ai des torts, je le sais, je l'avoue; mais ma punition ne leur est pas proportionnée»*

Les épistoliers soulèvent encore l'une des aberrations du système pénal de ce siècle: la notion d'équivalence entre un délit et la peine qui le sanctionne n'obéit pas à des codifications minutieuses⁵⁸. La durée de la sanction, qui n'est pas communiquée, peut paraître arbitraire.

Rappelons pour commencer les conditions d'incarcération des deux aristocrates à Vincennes: ils se trouvent l'un et l'autre dans une cellule étroite, sans chauffage et sans éclairage (la fenêtre, en hauteur et grillagée, ne laisse que peu percer la lumière du soleil), dépouillée de tout confort, avec pour seule compagnie des porte-clefs empressés et la vermine ou les rats qui pullulent. Ils sont généralement privés de toute communication avec l'extérieur, à l'exception de lettres qui peuvent être censurées et ou simplement interdites. Cette torture paraît sans fin car, pour les correctionnaires enfermés par lettre de cachet, aucune date de sortie n'est fixée: leur libération dépend du bon vouloir de la famille. Leur santé mentale et physique est progressivement délabrée: jeunes encore, ils souffrent de l'inactivité et développent les maladies inhérentes à leur enfermement, spécialement l'atrophie musculaire et des maux oculaires, mais aussi la tentation suicidaire.

Inspiré par le vocabulaire beccarien, Mirabeau ne se déclare pas innocent mais s'insurge contre la cruauté de cette punition: «J'ai des torts, je le sais, je l'avoue; mais ma punition ne leur est pas proportionnée»⁵⁹. De même, Sade souligne combien sa punition est «d'une longueur infiniment trop cruelle»⁶⁰. Ces deux écrivains captifs soulèvent alors une contradiction

⁵⁶ A. FARGE ET M. FOUCAULT, *op. cit.*, pp. 416-420 et p. 431.

⁵⁷ B. DIDIER, «Préface», in *Didier*, p. 17.

⁵⁸ J.-J. PAUVERT, *Sade vivant, 1777-1793*, R. Laffont, Paris, 1989, t. II, p. 107, citant Voltaire.

⁵⁹ MIRABEAU, *Lettre du 26 déc. 1777 à Lenoir*, in *Didier*, p. 200.

⁶⁰ SADE, *Lettre à sa femme d'oct. 1781*, in *Buffat*, p. 289.

majeure, celle de subir une condamnation impitoyable au pays des Lumières: «Mais je ne puis croire que le délit et la peine soient si inégalement proportionnés dans un gouvernement aussi doux que le nôtre», déclare le comte⁶¹. Cette réflexion n'est pas sans rappeler la condamnation de la France, en 2020, par la CEDH: comment ce pays démocratique des Droits de l'homme peut-il assumer la surpopulation carcérale et ses conséquences sur les êtres humains incarcérés? Ayant démontré la fragilité des accusations, Mirabeau et Sade dénoncent l'inadéquation entre les erreurs commises et la punition infligée⁶². Ils demeurent ainsi dans le sillage de Beccaria, qui réclame la «proportion entre les délits et les peines»⁶³. Plus particulièrement, le philosophe milanais considère la prison comme relevant d'une véritable peine, dont on doit mesurer les effets⁶⁴. De la même manière, à l'heure actuelle, si les motifs d'incarcération sont légitimes, faut-il pour autant enfermer dans des conditions indignes pour mieux punir ?

Dans cet esprit, Mirabeau et Sade exposent et dénoncent la cruauté des sévices subis: «l'on pourrait me détenir, sans me détruire»⁶⁵, déclare le comte. En effet, les conditions matérielles de détention, et particulièrement le linge trop rare, la mauvaise qualité de la nourriture, la vermine perpétuellement présente dans les cachots, de même que la privation de promenade et d'air nuisent cruellement à la santé du prisonnier. À l'instar d'autres écrivains de l'expérience carcérale, ils représentent finalement le donjon de Vincennes comme un séjour des morts. Mirabeau, qui dit porter pour tout habit un «linceul»⁶⁶, se décrit à plusieurs reprises comme «enseveli»⁶⁷ dans un «sépulcre»⁶⁸. Sade compare la prison à un «tombeau»⁶⁹,

⁶¹ MIRABEAU, *Lettre du 29 sept. 1777 à Lenoir*, in *Didier*, p. 153.

⁶² Voir M. BUFFAT, *Le vice au pouvoir. Critiques de la prison dans les lettres de Sade*, in J.-C. ABRAMOVICI ET F. LOTTERIE, *Sade en jeu, Fabula/Les colloques*, § 6 [mis en ligne le 14.11.18] [consulté le 17.02.25] URL : <http://www.fabula.org/colloques/document5844.php>

⁶³ C. BECCARIA, *Des Délits et des peines*, cit., p. 73.

⁶⁴ *Ivi*, p. 108.

⁶⁵ MIRABEAU, *Lettre du 24 janvier 1778 à Lenoir*, in *Didier*, pp. 235-236.

⁶⁶ MIRABEAU, *Lettre 45, s. d.*, in ID., « *Les amours qui finissent ne sont pas les nôtres* ». *Lettres à Sophie de monnier. 1777-1780*, J.-P. DESPRAT (éd.), Taillandier, Paris, 2010, p. 229. À partir de cette note, l'ouvrage sera indiqué comme suit: *Desprat*.

⁶⁷ MIRABEAU, *Lettres du 1^{er} août 1777 à Lenoir, du 12 sept. 1777 à Sophie et du 6 oct. 1777 à Sophie*, in *Didier*, p. 37, p. 124 et p. 161.

⁶⁸ *Des Lettres de cachet*, p. 27 et p. 3. Cf. *Lettres du 12 sept. 1777 à Sophie et du 9 janv. 1778 à Lenoir*, in *Didier*, p. 121 et p. 226 et *Lettre 45, s. d.*, in *Desprat*, p. 229.

⁶⁹ SADE, *Lettre du 20 février 1781*, in *Buffat*, p. 211. Cf. *Lettre du 17 août 1780*, in *Buffat*, p. 173.

«où l'on [l'a] englouti tout vivant»⁷⁰ et se dépeint comme un cadavre ambulante: «J'étais comme un véritable déterré, au point de me faire peur moi-même»⁷¹; à quarante ans, ajoute-t-il sur un ton sarcastique, il prend «une petite teinte de cercueil»⁷². Cet imaginaire sépulcral, reprenant les *topoi* du roman noir, vise la mise en lumière du corps souffrant du détenu mais dénonce encore symboliquement la «mort civile»⁷³ à laquelle il est condamné. La prison confine de cette manière à la peine de mort. Les épistoliers réclament en conséquence une punition proportionnée à leurs fautes et font de cette revendication l'un des *leitmotifs* de leur correspondance.

Effectivement adultère, Mirabeau réclame néanmoins justice dans une société qu'il veut croire juste: «Il arrive très fréquemment des choses plus étonnantes et plus graves que la fuite de la femme d'un époux septuagénaire, et [...] ces choses n'attirent pas aux coupables une punition aussi cruelle»⁷⁴. Par cette question rhétorique, le détenu apostrophe, comme fréquemment, le destinataire de sa lettre et l'enjoint à faire preuve d'esprit critique. En 1778, Voltaire lui-même dénonce ce chef d'accusation: «la société, expose-t-il, a fait une convention secrète de ne point poursuivre les délits dont elle s'est accoutumée à rire»⁷⁵. D'ailleurs, le petit nombre de détenus incarcérés à la Bastille pour mœurs semble confirmer la tolérance des autorités sur la question de l'adultère; d'après Claude Quétel, «les affaires de mœurs punies d'un embaстиllement sont [...] relativement peu nombreuses, avec à peine une centaine de cas – et encore conviendra-t-il d'en distinguer une soixantaine concernant spécialement la sodomie»⁷⁶. Selon la même logique, Sade s'insurge: «Je ne suis [dit-il] coupable que de simple et pur libertinage, et tel qu'il se pratique par tous les hommes»⁷⁷. Effectivement, à Marseille, au XVIII^e siècle, «le développement de la prostitution et de formes insolites de la débauche sont fréquemment suggérés dans les registres de la Compagnie du Saint Sacrement»⁷⁸. La

⁷⁰ SADE, *Lettre à sa femme du 6 mars 1777*, citée par G. LELY, *Vie du marquis de Sade*, cit., t. I, p. 601.

⁷¹ SADE, *Lettre du 27 juillet 1780*, in *Buffat*, p. 167.

⁷² *Ivi*, p. 171.

⁷³ Voir M. COTTRET, *op. cit.*, pp. 132-133.

⁷⁴ MIRABEAU, *Lettre de juil. 1777 à Lenoir*, in *Didier*, pp. 24-25.

⁷⁵ VOLTAIRE, *Prix de la justice*, cit., pp. 64-65.

⁷⁶ C. QUÉTEL, *La Bastille. Histoire vraie d'une prison légendaire*, R. Laffont, Paris, 1989, pp. 218-219.

⁷⁷ SADE, *Lettre du 20 février 1781*, in *Buffat*, p. 229. L'auteur souligne.

⁷⁸ A.J. BOURDE, *Sade, Aix et Marseille: un autre Sade*, in *Le Marquis de Sade*, cit., pp. 59-60.

logique sociale et le caractère ordinaire d'une certaine forme de débauche supposent en conséquence que la peine est abusive: «Non, des putains ne valent pas douze ans de supplices»⁷⁹, déclare Sade, dans un mépris évident et très partagé à cette époque pour les prostituées.

Notons alors les failles de la réflexion de Sade, qui vise peut-être une réforme du Droit pénal mais s'inspire surtout de ses lectures pour défendre son propre dossier. Le marquis n'évoque en aucun cas ni les inégalités sociales qui perdurent en prison (les aristocrates connaissent des conditions d'incarcération privilégiées) ni les conséquences de ses actes sur ses victimes, jeunes et précaires. On est bien loin des réflexions récentes issues de la justice restaurative, «qui s'attache à reconnaître la souffrance de la victime»⁸⁰. L'aristocrate, auteur des *Cent Vingt Journées de Sodome*, méprise spécialement les prostituées qu'il est soupçonné (à tort) d'avoir empoisonnées: «rien n'est moins respectable qu'une putain et [...] la manière dont on s'en sert doit être aussi égale que celle dont on pousse sa selle»⁸¹. Il s'estime plus précieux que ces objets sexuels sans valeur. Le vocabulaire familier employé à l'égard de ces femmes ainsi que leur réification manifestent d'une part son refus du déclassement social opéré par la prison, d'autre part un mépris somme toute partagé pour la condition de femmes précaires à cette époque. Au XVIII^e siècle, il ne s'agit pas encore de punir pour chercher à réduire les injustices sociales ou à réparer la victime féminine; la réflexion de Sade et Mirabeau s'appuie avant tout sur la nécessité de préserver le condamné.

Car selon le marquis, la trop grande sévérité de la punition accroît les failles du correctionnaire. L'«abstinence atroce sur le péché de la chair» à laquelle le marquis est cruellement soumis en détention renforce selon lui les pensées, les écrits et les pratiques sexuelles; il aurait fallu, selon lui, «tolérer un mal pour détruire un vice»⁸². Dans sa correspondance, Sade propose des solutions pour pallier les effets délétères de la réclusion, c'est-à-dire davantage de douceur ou de profusion. «Pourquoi employer la rigueur avec quelqu'un que l'on sait qu'elle n'a jamais fait que révolter?»⁸³, demande-t-il. Selon lui, il faudrait l'enfermer dans un sérail afin de le

⁷⁹ SADE, *Lettre de début janvier 1783*, in Buffat, p. 348. Cf. *Lettre au lieutenant général de police de sept. 1785*, in *Correspondance du marquis de Sade et de ses proches*, cit., vol. XIX, p. 175; *Lettre du 26 mars 1783*, in Buffat, pp. 362-363; *Lettre du 15 sept. 1783*, in Buffat, pp. 397-398.

⁸⁰ Pour une réflexion contemporaine sur le sujet et sur le malaise créé par la peine, voir N. BERGER, *Pourquoi punir?*, in *Projet*, 4/2018, pp. 11-17.

⁸¹ SADE, *Lettre de 1781*, in Buffat, p. 309.

⁸² SADE, *Lettre de juillet 1783*, in Buffat, p. 391.

⁸³ SADE, *Lettre du 20 sept. 1780*, in Buffat, p. 178.

rassasier par le foisonnement de l'objet du désir⁸⁴. À l'inverse, les restrictions amplifient la soif de fauter: «vous avez échauffé ma tête, vous m'avez fait former des fantômes qu'il faudra que je réalise. Ça commençait à se passer, et cela sera à recommencer de plus belle. Quand on fait trop bouillir le pot, vous savez bien qu'il faut qu'il verse»⁸⁵.

Selon leur logique, ces deux libertins ne sont donc pas tout à fait immoraux. Ils avouent leur penchant pour les femmes, toutefois, la faute leur semble mineure au regard des tortures carcérales et mérite d'être réévaluée. C'est pourquoi ils exposent la nécessité d'un procès. Beccaria (et Voltaire dans son sillage) déclare qu'«une fois que les preuves ont été reconnues valables et la certitude du délit établie, il faut accorder à l'accusé le temps et les moyens nécessaires pour se justifier»⁸⁶. Le système des lettres de cachet, parce qu'il se développe dans un secret absolu, s'oppose en tout point à ce principe. L'absence de procès fait du détenu un «objet que l'on peut livrer à la machine de l'établissement...»⁸⁷, selon l'expression de Goffman.

4. *La lettre, espace d'un procès confisqué: la dénonciation d'une vendetta familiale illégitime*

Le courrier des deux libertins devient alors tribunal: ils condamnent ce régime qui les torture et les soumet à la loi du plus fort. Sade s'étonne en effet «qu'il y ait dans le monde un gouvernement qui tolère de pareilles infamies, un gouvernement qui, sans examen, sans interrogation, sans éclaircissement, et seulement parce que ça engraisse les roues de la machine, sacrifie»⁸⁸ un innocent. Par conséquent, il réclame, mais en vain, la possibilité d'être entendu: «Si on a de l'humanité, on éclaircira et on ne me condamnera pas sans m'entendre»⁸⁹.

De même, Mirabeau conteste l'intérêt du secret absolu, maintenu en faveur d'un supposé intérêt familial: «Quant aux prisonniers de famille, de

⁸⁴ J.-L. CORNILLE, *Le Château de la Poste*, in *La Lettre française. De Crébillon fils à Rousseau, Laclos, Sade, Vrin/Peeters*, coll. « Accents », Paris, 2001, p. 118.

⁸⁵ SADE, *Lettre de juillet 1783*, in *Buffat*, p. 391.

⁸⁶ C. BECCARIA, *Des Délits et des peines*, cit., p. 139.

⁸⁷ E. GOFFMAN, *Asiles. Études sur la condition sociale des malades mentaux*, Minuit, coll. Le Sens commun, Paris, 1968, p. 59.

⁸⁸ SADE, *Lettre du 4 mars 1781*, in *Buffat*, pp. 237-238.

⁸⁹ SADE, *Lettre écrite entre le 7 et le 28 sept. 1778*, in *Buffat*, p. 35. Pour justifier la nécessité d'un procès, il fait référence à l'affaire Calas (ID., *Lettre du 20 février 1781*, in *Buffat*, p. 228).

bonne foi, où est l'importance d'un secret si profond, qu'il faille tout leur refuser et presque les étouffer dans leurs cachots, de peur que leur existence ne soit connue?»⁹⁰. Rien ne semble justifier selon lui la mutilation subie au nom de l'honneur des familles, car cette question est éminemment relative: «presque toujours, d'après Beccaria, [dans les codes et les annales des nations] les noms de vice et de vertu, de *bon citoyen* ou de criminel prennent un autre sens au cours des siècles»⁹¹. La seule justification de l'opprobre familial ne doit donc pas motiver une incarcération.

Par conséquent, l'écriture épistolaire pallie cette absence de procès. La correspondance constitue la voix du condamné et l'espace de sa défense. Les épistoliers captifs marquent eux-mêmes leurs juges du fer rouge en les comparant à la plus cruelle et la plus arbitraire des institutions: l'Inquisition. La force de ces détenus est d'employer une attaque des plus répandues. En effet, «l'horizon répulsif des terres d'Inquisition» compte parmi les «lieux communs qui mobilisent leur terrible potentiel de craintes»⁹², comme en témoignent ces propos de Voltaire: «Plonger un homme dans un cachot, l'y laisser seul en proie à l'effroi et à son désespoir, l'interroger seul quand sa mémoire doit être égarée par les angoisses de la crainte et du trouble entier de la machine [...] c'est [...] la méthode de l'inquisition. [...] En France le code criminel paraît dirigé pour la perte des citoyens; en Angleterre pour leur sauvegarde [car on y accorde deux avocats]»⁹³.

Les correspondances carcérales étudiées ne font effectivement pas exception: selon Mirabeau, «cette terrible inquisition civile, exercée par les ordres arbitraires»⁹⁴ s'inspire des stratégies inquisitoriales de domination. Sade se compare à un torturé de l'Inquisition⁹⁵ et fait référence à la «poire d'angoisse»⁹⁶. Il désigne maintes fois Rougemont, gouverneur du château de Vincennes, comme «un familier du Saint-Office»⁹⁷ et un «révérend père

⁹⁰ *Des Lettres de cachet*, p. 335.

⁹¹ C. BECCARIA, *Des Délits et des peines*, cit., p. 80 et pp. 74-75.

⁹² M. COTTRET, *op. cit.*, p. 125. Voir également M. PORRET, *Voltaire et le droit de punir*, cit., p. 100.

⁹³ VOLTAIRE, *Article XXIII « Doit-on permettre un conseil, un avocat à l'accusé ? »*, in ID., *Prix de la justice*, cit., pp. 101-102.

⁹⁴ MIRABEAU, *Lettre du 24 sept. 1779*, in *Desprat*, p. 297.

⁹⁵ SADE, *Lettre du 27 juillet 1780*, in *Buffat*, p. 167.

⁹⁶ SADE, *Lettre du 16 mai 1779*, in *Buffat*, p. 101.

⁹⁷ SADE, *Lettre du 2 déc. 1779*, in *Buffat*, p. 123.

inquisiteur»⁹⁸. Sur le modèle de Voltaire⁹⁹ ou Morellet¹⁰⁰, les épistoliers confrontent les usages de l'institution pénitentiaire à la politique de la terreur pratiquée par l'Inquisition: «Sans doute [Rougemont] impassible [...] a lu l'histoire de l'Inquisition; sans doute il l'étudie, il la médite, et son administration est réglée sur un tel modèle»¹⁰¹, expose Mirabeau, qui songe probablement à l'*Histoire de l'Inquisition française* (1715) de Constantin de Renneville.

Dans sa lettre du 2 décembre 1779, Sade réclame également à sa femme le «traité des inquisiteurs» et indique qu'il se trouve probablement chez Rougemont¹⁰². Le marquis songe vraisemblablement au *Directorium inquisitorum* écrit entre 1375 et 1380 par Nicolas Eymerich, grand inquisiteur du royaume d'Aragon, qui détaille les stratégies inquisitoriales de torture physique et psychologique pour mieux maîtriser les hérétiques. Le succès de la traduction de l'abbé André Morellet, publiée en 1762 et intitulée *Manuel des Inquisiteurs*, révèle le vent de contestation qui court à l'égard des pratiques judiciaires de l'Ancien régime. Dans le même esprit, Sade souligne la pertinence du rapprochement entre les techniques d'Inquisition et le système judiciaire de son temps: «les prisons d'état ont pour maxime un secret inviolable mais le secret est un abus réel et manifeste à l'ombre duquel se commettent mille tyrannies et mille injustices et l'on pourrait dire d'elles, en ce sens-là, ce qui a toujours été dit de l'Inquisition»¹⁰³. Cette comparaison souligne la nécessité d'une réforme.

Inspirés par une association devenue fréquente entre les pratiques inquisitoriales et la justice du XVIII^e siècle, les épistoliers révèlent donc une menace qui pèse sur l'ensemble de la population française: au siècle des Lumières, tout citoyen peut encore subir cette mécanique de l'écrasement institutionnel, et pour des motifs variables¹⁰⁴. L'absence de procès soumet selon eux le prisonnier martyr à la loi «du plus fort»¹⁰⁵, celle d'une autorité

⁹⁸ *Ivi*, p. 121.

⁹⁹ VOLTAIRE, *Inquisition*, in *Dictionnaire philosophique* [1764], Garnier-Flammarion, Paris, 1964, pp. 237-240.

¹⁰⁰ A. MORELLET, *Abrégé du manuel des inquisiteurs* [1762], Jérôme Million, Grenoble, 2000, p. 216.

¹⁰¹ *Des Lettres de cachet*, p. 347.

¹⁰² SADE, *Lettre du donjon de Vincennes du 2 déc. 1779*, in *50 lettres du marquis de Sade à sa femme*, C. GUILBERT ET P.-E. LEROY (éd.), établies et annotées par P. Graille et J.-C. Abramovici, Flammarion, Paris, 2009, p. 59.

¹⁰³ SADE, *Note « Prison d'État semblable aux inquisitions »*, in ID., *Correspondance du marquis de Sade et de ses proches*, cit., vol. XV, p. 108.

¹⁰⁴ M. COTTRET, *op. cit.*, pp. 132-133.

¹⁰⁵ SADE, *Lettre de début juin 1780*, in *Buffat*, p. 146.

arbitraire dont les méfaits sont masqués et qui fait fi de toute hiérarchie sociale.

Plus spécialement, Sade et Mirabeau visent à démontrer que la lettre de cachet, forme de survivance d'une justice archaïque, autorise la vengeance individuelle au mépris de la «justice modérée de l'État»¹⁰⁶: leur punition n'est qu'une vengeance privée, celle du père de Mirabeau ou de la belle-mère de Sade¹⁰⁷ contre un fils de famille dont le comportement est jugé avec une trop grande sévérité et qui n'a besoin que de douceur pour s'améliorer. Selon les considérations des deux correctionnaires, le monarque ne doit pas œuvrer pour la préservation de l'honneur familial, qui engendre des incarcérations injustes et favorise des tyrans domestiques, mais bien plutôt pour le bien-être des individus qui composent la nation. Pour Mirabeau, la lettre de cachet perd toute forme de légitimité. Il s'agit d'un «papier illégal», qui livre un citoyen innocent non à la justice mais «aux fantaisies des maîtresses, et aux vengeances des ministres et des commis»¹⁰⁸. «Gouverner [...] par la terreur, par les lettres de cachet, par les ordres arbitraires»¹⁰⁹ est d'après lui dangereux et immoral. Ce système, au nom de la justice, sert des ambitions et des revanches personnelles aux dépens de sujets innocents. Cette forme de punition est donc contraire à l'équité.

Le prisonnier par lettre de cachet n'est plus un coupable mais bien une victime; le secret ne profite qu'à un système judiciaire injuste et aux intérêts privés d'une famille vindicative. En cela, Sade et Mirabeau s'appuient sur la dénonciation de la vengeance privée unanime parmi les philosophes, de Montesquieu à Beccaria, en passant par les encyclopédistes¹¹⁰, qui prônent au contraire «le recours à la justice modérée de l'État comme processus de régulation des litiges individuels et publics»¹¹¹. Une «injuste prison» n'assouvit que les viles passions des «enfermeurs»¹¹², selon l'expression de

¹⁰⁶ M. PORRET, *Lumières et droit de punir: l'impossible vengeance*, in C. GAUVARD ET A. ZORZI, *La Vengeance en Europe: XII^e au XVIII^e siècle*, Éd. de la Sorbonne, Paris, 2015, § 7 [en ligne] [consulté le 17.02.25]. URL: <http://books.openedition.org/psorbonne/72309>.

¹⁰⁷ «Mais [ma belle-mère] se venge ! En ce cas-là, le ministère permet donc la vengeance ? Éh bien! s'il la lui permet, à elle, de quel droit me le défendrait-il, à moi ? J'en userai donc, et un peu ferme» (SADE, *Lettre du 20 avril 1783*, in *Buffat*, p. 366).

¹⁰⁸ MIRABEAU, *Essai sur le despotisme*, Bailleul/Renard/Baudoin, Paris, 1821, p. 99.

¹⁰⁹ *Ivi*, p. 201. L'auteur souligne.

¹¹⁰ M. PORRET, *Lumières et droit de punir*, cit., § 6-8.

¹¹¹ *Ivi*, § 7. Sur la notion de vengeance au siècle des Lumières, voir M. PORRET, *Voltaire et le droit de punir*, cit., p. 93 et M. FOUCAULT, *Résumé des cours, 1970-1982*, Juillard, Paris, 1988, pp. 29-51.

¹¹² SADE, *Lettre XXXIX de Déterville à Valcour*, in ID., *Aline et Valcour*, in ID., *Œuvres*, M. DELON (éd.), Paris, Gallimard, coll. Bibliothèque de la Pléiade, 1990-1998, t. I, p. 957, note

Sade et produit un désir terrifiant mais légitime de retourner les souffrances à l'envoyeur. Dans cette perspective, l'espace épistolaire tient lieu non plus seulement de tribunal mais d'outil de représailles: «Enfin puisqu'il faut souffrir, souffrons, et vivons dans la douce espérance de prouver à mes bourreaux mercenaires que la prison peut bien arranger leurs affaires, mais sûrement jamais corriger, qu'elle gâte le caractère, qu'elle abrutit l'esprit, qu'elle abîme la santé, et que les seuls sentiments que l'on y forme sont ceux de *la vengeance*»¹¹³.

Les deux correctionnaires montrent encore dans quelle mesure l'application de cette vendetta familiale, si elle est soutenue par le roi, engendre une autre violence, source d'une peur ancestrale, la «violence vindicative»¹¹⁴, celle du détenu arbitrairement condamné. Cette vengeance incontrôlable risque de mettre en péril la nécessaire paix visée par le contrat social. Sade va se venger; Mirabeau va pousser à la révolte. Leur correspondance, est un acte vengeur de dévoilement: écrire permet de démasquer la perversité de ceux qui, libres, détiennent l'autorité. Privés de procès et soumis à des despotes familiaux, Mirabeau et Sade, en dévoilant «le dessous des cartes»¹¹⁵ institutionnelles, adoptent la stratégie habituelle de l'inversion des rôles. Ils dénoncent l'immoralité voire la sauvagerie des tenants de l'institution, «qui, selon le marquis, osent abuser de tous les droits de l'humanité»¹¹⁶: «ces procédés sont odieux; ils sont également dépourvus d'humanité et de bon sens et ne portent l'emblème que d'une férocité imbécile pareille à celle des tigres et des lions»¹¹⁷.

Les colères individuelles des écrivains, qui s'appuient sur l'expérience réelle et la réflexion philosophique, menacent les fondements étatiques et incitent à la révolte collective.

5. Menacer les «fauves» institutionnels d'une justice privée: la violence justifiée des correctionnaires

Le portrait-charge des autorités et des effets de l'incarcération, en particulier le règne secret d'une cruauté bestiale, justifie l'agressivité des

de l'auteur.

¹¹³ SADE, *Lettre du 20 sept. 1780*, in *Buffat*, p. 181.

¹¹⁴ M. PORRET, *Lumières et droit de punir*, cit., § 8.

¹¹⁵ SADE, *Lettre de mai 1779*, in *Buffat*, p. 110.

¹¹⁶ SADE, *Lettre écrite entre le 7 et le 28 sept. 1778*, in *Buffat*, p. 34.

¹¹⁷ SADE, *Lettre du 17 février 1779*, in *Buffat*, p. 74.

captifs à l'égard de l'institution: «ce que vous me faites est positivement ce qu'on fait aux chiens pour les rendre plus méchants, s'insurge Sade»¹¹⁸. L'expression de l'indignation des épistoliers se fonde sur ce socle d'infamies institutionnelles. Lorsque Mirabeau désigne la population des condamnés comme une «meute»¹¹⁹, il dénonce son traitement inhumain par les autorités et annonce en filigrane son potentiel destructeur: l'épistolier n'est pas seul; ils sont nombreux dont la violence va éclater. Le chien peut encore mordre la main du maître. Sade est plus explicite encore. Dans une forme de renversement (puisqu'il a déjà comparé les autorités à des tigres et des lions¹²⁰), il s'imagine en lion en cage et avertit son lecteur-censeur: «Persécuteurs, persécutrices, tyrans, valets de tyrans, odieux satellites de leurs honteux caprices, vous tous en un mot qui n'avez que la vengeance pour objet, ou l'espoir d'arriver aux honneurs en servant bassement la rage de ceux dont le crédit vous étaie ou l'argent vous nourrit, savez-vous à quoi je vous compare? À cette troupe de polissons qui allaient insulter avec des baguettes le lion qu'on retenait dans une cage de fer. Ils l'agaçaient au travers de ses barreaux, l'impression de la plus vive crainte mêlée à leur taquinerie. Si l'animal eût rompu ses freins, vous les eussiez tous vus fuir en se précipitant les uns sur les autres, et mourir de frayeur avant que d'être atteints. Vous voilà, mes amis, vous voilà: jugez mes sentiments par la comparaison, et vos infamies par sa justesse»¹²¹. La bête féroce, même engagée, demeure au fond puissante: son maître doit la craindre car elle affute ses armes et peut encore sortir ses griffes épistolaires. Le marquis met d'ailleurs à exécution cette menace, en dévoilant la vraie nature de ses bourreaux. Il promet de s'amuser à la manière perverse d'un chat jouant avec sa proie: «Je prouverai à ces indignes monstres [...] que je ne suis pas leur jouet, et que si j'ai eu l'infortune de l'être quelque temps, ils pourront bien, un jour, devenir aussi les miens, quels qu'ils soient»¹²². L'écriture épistolaire doit écorcher et blesser l'institution.

Expérimenté en matière littéraire et théâtrale, le marquis promet une «vengeance littéraire»¹²³ digne de son rang: «l'œuvre sadienne est résistance: la promesse d'une dénonciation par la plume»¹²⁴ ...Lucide (ou paranoïaque), il annonce l'usage d'une arme littéraire non moins

¹¹⁸ SADE, *Lettre du 21 mai 1781*, in Buffat, p. 269.

¹¹⁹ *Des Lettres de cachet*, p. 321.

¹²⁰ SADE, *Lettre du 17 février 1779*, in Buffat, p. 74.

¹²¹ SADE, *Lettre de mars ou avril 1779*, in Buffat, pp. 96-97.

¹²² SADE, *Lettre du 22 mars 1779*, in Buffat, p. 91.

¹²³ J.-B. JEANGENE VILMER, *op. cit.*, p. 475.

¹²⁴ *Ivi*, pp. 239-240.

humiliante que les «farces» de ses bourreaux. Le correctionnaire les dévoile sous leur jour le plus ridicule et attaque de la sorte les fondements de l'institution carcérale: «ma plume sera mon arme tant que le sort ne m'en rendra pas d'autres. [...] Patience... patience! rira bien qui rira le dernier! C'est tout mon espoir et toute ma consolation»¹²⁵, promet-il dès 1779. Il persiste en 1782; s'adressant à Lenoir, il légitime ses attaques épistolaires: «j'ai dit que puisqu'on me refusait justice, si cela arrivait encore, je me vengerais. On a recommencé. Je m'en suis pris à qui j'ai pu, Monsieur, et j'ai été guidé en cela par cet axiome du droit naturel qui me guidera toute ma vie: *me faire justice moi-même toutes les fois qu'elle me sera refusée*»¹²⁶. Ces promesses régulières de représailles, au sujet desquelles Renée de Sade s'alarme, lui font regagner en dignité: «*On se moque de mes menaces, ajoutez-vous et l'on ne me craint guère... Je le crois. La preuve pourtant qu'on me craint, c'est qu'on me serre; on n'enchaîne pas ceux qu'on méprise*»¹²⁷. L'excès de surveillance contribue non plus à forger une image de victime mais démontre au contraire son pouvoir de nuisance: la crainte change de camp. Il joue à armes égales avec ses accusateurs: plus encore que Mirabeau, Sade se montre dissimulateur et violent et retire régulièrement son masque de martyr.

Tandis que Mirabeau dénonce les «impostures» dont il est victime et le «bâillon» qui le comprime, il annonce qu'il va instruire le roi pour que «la vérité ne perce»¹²⁸, et, dans son *Essai sur le despotisme* rédigé en prison, promet une vengeance à son père et plus généralement aux tyrans: «La nation finit toujours par être plus puissante que le tyran [...] les hommes se vengent tôt ou tard»¹²⁹; «la violence détrompe une nation, la réveille, et hâte sa révolution»¹³⁰. Cet *Essai* subversif, publié de façon clandestine, incite même à la révolte: «les hommes [...] doivent par conséquent renverser la puissance qui les pille et les opprime»¹³¹. L'interpellation directe du lecteur sous la forme d'une question rhétorique encourage le lecteur à ouvrir les yeux, si ce n'est à se rebeller: «Mais qui voudrait ramper à jamais sous une

¹²⁵ SADE, *Lettre du 22 août 1779*, in *Buffat*, p. 114.

¹²⁶ SADE, *Lettre à Lenoir du 22 oct. 1782*, in *Monsieur le 6. Lettres inédites (1778-1784)*, G. DAUMAS (éd.), G. Lely (préf.), Julliard, Paris, 1954, p. 213.

¹²⁷ SADE, *Lettre à Millie Rousset d'avril ou mai 1779*, in *Correspondance (1759-1814)*, G. LELY (éd.), Tête de feuilles, coll. «*Cœuvres complètes*», Paris, 1973, vol. 6, t. XII, p. 204. L'auteur souligne.

¹²⁸ MIRABEAU, *Lettre du 13 avril 1778 à Lenoir*, in *Didier*, p. 294.

¹²⁹ MIRABEAU, *Essai sur le despotisme*, cit., p. 113.

¹³⁰ *Ivi*, p. 134.

¹³¹ *Ivi*, p. 310.

verge de fer ?»¹³². Dans un monde où «les paroles sont des crimes [et où] la liberté de penser est presque refusée»¹³³, Mirabeau refuse de se constituer en «[esclave] des cours»¹³⁴, c'est-à-dire en courtisan asservi au pouvoir despotique. L'injustice du système des lettres de cachet légitime la rébellion du comte, en son nom propre, mais aussi au nom de ses concitoyens.

En guise de représailles, les deux correctionnaires placés dans le secret des prisons vont donc montrer ce que l'institution cache. Ce dévoilement comporte un double avantage: une efficacité individuelle (retourner l'accusation) et une efficacité collective (détruire le système par le grossissement). Les deux épistoliers s'érigent paradoxalement (et même fallacieusement) en philosophes éclairés et en sévères moralistes. Ils montrent combien ils résistent, en aristocrates et en penseurs, aux assauts de la justice¹³⁵ et diffusent une éthique de l'incarcération et plus généralement de la punition: leur plume vengeresse va prouver que les brigands, les pervers et les assassins ne sont pas ceux que l'on croit.

6. *Mieux punir: une nécessaire amélioration des conditions d'incarcération*

Sade et Mirabeau constituent, avec les philosophes des Lumières, un héritage philosophique pour la justice contemporaine: à la lecture de leurs lettres de prison, on comprend que l'on peut punir et neutraliser des éléments néfastes sans les faire souffrir inutilement. Leurs lettres, dans le sillage d'autres écrits carcéraux, déchirent le voile de l'hypocrisie institutionnelle. Le courrier tient lieu non seulement de tribunal pour les épistoliers accusés, qui organisent leur défense, mais il offre encore un espace d'accusation, les prisonniers devenant juges de leurs propres accusateurs. Ils démontrent dans quelle mesure une justice immorale ne peut obtenir une transformation des mœurs du condamné. Au contraire, les contraintes imposées par l'administration carcérale nourrissent la révolte et l'imagination littéraire des détenus. Dans *Aline et Valcour*, à la manière d'un *leitmotiv*, Sade prolonge sa réflexion et dénonce le traitement inhumain des détenus dans les hôpitaux-prisons tels que Bicêtre: «Vous ne voulez pas voir

¹³² *Ivi*, p. 276.

¹³³ *Ivi*, p. 71.

¹³⁴ *Ivi*, p. 250.

¹³⁵ Sur l'héroïsme de Sade captif, voir M. HERSANT, *L'héroïsme de la solitude*, in ID., *Genèse de l'impur. L'écriture carcérale du marquis de Sade (1777-1790)*, A. Colin, coll. «Le vent se lève», Paris, 2021, pp. 481-513.

de mendiants en France, n'épuisez pas le malheureux cultivateur par des taxes au-dessus de ses forces, ne foulez pas vos fermiers, afin d'être plus en état de broder vos habits et de pomponner vos cheveux; et les mendiants, malheureuse excrescence de tous ces abus, ne fatigueront point vos regards; mais ne les bannissez pas, ne les molestez pas par une pitié barbare et insultante; ne les engouffrez pas comme des cadavres dans des sépulcres d'horreur et de fétidité; songez qu'ils sont hommes comme vous, que le même soleil les éclaire et qu'ils ont droit au même pain...»¹³⁶. L'oxymore «pitié barbare» met en lumière la duplicité institutionnelle par un écrivain qui, précisément, refuse de «détourner le regard» pour peindre les horreurs et les vices des autorités.

L'auteur de *Cent Vingt Journées de Sodome*, que l'on a jugé «immoral» et «sadique», rejoint principalement une réflexion largement partagée sur la nécessité de traiter décemment les détenus dont nous devrions avoir hérité. Sade comme Mirabeau visent une plus grande «douceur des peines», selon la logique beccarienne: «On constate en effet, tout au long du XVIII^e siècle, un net adoucissement des peines prononcées par les magistrats, dans le cadre d'une sensible humanisation de la justice pénale. Les vrais réformateurs ne sont donc pas ceux qu'on croit»¹³⁷. Pourtant, d'une façon générale, les institutions des prisons d'État ne sont pas aussi sévères que la littérature carcérale ne le laisse à penser¹³⁸. Pour preuve, l'inspecteur Lenoir et le policier Bruguières se montrent soucieux de Mirabeau : ils rendent régulièrement visite au comte, s'informent de sa santé et de celle de son amante, apportent des livres et des lettres, font des démarches en sa faveur et font généralement preuve d'un véritable «zèle»¹³⁹... Par exemple, Bruguière intervient pour éviter que Sophie ne se suicide: informé de cette tentation mortifère de la part de l'amante du comte, il lui promet une visite à Gabriel à la condition qu'elle remette «l'opium dont elle était munie»¹⁴⁰; Lenoir veille à ce que l'enfant illégitime de Sophie et Gabriel soit bien

¹³⁶ SADE, *Lettre XVII de Déterville à Valcour*, in ID., *Aline et Valcour*, cit., t. I, p. 446. Sur Bicêtre, voir aussi L.-S. MERCIER, *Tableau de Paris*, La Découverte/Syros, Paris, 1998 [Amsterdam, 1782-1788], pp. 79-80.

¹³⁷ P. AUDEGEAN, *Droit pénal et douceur des peines au XVIII^e siècle. Considérations sur quelques études récentes*, in *Rue Descartes*, éd. Collège international de philosophie, 1/2018, pp. 148-149 [en ligne] [consulté le 17.02.25] URL: <https://www.cairn.info/revue-rue-descartes-2018-1-page-148.htm>

¹³⁸ Voir A. FARGE, *Condamnés au XVIII^e siècle*, Le Bord de l'eau, coll. Troisième culture, Lormont, 2013, pp. 64-66 et J.-B. JEANGENE VILMER, *op. cit.*, pp. 73-80 et pp. 93-94.

¹³⁹ MIRABEAU, *Lettre du 28 déc. 1777 à Sophie*, in *Didier*, p. 203.

¹⁴⁰ MIRABEAU, *Lettre du 22 déc. 1777 à Lenoir*, in *Didier*, p. 197.

traité¹⁴¹. La pensée humaniste prérévolutionnaire a donc permis des avancées, mais elles demeurent insuffisantes, ce que Mirabeau et Sade ne soulignent pas, soucieux qu'ils sont de dénoncer pour mieux être libérés.

En vérité, la littérature anticarcérale attribuée à chacune des parties des rôles manichéens inspirés de la littérature hétérodoxe et de la propagande antibastillonnaire, le détenu écrivain se faisant souffre-douleur d'une autorité mauvaise et assoiffée de pouvoir. Cette peinture s'éloigne de la réalité plus complexe de la prison d'Ancien Régime, mais conserve une force littéraire à l'instar de l'écriture pamphlétaire. Toutefois, les écrits de réclusion doivent véhiculer des images assez fortes pour provoquer l'indignation et espérer des réformes. Leur efficacité réside dans l'impression qu'ils laissent aux destinataires. Faire connaître des témoignages d'anciens détenus, étudier la correspondance de captifs, conserver et dévoiler les archives de prison, permet de mettre au jour les effets perniciose de la réclusion et peut engager à mieux les prévenir et mieux accompagner les reclus vers la réinsertion. Car les témoignages des deux libertins du XVIII^e siècle éclairent les failles du système actuel. D'après Philippe Combessie, «tout ce qui abaisse la dignité d'un homme rejaillit sur les individus qui y coopèrent, sur l'institution qui le tolère, et sur la société qui l'accepte et qui, pour ce faire, l'occulte»¹⁴². Or les conditions contemporaines d'incarcération, si elles s'améliorent¹⁴³, demeurent inacceptables: l'insalubrité et la surpopulation demeurent des travers endémiques du milieu carcéral: aux rats de Vincennes répond la vermine de Fresnes¹⁴⁴.

En cela principalement, ces deux auteurs du siècle des Lumières éclairent les failles du système actuel. Lorsqu'ils prônent une peine humaniste qui doit être utile, leurs propos doivent résonner auprès de nos contemporains «au vu des conditions d'emprisonnement maintes fois

¹⁴¹ MIRABEAU, *Lettre du 24 oct. 1777 à Lenoir*, in *Didier*, p. 174.

¹⁴² P. COMBESSIE, *op. cit.*, pp. 111-112.

¹⁴³ La prison contemporaine connaît une tendance à l'amélioration et à la normalisation des conditions de vie. Toutefois, elles correspondent généralement à celles d'une personne aux faibles revenus (P. COMBESSIE, *op. cit.*, p. 60).

¹⁴⁴ Voir par exemple LE MONDE, *Invasion de cafards, rats et punaises dans la prison de Fresnes. L'État assigné en justice*, in *Le Monde* [Mis en ligne le 3.10.2016] [Consulté le 31.10.2022] URL: https://www.lemonde.fr/police-justice/article/2016/10/03/invasion-de-cafards-rats-et-punaises-dans-la-prison-de-fresnes-l-etat-assigne-en-justice_5007102_1653578.html et plus récemment OUEST FRANCE, *Un détenu de Fresnes hospitalisé après avoir contracté la leptospirose, "la maladie des rats"*, in *Ouest France* [mis en ligne le 28.02.24] [consulté le 17.02.25] URL: <https://www.ouest-france.fr/societe/faits-divers/un-detenu-de-fresnes-hospitalise-apres-avoir-contracte-la-leptospirose-la-maladie-des-rats-8ff40d08-d63b-11ee-9c76-f2c2ccb23225>

dénoncées, du taux de récidive, des freins à promouvoir les peines alternatives, on peut légitimement s'interroger sur les bienfaits de la peine [actuelle]»¹⁴⁵. Depuis l'Ancien Régime, la prison semble détruire progressivement l'individu au point de produire un désir de vengeance. La naissance de la prison pénale ne semble pas modifier cette mécanique. Jacques-Guy Petit démontre que, malgré toutes les réflexions philanthropiques, depuis lors et jusqu'à nous, «ce réceptacle de tous nos maux [...], loin d'être un purgatoire, un lieu de guérison, n'est perçu, expose-t-il, qu'en termes de paradis et d'enfer»¹⁴⁶. En conclusion, il se demande si «à l'encontre de tous ses objectifs avoués, la prison pénale n'a pas d'abord fonctionné, dans une indifférence générale secouée seulement par de cycliques appels à une sévérité extrême, comme une machine à détruire»¹⁴⁷. Les avertissements des témoins et réformateurs de la fin du XVIII^e siècle méritent donc d'être largement relus. En 2013, Arlette Farge déclare que «Beccaria semble oublié, même aujourd'hui où pourtant les prisons [...] subsistent dans des situations peu dignes des Droits de l'homme [...]. Rien ne justifie aujourd'hui, où les supplices ont disparu, qu'il puisse y avoir tant de corps maintenus dans la brutalité la plus totale, celle qui [...] construit de manière mortifère des êtres dévorés et anéantis par l'institution»¹⁴⁸. Les constats de l'OIP et les condamnations successives de la France par la CEDH semblent pourtant confirmer cet état de fait¹⁴⁹.

¹⁴⁵ N. BERGER, *op. cit.*, p. 17.

¹⁴⁶ J.-G. PETIT, *Ces Peines obscures. La Prison pénale en France (1780-1875)*, Fayard, Paris, 1990, p. 9.

¹⁴⁷ *Ivi*, p. 12.

¹⁴⁸ A. FARGE, *op. cit.*, pp. 73-75.

¹⁴⁹ Le ministre de la justice vient d'interdire les activités « ludiques » en raison d'une récente polémique. Voir LE MONDE AVEC AFP, *Gérald Darmanin ordonne l'arrêt des "activités ludiques" en prison*, in *Le Monde* [mis en ligne le 17.02.25] [consulté le 21.02.25] URL : https://www.lemonde.fr/societe/article/2025/02/17/gerald-darmanin-ordonne-l-arret-des-activites-ludiques-en-prison_6551038_3224.html Cette décision vient à l'encontre de la condamnation de la CEDH et de la réflexion de nos deux épistoliers. Voir FRANCE24 AVEC AFP, *Indignation face à l'arrêt annoncé des "activités ludiques" en prison*, in *France24.com* [mis en ligne le] [consulté le 25.02.25] <https://www.france24.com/fr/info-en-continu/20250219-indignation-face-%C3%A0-l-arr%C3%AAt-annonc%C3%A9-des-activit%C3%A9s-ludiques-en-prison-1>



ORDINES

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VERA MOSER

The Influence of Worldviews on Criminal Policy *From Newtonian Mechanics to Forensic Psychiatry*

ABSTRACT - The present paper explores the historical and philosophical evolution of criminal law and punishment, emphasizing how storytelling has shaped our understanding of these concepts. It starts with contrasting two key philosophies: Kant's view that punishment is inherently tied to justice and morality, and Bentham's belief that the primary aim of criminal law is the greater happiness of society. The discussion then delves into the influence of scholars like Voltaire and Franz von Liszt who had a great impact on criminal policy in Europe. It is argued that contemporary criminal law is influenced by worldviews, which assume that human behavior can be understood by means of science. Ultimately, the paper calls for increased transparency regarding the narratives that underpin criminal policy.

KEYWORDS - Determinism - Reductionism - Enlightenment - Science - Punishment - Stories

VERA MOSER*

The Influence of Worldviews on Criminal Policy
*From Newtonian Mechanics to Forensic Psychiatry***

CONTENTS: 1. *Introduction* - 2. *A story about the development of criminal law and punishment* - 3. *Determinism and reductionism in criminal policy* - 4. *Conclusion*

1. *Introduction*

Everything we know about the development of criminal law and punishment we owe to stories. For example, we all know the story of how the world was dominated by brute violence and revenge, how this violent world was civilized by means of codifications, and how criminal codes were and still are helping to establish justice. However, establishing justice is not the only purpose of criminal law. During the Enlightenment, many scholars have thought about it and came to different conclusions¹. Some held the view that society must punish bad behavior for it is bad behavior. For example, Kant believed that the purpose of criminal law should be rooted in the principles of justice and morality. He believed that actions are inherently good or bad regardless of their consequences and that bad actions should always be punished². Others, as for example Bentham, believed that the primary purpose of criminal law is to promote the greatest happiness of the greatest number of people. Therefore, criminal law must focus on the consequences it has for society³.

Probably, most parts of the stories, or in other words, the common narrative about the development of criminal law and punishment are true, since there is historical evidence. However, when we tell such stories, we always take a perspective on what happened in the past. We leave out things that do not seem important to us. We emphasize other things that help us to make our point. For example, for a long time, storytellers left out what

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** Contribution subject to anonymous evaluation.

¹ Cf. T. VORMBAUM, *Einführung in die moderne Strafrechtsgeschichte*, Springer, Berlin, 2019, pp. 23-47.

² I. KANT, *Die Metaphysik der Sitten* (1797), in H. EBLING (ed.), Reclam, Stuttgart, 1990, pp. 191-199; cf. N. POTTER, *Kant on Punishment*, in T.E. HILL JR. (ed.), *The Blackwell Guide to Kant's Ethics*, Blackwell Publishing Ltd, Chichester, 2009, p. 182.

³ For a detailed discussion of Bentham's theory, see J.C. WOLF, *Verhütung oder Vergeltung? Einführung in ethische Straftheorien*, Karl Alber, Baden-Baden, 1992, pp. 38-45.

women did for science and society and focused on the work of men without questioning the reasons⁴. Or another example, we often focus on western culture and pretend that the implications of our stories are true for the whole world⁵.

Not least, we retell the stories to each other, we pass them on to later generations, and in this way, we shape our understanding of the world. With this paper, I would like to generate an understanding of the criminal policy development and show how worldviews have influenced it. Of course, I do it by means of a story.

2. *A story about the development of criminal law and punishment*

In the second half of the 19th century, the German lawyer Franz von Liszt was dealing with criminal policy. He believed that criminal law should become more scientific. By this, he meant that we must base it on empirical findings, and such findings were to be obtained through investigations of causes and effects⁶. Accordingly, von Liszt believed that criminal law should not deal with guilt. Instead of retributing crimes, one should prevent them. Therefore, we must deal with people, and we must scientifically investigate to what extent delinquency could be expected from them. Although it was not known how such scientific investigations could be carried out, von Liszt believed that the criminal law should be reorganized to this end⁷. His work highly influenced criminal policy in Germany, Austria, and Switzerland⁸. The current criminal laws of these

⁴ This is called «The Matilda Effect» after M.W. ROSSITER, *The Matthew/Matilda Effect in Science*, in *Social Studies of Science*, 23(2)/1993, pp. 325-341.

⁵ This example is based on the idea of Eurocentrism after S. AMIN, *L'eurocentrism: critique d'une idéologie*, Anthropos, Paris, 1988.

⁶ See F. VON LISZT, *Aufsätze und Vorträge vol. I*, J. Guttentag, Berlin, 1905 [1893], p. 84; cf. M. PAWLIK, *v. Liszt im Kontext zeitgenössischer philosophischer Strömungen*, in A. KOCH AND M. LÖHNIG (eds.), *Die Schule Franz von Liszts. Sozialpräventive Kriminalpolitik und die Entstehung des modernen Strafrechts*, Mohr Siebeck, Tübingen, 2016, p. 65.

⁷ See F. VON LISZT, *op. cit.*, pp. 75-94; F. VON LISZT, *Aufsätze und Vorträge vol. II*, J. Guttentag, Berlin, 1905 [1882], pp. 5-8; cf. G. STRATENWERTH AND F. BOMMER, *Strafrecht. Allgemeiner Teil II: Strafen und Massnahmen*, Stämpfli, Bern, 2020, p. 3, N 3.

⁸ For more details to von Liszt influence see P. KAENEL, *Die kriminalpolitische Konzeption von Carl Stooss im Rahmen der geschichtlichen Entwicklung von Kriminalpolitik und Straftheorien*, Stämpfli, Bern, 1981; A. KOCH AND M. LÖHNIG (eds.), *op. cit.*; L. BRENESELOVIĆ, *Die wissenschaftskritischen Zuordnungen von Franz von Liszt. Ein Beitrag zum Verständnis der Modernen Schule des Strafrechts*, Duncker & Humblot, Berlin, 2020.

states focus on crime prevention. With sanctions such as preventive detention or stationary therapeutic measures criminal law intends to protect the society from dangerous people⁹. But how do the courts decide who is dangerous? They base their decisions on forensic expertise, such as psychiatric risk assessments, and these assessments claim to be scientific¹⁰. However, this claim cannot be fully checked¹¹. For details of the algorithms of such tools which are used to assess the risk of relapse are kept secret¹². At least, the risk assessment tool FOTRES which is used in Switzerland «is insufficiently based on international scientific standards» as recent research in theory of science is showing¹³. But society does not really seem to care about it. They are glad that potentially dangerous people are held in prisons, even if non-dangerous people get in there as well, as long as it is not themselves.

Whether the claim that psychiatric risk assessments are scientific is true or not, it is supported by worldviews which have long been predominant within the western scientific world, such as determinism and reductionism¹⁴. In the 18th century, one person in particular had contributed to the spread of such worldviews across the European continent. The French writer and philosopher, François-Marie Arouet, better known by the pseudonym Voltaire, seemed talented at presenting complex ideas in a simple way and making them accessible to a wider public¹⁵. For example, it was to his credit that the complex thoughts of Montesquieu about a modern criminal law had been made accessible¹⁶. Montesquieu believed that good codes, especially criminal codes, were needed in order to guarantee the political freedom of citizens. They should be systematic and provide for separation of powers. Torture should be prohibited, and proportionality of

⁹ D. JOSITSCH, G. EGE AND C. SCHWARZENEGGER, *Strafrecht II. Strafen und Massnahmen*, Schulthess, Zürich, 2018, pp. 23-38.

¹⁰ M.A. NIGGLI AND H. WIPRÄCHTIGER (eds.), *Strafrecht. Strafgesetzbuch. Jugendstrafrecht*, Helbing Lichtenhahn, Basel, 2019, Art. 56 N 39, 65c, pp. 1165, 1193.

¹¹ For more details see T. RÄZ, *Understanding risk with FOTRES?*, in *AI Ethics*, 3/2022, pp. 1153-1165.

¹² *Ivi*, p. 1155.

¹³ *Ivi*, p. 1165.

¹⁴ On the influence of determinism see U. GERMANN, *Kampf dem Verbrechen. Kriminalpolitik und Strafrechtsreform in der Schweiz 1870–1950*, Chronos, Zürich, 2015, pp. 62-64.

¹⁵ H.H. BORZESZKOWSKI AND R. WAHSNER, *Newton und Voltaire. Zur Begründung und Interpretation der klassischen Mechanik*, Akademie-Verl., Berlin, 1980, pp. 41-42.

¹⁶ E. SCHMIDT, *Einführung in die Geschichte der deutschen Strafrechtspflege*, Vandenhoeck & Ruprecht, Göttingen, 1965, pp. 347-348; cf. VOLTAIRE, *Traité sur la tolérance. A l'occasion de la mort de Jean Calas*, Gallimard, Paris, 1763.

punishment should be guaranteed. Montesquieu also believed that punishments were meant to prevent further crimes and were not meant to compensate guilt¹⁷. In fact, Voltaire's influence was even greater than bringing Montesquieu's thoughts to the people. Through correspondence with various authorities, for example with the Prussian King Frederick the Great or with the Russian Tsarina Catherine II, he made his concerns known throughout Europe¹⁸.

In the early 18th century, Voltaire travelled to England because he was exiled from France¹⁹. In England, he found a society marked by progress unlike anything he had seen before. Voltaire was so taken with this progress that he studied the latest discoveries in physics and mathematics which had become popular in England in the preceding decades. He read Isaac Newton's *Principia* which had been published approximately 40 years before his stay, and he was excited about it. He learned that Newtonian Mechanics had a special influence on the scientific and technological progress²⁰. With it, one could explain many phenomena in everyday life that were unexplainable before – or were attributed to God or Gods. Furthermore, Newtonian Mechanics made it possible to build machines that were unimaginable before – or would have been considered witchcraft. Driven by the new ideas and possibilities, Voltaire imported his knowledge to France. After two and a half years, he returned from England and spread his impressions. He illegally published his *Lettres philosophiques* where he compared the conditions in France to those in England. Compared to France, the people in England were granted more religious and political freedom. Voltaire wanted such freedom for France and the rest of Europe as well. Since it seemed that Newtonian Mechanics had contributed to the welcoming conditions in England, Voltaire studied the *Principia* more intensively²¹. In the following years, he and the mathematician, physician, and philosopher Emilie du Châtelet had written the *Eléments de la philosophie de Newton*. Through this work, Newtonian Mechanics was popularized in France. However, in the spirit of the Enlightenment Voltaire transferred the

¹⁷ N. RÖTHLIN, *Die Verbesserung des Strafrechts nach Montesquieu und Beccaria. Voltaire und die Berner Preisfrage von 1777*, in ZRG, 121/2004, pp. 243-245; E. SCHMIDT, *Die geistesgeschichtliche Bedeutung der Aufklärung für die Entwicklung der Strafjustiz aus Sicht des 20. Jahrhunderts*, in ZStrR, 73/1958, pp. 346-359.

¹⁸ N. RÖTHLIN, *op. cit.*, pp. 249-251.

¹⁹ On Voltaire's stay in England see VOLTAIRE, *Briefe aus England*, in R. VON BITTER (ed.), *Stürmischer als das Meer*, Diogenes, Zürich, 2017.

²⁰ H.H. BORZESZKOWSKI AND R. WAHSNER, *op. cit.*, pp. 42-43.

²¹ *Ivi*, p. 42.

principles of physics to the field of morality and by doing this he spread new worldviews²². Thereby, Voltaire neglected some serious problems Newton was concerned with and drew conclusions that were not compatible with Newton's *Principia*. Voltaire believed that Newtonian Mechanics provides a principle that could be used to eventually explain every phenomenon²³, but Newton himself knew that this is not the case. For his work has epistemic problems²⁴. However, such a principle was just what Voltaire needed in order to spread his Enlightenment ideas. For, if Newtonian Mechanics or any other scientific theory would provide a principle by means of which one could understand every phenomenon, the world could ultimately be grasped by means of reason, and this idea fit well with the enlightenment thoughts²⁵.

Without Voltaire's interpretation, Newtonian Mechanics might not have found favor in France and other parts of the continent. Voltaire combined Newton's approaches with those of Leibniz and Descartes which were both popular in Europe at that time²⁶. And by doing this, he laid the foundation for worldviews that had – among other things – influenced the development of criminal policy in Europe.

All in all, Voltaire had a great influence on society and politics. Not only because he made public how inhuman the criminal justice system was at his time, but also because he had many personal connections all over Europe. For example, with Cesare Beccaria who is considered the first criminologist²⁷. Furthermore, he sponsored prize competitions to make the politics write criminal codes²⁸. And – as is well known – he had a great impact on the French Revolution²⁹.

Of course, it was not only Voltaire's work which influenced the progress in criminal policy. In general, there was a boom of philosophical and scientific findings in the 18th and 19th century that had their impact. Many scientific disciplines – such as sociology, psychology, and

²² *Ivi*, p. 41.

²³ *Ivi*, p. 43.

²⁴ *Ivi*, p. 47. I will elaborate on this point later in the article.

²⁵ *Ivi*, p. 41.

²⁶ On the influence of Descartes and Leibniz see K. VON MEYENN, *Lust an der Erkenntnis. Triumph und Krise der Mechanik. Ein Lesebuch zur Geschichte der Physik*, Piper, München/Zürich, 1990, pp. 48–54.

²⁷ Cf. P. KNEPPER and A. JOHANSEN (eds.), *The History of Crime and Criminal Justice*, Oxford University Press, Oxford, 2016, p. 374.

²⁸ N. RÖTHLIN 2004, *op. cit.*, pp. 238, 240.

²⁹ H.H. BORZESZKOWSKI AND R. WAHSNER, *op. cit.*, p. 41.

anthropology –emerged then and influenced the way we deal with delinquency today³⁰. In the 19th century some scientists were analyzing human bodies to seek for causal relations between physical conditions and criminal behavior³¹. Some others were trying to explain delinquency by means of sociological theories³². And now, it is – above all – forensic psychiatry which must ensure that crimes are prevented³³.

All in all, the intellectual and political world was – and still is – driven by new possibilities science is providing. However, many influential people sometimes neglect that the science they are working with is supported not only by empirical findings, but also by worldviews. And this is what I would like to point out in the next chapter.

3. *Determinism and reductionism in criminal policy*

There is one prevailing assumption underlying criminal policy which is as follows: We can understand and predict criminal behavior in a similar way as we understand and predict the motions of planets or the movements of objects on earth, namely by means of science. In short, this means that we can understand and predict criminal behavior by investigating causes and effects³⁴. As I will argue, this prevailing assumption underlying criminal policy is supported by both a determinist and a reductionist worldview.

Although there are several notions of determinism, in general, it posits that all events, including human actions, are governed by preexisting causes and conditions³⁵. If this claim is true, it seems likely that we could explain and predict criminal behavior by means of science, namely through investigation of causes and effects. Now, if we would have a principle by which we can explain cause-and-effect relations, we could eventually

³⁰ On the influence of scientific disciplines on criminal law see D. STEPHANITZ, *Exakte Wissenschaft und Recht. Der Einfluss von Naturwissenschaft und Mathematik auf Rechtsdenken und Rechtswissenschaft in zweieinhalb Jahrtausenden. Ein historischer Grundriss*, De Gruyter, Berlin/Boston, 1970.

³¹ Cf. D. DÖLLIG, D. HERMANN AND C. LAUE, *Kriminologie. Ein Grundriss*, Springer, Berlin/Heidelberg, 2022, pp. 14-16.

³² *Ivi*, pp. 16-17.

³³ *Ivi*, pp. 83-84.

³⁴ Cf. K.L. KUNZ, *Schweizerische Kriminalpolitik*, in *ZStrR* 143/2025, p. 39.

³⁵ Cf. R. KUHLIN, K. GRÜNDER AND G. GABRIEL, *Determinismus/Indeterminismus*, in J. RITTER, K. GRÜNDER AND G. GABRIEL (eds.), *Historisches Wörterbuch der Philosophie online*, Schwabe, Basel, last access 21.05.2025.

explain all phenomena and predict all human actions. As I showed earlier, in Voltaire's opinion Newtonian Mechanics provides such a principle. However, this is not the case, as Newton himself was aware of. He knew that his law of gravitation is formulated in mathematical language and that any attempt to describe it in natural language is doomed to failure. For the law of gravitation expresses an equivalence between mathematical quantities and says nothing about causal relations between bodies in the world of experience³⁶. Voltaire, however, neglected this epistemic problem and spread a determinist worldview on the European continent³⁷.

One and a half centuries later, Franz von Liszt was thinking along the lines of this worldview in the following way: If science provides a principle by which we can explain cause-and-effect relations, we may find a principle by which we can predict human behavior, such as criminal behavior. Although von Liszt did not explicitly mention this thought, it underlies his work on criminal law which is shaping our criminal policy until these days³⁸. In von Liszt's opinion, the law must take a scientific view which inevitably leads to determinism. Accordingly, von Liszt believed that every human action has its cause in an event, which in turn is the effect of another previous event. Although he was aware of the epistemological problems that determinism entails, he neglected these problems by arguing that it is only the empirical world which must be considered for establishing the law³⁹. However, by applying determinism on the field of law, von Liszt disregarded the fact that his own view is based on a worldview and not just on empirical findings. As I will indicate below, today's criminal policy is still affected by this worldview.

Nowadays, criminal policy requests that forensic psychiatry assesses criminal behavior based on empirical findings in order to decide whether a preventive measure, for instance preventive detention, should be imposed. However, we still lack a principle by which we can explain cause-and-effect relations in the way Voltaire expected it to. Still, if we believe that it is possible to assess human behavior without having such a principle, we must assume, as von Liszt did, that human actions are governed by preexisting causes and conditions. Since determinism states that all events, including human actions, are governed by such causes and conditions, the

³⁶ See H.H. BORZESZKOWSKI AND R. WAHSNER, *op. cit.*, pp. 45-47.

³⁷ *Ivi*, pp. 45-51, 56-58, 65-66.

³⁸ See T. STÄCKER, *Die Franz von Liszt-Schule und ihre Auswirkungen auf die deutsche Strafrechtsentwicklung*, Nomos, Baden-Baden, 2012, p. 32.

³⁹ F. VON LISZT, *Aufsätze und Vorträge vol. I, cit.*, pp. 84-85.

prevailing assumption in criminal policy that we can understand and predict criminal behavior by investigating causes and effects is supported by a determinist worldview.

In addition, this assumption is based on another worldview which dominates our understanding of science today. As I will argue, the contemporary way criminal policy attempts to understand human behavior is supported by reductionism. This philosophical perspective seeks to understand complex phenomena or theories by breaking them down into simpler, more fundamental components⁴⁰. Usually, it is explained in the following way: Some theories or phenomena are assumed to be on a higher level of organization than others, for example, chemical phenomena are assumed to be on a higher level of organization than physical phenomena. Furthermore, it is said that the phenomena on a higher level can be explained by breaking them down into phenomena on a lower level. For example, it is said that the temperature of an object can be explained by breaking it down to the motion of atoms this object consists of. Usually, physical phenomena are assumed to be on the lowest level, followed by chemical, biological, psychological, and sociological phenomena⁴¹.

Nowadays, criminal policy demands that forensic psychiatrists explain and predict criminal behavior by examining the psyche – or in other words the mental states – of offenders. For that matter, the psyche is understood as a complex system which is traced back to biological and chemical processes in our bodies. Again, these processes are understood as something which arises from genetical dispositions and from influences of the social environment of the person in question. Thus, to understand the psyche of an offender in such a way that their criminal behavior can be assessed, the mental states are broken down into simpler, more fundamental components. For instance, forensic psychiatry assumes that consciousness is generated in our brains, and that the way we behave is due to brain processes⁴². Irrespective of the fact that this assumption neglects the so called hard problem of consciousness which points out some epistemic problems⁴³, it shows that forensic psychiatrists are breaking down the

⁴⁰ Cf. M. STÖCKLER, *Determinismus/Indeterminismus*, in J. RITTER, K. GRÜNDER and G. GABRIEL (eds.), *Historisches Wörterbuch der Philosophie online*, Schwabe, Basel, last access 21.05.2025.

⁴¹ Cf. A. NEY, *Reductionism*, in J. FIESER AND B. DOWDEN (eds.), *Internet Encyclopedia of Philosophy (IEP)*, online, last access 21.5.2025.

⁴² See T. URWYLER, J. ENDRASS, H. HACHTEL AND M. GRAF, *Handbuch. Strafrecht, Psychiatrie, Psychologie*, Helbing Lichtenhahn, Basel, 2022, pp. 3-4.

⁴³ This problem goes back to D. CHALMERS, *Facing up to the problem of consciousness*, in *Journal of Consciousness Studies*, 2(3)/1995, pp. 200-219.

human psyche into simpler, more fundamental components in order to assess criminal behavior. In other words, our consciousness and the way we behave are explained by means of biochemical processes, such as the release of neurotransmitters across synapses in our brains⁴⁴. Thus, whereas the reductionist worldview is based on the idea that complex systems can be understood by examining their constituents and the interactions between them, contemporary criminal policy is based on the idea that human behavior can be understood by examining the psyche in exactly such a way. Therefore, the prevailing assumption in criminal policy that we can understand and predict criminal behavior by investigating causes and effects is supported not only by a determinist, but also by a reductionist worldview.

The insight that contemporary criminal policy is supported by worldviews is crucial for the people who are affected by criminal law. For their liberty depends not only on scientific knowledge, as criminal policy seems to suggest, but also on the way we shape our understanding of the world. In order to establish a fair criminal law, we should be transparent about the premises criminal policy is based on and admit that empirical knowledge is not sufficient to justify the imprisonment of so-called dangerous people.

4. *Conclusion*

It is not surprising that stories are favored to achieve political goals, as they are more accessible to a broader public than scientific theories. In this paper, too, a story was used to achieve a goal. Namely, the goal to generate a somewhat different understanding of the development of criminal policy than it is usually portrayed in criminal law. Based on a story about the influence of worldviews on criminal policy, the following conclusion can be drawn.

Although we live in a society that highly values scientific knowledge, it is not only scientific findings that shape the current criminal law. Additionally, there are worldviews which influence how we deal with crime today. In recent centuries criminal policy has increasingly set itself the goal of preventing crime by assessing people's criminal behavior on an empirical basis. However, not only scientific findings are used to achieve this goal, but also worldviews. In the present paper, it was shown that both

⁴⁴ See T. URWYLER J. ENDRASS, H. HACHTEL AND M. GRAF, *op. cit.*, pp. 3-4.

a determinist and a reductionist worldview support the current criminal policy. This we should be aware of. For, we cannot neglect that criminal policy works with stories and not only with scientific knowledge. Indeed, when it comes to depriving people of their liberty, we need to communicate transparently the assumptions and narratives on which the interventions are based. If we argue that it is scientifically justified to detain people for the sake of prevention, we should make the epistemic problems visible. Everything else seems highly unfair.



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ALESSIA FARANO

The legitimation of *ius puniendi via science.* *The case of expert witness*

ABSTRACT - The increasing reliance on scientific expertise within contemporary legal proceedings raises fundamental theoretical questions concerning the relationship between truth, responsibility, and the legitimation of punishment. Dominant legal scholarship tends to frame this phenomenon within an epistemological paradigm, viewing the trial primarily as a mechanism for truth-finding, with science positioned as the privileged model of objectivity. However, in so-called “knowledge societies,” where truth is often conflated with scientific validity, expert testimony emerges as a normative device that shapes juridical constructions of responsibility. This paper offers a conceptual reframing of the role of expertise in criminal adjudication—not merely as a tool for epistemic accuracy, but as a constitutive element in the normative justification of punishment. Specifically, it explores how the deployment of expert knowledge can be understood as instrumental in actualizing the principle of personal integrity, thereby contributing to the legitimacy of penal judgment.

KEYWORDS - *Ius puniendi* - Expert Witness - Science at trial - Truth at trial

ALESSIA FARANO*

The legitimation of *ius puniendi* via science.
*The case of expert witness***

CONTENTS: 1. *Introduction* - 2. *Judicial cognitivism* - 3. *From the truth of facts to the truth of the author* - 4. *Neuroscience at trial* - 5. *Against a deferentialist approach* - 6. *Humanizing punishment through science*

1. *Introduction*

The integration of scientific evidence into legal proceedings has become an increasingly prevalent feature of modern judicial systems. This trend is exemplified by the widespread reliance on diverse forms of scientific expertise, including fingerprint analysis, genetic testing, psychiatric evaluations, and, more recently, neuroscientific evidence. The dominant perspective in legal scholarship has been to interpret this reliance primarily through the lens of truth-seeking within judicial processes, wherein scientific methodologies are regarded as instrumental in establishing factual accuracy.

In contemporary “knowledge societies”¹, where scientific inquiry is deeply embedded in the understanding of reality, truth is frequently equated with scientific truth. As a result, experts wield significant influence within legal proceedings, shaping not only evidentiary assessments but also broader determinations of responsibility and justice.

While this phenomenon can be understood by analyzing the role of expertise in legal truth-seeking, a comprehensive examination requires a nuanced theoretical framework. Such an analysis must encompass the underlying theories of trials, of evidence, and accountability, as well as the broader intersection of science and law. Although a detailed exploration of these complexities exceeds the scope of this paper, the present discussion aims to reframe the truth-making process as a means to substantiate the personal integrity principle and, consequently, in the attempt to propose the acknowledgement of the role of expertise at trial as a legitimation of punishment.

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** Contribution subject to anonymous evaluation.

¹ UNESCO, *Towards Knowledge Societies*, document SHS.2005/WS/44, 2005, available at the following link: <https://unesdoc.unesco.org/ark:/48223/pf0000141843>.

2. *Judicial cognitivism*

As anticipated, the increasing role played by experts at trial can be traced back to the basic function of truth-assessment at trial: the so-called cognitivist approach. This approach is exemplified by the work of prominent legal scholars such as Michele Taruffo². The central concept underpinning this method is that trials are designed to assess the truth. This need for objectivity is undoubtedly summarized by the phrase *veritas non auctoritas facit iudicium*, which roots the justice of the decision in the truthful ascertainment of the facts of the case. The process, and this is what one might call “the simple truth”³ that Taruffo left us as an inheritance, would in fact be «a structured set of activities aimed at obtaining truthful knowledge of the facts relevant to the solution of the dispute»⁴. With respect to this need for truth, the “expert” testimony would guarantee an objective reconstruction of the facts: according to Taruffo, scientific evidence confirms the “alethic” or “epistemic” function of the trial, since «there would be no need to resort to science (...) if one started from the premise that in the trial one cannot or should not ascertain the truth of the facts»⁵.

From the perspective of criminal trial, Luigi Ferrajoli has identified procedural cognitivism as an essential characteristic of the principle of “due process” in criminal law, openly admitting that the *quaestio facti* must lead to the “factual truth,” «ascertainable through proof of the occurrence of the fact»⁶. It is evident that in Ferrajoli the comprehensible normative concerns – the defense of penal guarantees – absorb the more purely epistemic

² See notably M. TARUFFO, *La semplice verità. Il giudice e la costruzione dei fatti*, Laterza, Roma-Bari, 2009 (in English, his approach can be found in M. TARUFFO, *Inferences in judicial decisions about facts*, in J. FERRER BELTRÁN AND C. VÁZQUEZ, *Evidential Legal Reasoning: Crossing Civil Law and Common Law Traditions*, Cambridge University Press, New York, 2000. Against the cognitivist approach, for different reasons, see at least M. DAMAŠKA, *Evidence Law Adrift*, Yale University Press, New Haven, Connecticut (USA), 1997; R.A. POSNER, *An Economic Approach to the Law of Evidence*, in *Stanford Law Review*, 51/1999, pp. 1477 ff.

³ M. TARUFFO, *La semplice verità*, cit.

⁴ *Ivi*, p. 135 (my translation from the Italian).

⁵ M. TARUFFO, *La prova scientifica. Cenni generali*, in *Ragion pratica*, 2/2016, pp. 335 ff., especially p. 336.

⁶ L. FERRAJOLI, *Diritto e ragione. Teoria del garantismo penale* [1989], Laterza, Roma-Bari, 2011, pp. 13 ff., especially p. 20. 1. An English portrait of Ferrajoli’s theory can be found in J.J. MORESO, *An Italian Path to Legal Positivism: Ferrajoli’s Garantismo*, in T. SPAAK AND P. MINDUS (eds.), *The Cambridge Companion to Legal Positivism*, Cambridge Companions to Law, Cambridge University Press, Cambridge, 2021, pp. 606-624.

aspect⁷. As Ferrajoli himself acknowledges, «The concept of procedural truth (...) cannot be removed, except for explicit options for purely decisionist penal models, if not at the cost of a profound misunderstanding of jurisdictional activity and the renunciation of its main form of rational control»⁸. This position cannot be considered separately from the relationship that a certain idea of truth has with procedural models⁹. The principle of strict jurisdiction¹⁰, which undergirds the epistemology of the guarantor, necessitates that accusatory hypothesis be verifiable or falsifiable by virtue of its assertive character. These hypotheses must also be susceptible to empirical proof within the process.

This stance is deeply rooted in the Enlightenment tradition, as evidenced by Jeremy Bentham's metaphor of "Injustice and her handmaid Falsity"¹¹, which underscores the notion that the pursuit of truth serves as an instrument of justice. The concept of *ius puniendi*, or the right to punish, is predicated on the assumption that the facts ascribed to the defendant have indeed occurred as there must be a clear correspondence between the legal provision and the facts¹².

3. From the truth of facts to the truth of the author

This pivotal juncture in the evolution of legal thought has been a focal point of Michel Foucault's sustained critical inquiry, which has highlighted the rise of truth as a paramount value in judicial proceedings and its interrelation with expertise¹³.

⁷ This aspect has been critically addressed by J. FERRER BELTRÁN, *Prueba y verdad en el derecho*, Marcial Pons, Madrid-Barcelona, 2002, p. 23. See also: ID., *Legal Proof and Fact Finders' Beliefs*, in *Legal Theory*, 12/2006, pp. 293-314.

⁸ *Ivi*, p. 20 (my translation from Italian).

⁹ *Ibidem*.

¹⁰ *Ibidem*.

¹¹ J. BENTHAM, *Rationale of Judicial Evidence* [1827], Garland, New York, 1978, p. 22.

¹² The idea of judicial syllogism is one of the tenets of the political Enlightenment, dating back at least to Cesare Beccaria: C. BECCARIA, *On Crimes and Punishments* [1764], translated by D. Young, Cambridge University Press, Cambridge, 1995 (or. *Dei delitti e delle pene*, ed. Livorno 1766, edited by F. VENTURI, Einaudi, Torino, 1981).

¹³ Most notably see: M. FOUCAULT, *Surveiller et punir. Naissance de la prison*, Gallimard, Paris, 1975, translated by A. Sheridan, *Discipline and Punish: The Birth of the Prison*, Vintage Books, New York, 1995; ID., *La vérité et les formes juridiques* [1974], in ID., *Dits et Écrits: 1954-1988*, II, Gallimard, Paris, 1994, pp. 538-623; ID., *Mal faire dire vrai. Fonction de l'aveu en justice*, Cours de Louvain 1981, edited by F. BRION AND B.E. HARCOURT, Press Universitaire de

In his historical analysis, the necessity of truth in legal proceedings is examined in relation with the transition of the judicial system from one focused on resolving conflicts to one based on the judgment of the king¹⁴. This shift necessitated a robust legitimating narrative to support the court's punitive power. This is a significant step, insofar as the “sovereign” (or whoever is acting on his behalf) will be called upon to tell the truth, to pronounce the definitive “word” on the events to be legally qualified¹⁵. The sentence must be cloaked in that special power that the “true word” will have. And the confession plays a pivotal role in both the criminal rite of the Ancient Régime (characterized by torture and a formal legal proof system¹⁶) and the new reformed rite. Following the dissolution of the formal system of legal proof, the judge’s discretion would have undoubtedly been enriched by the epistemic value of confession.

The transformation of the rite also entails a new approach to the understanding of truth, because of the strong democratic attitude of the Enlightenment project: it is accessible to all, as no one can claim exclusive epistemic authority over it. The universally experienced truth is thus an exercise of resistance of the individual conscience in the face of sovereign power¹⁷. This novel conception of truth, termed “Cartesian” or “empirical”¹⁸, is subject to judicial scrutiny, wherein the judge, liberated from the constraints of formal legal proof, adjudicates based on his or her independent conviction¹⁹.

However, Foucault contends that the need for truth is not met by confession alone, as the truth of the confessor becomes inadequate when his

Louvain- The University of Chicago Press, Chicago-Louvain, 2012, translated by Stephen W. Sawyer, *Wrong-doing truth-telling. The Function of Avowal in Justice*, The University of Chicago Press, Chicago-London, 2014.

¹⁴ M. FOUCAULT, *Wrong-doing truth-telling*, cit., pp. 222 ff.

¹⁵ «The necessity of a veridiction was inscribed in the displacement that had the effect that penal justice would rise, if you will, from a resolution of a conflict in the form of a struggle between two individuals to a resolution of a conflict in the form of a decision by a sovereign court or by a decision of the sovereign himself», *ivi*, p. 223.

¹⁶ H. LANGBEIN, *Torture and the Law of Proof. Europe and England in the Ancien Régime* [1977], University of Chicago Press, Chicago, 2006.

¹⁷ M. FOUCAULT, *Wrong-doing truth-telling*, cit., p. 208.

¹⁸ *Ibidem*.

¹⁹ A comprehensive understanding of this historical shift can be found in M. DAMAŠKA, *Evaluation of Evidence: Pre-Modern and Modern Approaches*, Cambridge University Press, Cambridge (Ma), 2018.

motivations are called into question²⁰, compelling the penal system to demand a more specific kind of truth: the personal truth about the defendant. The justification required for punishment seems to be rooted in the very nature of the offender, who was deemed to have committed the crime due to their abnormal character. In other words, the offender deserves punishment because he is the embodiment of his crime.

In order to assess the truth of the criminal, therefore, a new body of knowledge is required – the newborn criminal anthropology – which will allow the “deadly” embrace between psychiatry and law, functional to the creation and study of the criminal class. Thus, in Foucault’s recollection, criminal expertise comes into play²¹. The expert report is accorded a «legal presumption of truth», and the discourse of experts is regarded as a privileged, super-legal discourse in the production of judicial truth²².

In *Les anormaux*, Foucault refers to the phenomenon of “dedoublement” as the psychological and moral doubling of the criminal, the person who is judged and punished by the court, and the person who is considered sick or weak and is diagnosed and treated by a psychiatrist.

²⁰ We see at work what Mario Sbriccoli labelled as “reversal” (*rovesciamento*), a concept he expounds upon in his commentary on *Surveiller et punir*. The Italian legal historian noted how Foucault presented the failure of the prison system as the paradoxical outcome of its total affirmation, characterizing it as «a project that finds (or even seeks?) success by allowing itself to fail, and therefore a reversed reversal» (my translation from Italian). This notion of “reversal” is further elaborated upon by M. SBRICCOLI in his work *La storia, il diritto, la prigione. Appunti per una discussione sull’opera di Michel Foucault*, published in *Studi sulla questione criminale* [1977] and subsequently included in ID., *Storia del diritto penale e della giustizia. Scritti editi e inediti* (1972-2007), Giuffrè, Milano, 2009, p. 1089.

²¹ Foucault had previously devoted notable pages to the subject: M. FOUCAULT, *Moi, Pierre Rivière, ayant égorgé ma mère, ma soeur et mon frère... Un cas de parricide au XIXe siècle, présenté par M. Foucault*, Paris, 1973; ID., *Discipline and Punish* [1975], cit.; ID., *Abnormal. Lectures at the Collège de France 1974-1975*, edited by V. MARCHETTI AND A. SALOMONI; translated by G. Burchell, Verso, London-New York, 2003.

²² «D’autre part, le rapport des experts – dans la mesure où leur statut d’experts confère à ceux qui le prononcent une valeur de scientificité ou plutôt un statut de scientificité – a, vis-à-vis de tout autre élément de la démonstration judiciaire, un certain privilège. Ce ne sont pas des preuves légales au sens où l’entendait le droit classique, encore à la fin du XVIIIe siècle, mais ce sont pourtant des énoncés judiciaires privilégiés qui comportent des présomptions statutaires de vérité, présomptions qui leur sont inhérentes, en fonction de ceux qui les énoncent. Bref, ce sont des énoncés avec des effets de vérité et de pouvoir qui leur sont spécifiques: une sorte de supra-légalité de certains énoncés dans la production de la vérité judiciaire». M. FOUCAULT, *La vérité et les formes juridiques* [1974], in ID., *Dits et Écrits: 1954-1988*, II, Gallimard, Paris, 1994, pp. 538-623.

This dichotomy, as Foucault observed, underscores the institution's capacity to transform the criminal through the process of punishment.

This last point deserves to be taken seriously, because it shows the typical Foucauldian gist: to see in an apparently "progressist" historical-philosophical movement – judicial expertise as a way of establishing truth that is discernible by all individuals, not just by the custodians of divine knowledge to whom the legal procedures of proof belonged – a reactionary force. The culmination of a liberating democratic process becomes the ultimate tool for controlling people's bodies.

This narrative is widely recognized. However, an alternative explanation for this relationship between scientific evidence and the concept of *ius puniendi*, or the legal right to impose a punishment, will be proposed here.

4. Neuroscience at trial

Foucault's theory of power-knowledge has been further developed by Science and Technology Studies, which have emphasized the intricate interplay between science and law, particularly within legal proceedings²³. The Foucauldian idea that power and law can influence scientific knowledge has been refined, emphasizing the reciprocal nature of these influences. The concept of "co-production" initially introduced by Bruno Latour²⁴, underscores the indistinguishability of scientific production and legal governance. From this vantage point, the emergence of expert witnesses can be interpreted as a byproduct of an alternatively defined scope of legal proceedings.

The utilization of neuroscientific evidence in legal proceedings serves as a salient example. In Italy²⁵ (but also in the United States, and in the

²³ Sheila Jasanoff acknowledges the Foucault's legacy in S. JASANOFF, *States of Knowledge. The Co-production of Science and the Social Order*, Routledge, London-New York, 2004, p. 18, and very clearly asserts that: «science and technology operate, in short, as political agents» (*ivi*, p. 14). On the co-production within the trial see the classical: ID., *Science at Bar. Law, Science and Technology in America*, Harvard University Press, Cambridge-London, 1995.

²⁴ B. LATOUR, *We Have Never Been Modern*, Harvard University Press, Cambridge (MA), 1993, translated by C. Porter from ID., *Nous n'avons jamais été modernes: Essai d'anthropologie symétrique*, Editions La Découverte, Paris, 1991.

²⁵ Court of Appeal of Trieste, 18 September 2009, n. 5, in *Rivista penale*, 2010, pp. 70 ff.; Court of Como, 20 May 2011, in *Rivista italiana di medicina legale e diritto in campo sanitario*, 2012, pp. 246 ff.

United Kingdom, amongst other countries) there has been an increasing number of judicial proceedings based on neuroscientific evidence²⁶. This entails the use of neuroimaging to assert the insanity defense, even when there is psychological expert testimony regarding the same defendant. Neuro-techniques have been employed to demonstrate various forms of mental illness, including psychopathy, brain cancer-induced sexual control impairments, and neurogenetic diseases that hinder behavior control. This surge in neuroscientific utilization has prompted scholars to concentrate on the indistinct boundaries between insanity and capacity²⁷. The question to be addressed is whether these individuals are truly insane and, if so, whether they are responsible for their actions. Adrian Raine, a neurolaw scholar, focused on neural circuits in the study of criminal behavior aiming to identify the underlying causes of violent behavior²⁸.

But the challenge posed by neuroscientific techniques has also the potential to impact the philosophical foundations of responsibility²⁹, thereby prompting a re-evaluation of the relationship between science and the concept of *ius puniendi* in specific contexts. According to the most radical

²⁶ For a comparative analysis see T.M. SPRANGER (ed.), *International Neurolaw. A Comparative Analysis*, Springer, Berlin-Heidelberg, 2012. For a comprehensive understanding of the interaction between neuroscience and law, see S. ZEKI AND O. GOODENOUGH (eds.), *Philosophical Transactions of Royal Society*, in B: *Biological Sciences*, 359/2004; B. GARLAND (ed.), *Neuroscience and the Law*, Dana Press, Washington, 2004; M. FREEMAN (ed.), *Law and Neuroscience*, Oxford University Press, Oxford, 2011; S.J. MORSE AND A. ROSKIES, *A Primer on Criminal Law and Neuroscience*, Oxford University Press, Oxford, 2013; M.S. PARDO AND D. PATTERSON, *Minds, Brains and Law. The Conceptual Foundation of Law and Neuroscience*, Oxford University Press, Oxford, 2013.

²⁷ A notable finding is the presence of neural dysfunction, including psychopathy, even in individuals who appear to be healthy and well-behaved. This intriguing phenomenon is further explored in a book by a neuropsychiatrist who, during his research, inadvertently identified himself as a psychopath: J. FALLON, *The Psychopath inside: A Neuroscientist's Personal Journey into the Dark Side of the Brain*, Current, New York, 2013.

²⁸ A. RAINE, *The Biological Roots of Crime*, Pantheon Books, New York, 2013.

²⁹ Benjamin Libet's experiment (1983) explored the timing of conscious decisions and neural activity. Using EEG recordings, he found that the brain exhibits a readiness potential (RP) approximately 550 milliseconds before a voluntary action, while participants reported conscious awareness of their decision only about 200 milliseconds before movement. This led to debates on free will, as it suggests that unconscious processes initiate actions before conscious intent arises. See: B. LIBET, C.A. GLEASON, E.W. WRIGHT AND D.K. PEARL, *Time of Conscious Intention to Act in Relation to Onset of Cerebral Activity (Readiness-Potential): The Unconscious Initiation of a Freely Voluntary Act*, in *Brain*, 106(3)/1983, pp. 623-642; C.S. SOON, M. BRASS, H.J. HEINZE AND J.-D. HAYNES, *Unconscious Determinants of Free Decisions in the Human Brain*, in *Nature Neuroscience*, 11/2008, pp. 543-545.

branch of scientists and legal scholars in this field, neuroscience has the capacity to invalidate the free will concept entirely, as behaviour can be predicted and explained. The deterministic perspective would be established, thereby weakening the possibility of individual responsibility³⁰.

At a closer look, a twofold logic is at play: on the one hand, the need for truth – following the Foucauldian genealogy – about the facts and the defendant himself must be fulfilled with scientific knowledge via expertise. On the other hand, scientific findings suggest a lack of free will, thereby undermining the traditional basis for punishment. In this respect, *ius puniendi* is grounded on a deterministic ontology, which considers human behaviour susceptible to be motivated (*rectius* caused) by the threat of a sanction. As a consequence, the only theory of punishment allowed is a consequentialist one³¹.

5. Against a deferentialist approach

To escape this paradox, we need to reframe the issue, by rejecting what Susan Haack would term the “deferentialist approach”³². The deferentialist

³⁰ One of the most radical positions is held in: A.R. CASHMORE, *The Lucretial Swerve: The Biological Basis of Human Behavior and the Criminal Justice System*, in *Proceedings of the National Academy of Sciences of the United States of America*, 107/2010, pp. 4503 ff.

³¹ This was notably claimed by J. GREENE AND J. COHEN, *For the Law Neuroscience Changes Nothing and Everything*, in S. ZEKI AND O. GOODENOUGH (eds.), *Philosophical Transactions of Royal Society*, pp. 1775 ff. Starting from a deterministic ontology, one can argue for both a compatibilist theory of legal responsibility – namely, that a lack of free will is compatible with, or even required for, legal responsibility – and radical scepticism about free will in general and responsibility in particular, assuming incompatibility between free will and responsibility (P. VAN INWAGEN, *An Essay on Free Will*, Clarendon Press, Oxford, 1983). For a comprehensive overview of the debate, see: N.A. VINCENT, T. NADELHOFFER, M.D. MOORE (eds.), *Free Will and the Law: New Perspectives*, Oxford University Press, Oxford, 2016.

Foucault himself was well aware of the threat posed to legal responsibility by a deterministic ontology, as explicitly theorised by 19th-century criminal anthropology: « For the Criminal Anthropologists this meant totally abandoning the judicial notion of responsibility, and posing as the fundamental question not the degree of freedom of the individual, but the level of danger he represents for society» (M. FOUCAULT, *About the concept of the “Dangerous Individual” in 19th Century Legal Psychiatry*, in *International Journal of Law and Psychiatry*, Vol. 1, 1978, pp. 1-18, p. 13). I am grateful to the anonymous referee for the aforementioned Foucauldian passage.

³² S. HAACK, *Defending Science – Within Reason: Between Scientism and Cynicism*, Prometheus Book, Amherst, New York, 2003, p. 19.

approach suggests that judges should adopt a deferent approach to expert witnesses, accepting without questioning their expertise.

That translates into accepting a neuroscientific expertise establishing the neuro-genetic inclination to a violent behaviour.

A rejection of a deferent approach comes from an Italian case involving a pediatrician who was convicted of sexually harassing his young patients³³. During the trial, evidence was presented indicating a specific type of brain cancer, for which scientific literature acknowledged a causal link to pedophilia. The Italian judge sentenced the defendant to prison, finding him fully responsible, and thus rejecting the neuroscientific evidence. The judge's reasoning underlying the sentence is noteworthy, as it highlights the defendant's ability to employ practical reasoning. The pediatrician's capacity to avoid harming his young patients in kindergartens, as evidenced by his ability to elude vigilant teachers, was acknowledged by the Italian judge as indicative of his competence.

Even more remarkable, for the purpose of this paper, is the evaluation of scientific reliability of the expertise provided by the judge.

According to the Daubert standard, which is increasingly acknowledged by Italian courts, judges need to act as gatekeepers of science during trials³⁴, this entails the responsibility of evaluating the scientific reliability of the science produced by court experts, rather than merely accepting it uncritically. While the Daubert standard is not immune to

³³ Court of Venezia, G.i.p. dott.ssa Roberta Marchiori, 24 January-8 April 2013, n. 296.

³⁴ *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). According to the Daubert standard, judges should act as "gatekeepers" in assessing whether expert evidence is both relevant and reliable before being presented to a jury. The standard considers factors such as (1) whether the theory or technique can be tested, (2) whether it has been peer-reviewed, (3) its known or potential error rate, (4) whether it has gained general acceptance in the relevant scientific community, and (5) whether standards exist for controlling its operation. The *Daubert* decision replaced the older *Frye* standard, which relied solely on general acceptance in the scientific community.

The scholarship on the Daubert standard has enormously grown over the last 30 years. See *ex multis*: J. SANDERS, *From Science to Evidence. The Testimony of Causation in the Bendectin Cases*, in *Stanford Law Review*, 46(1)/1993, pp. 1 ff.; M. FARRELL, *Daubert vs Merrell Dow Pharmaceuticals, Inc.: Epistemology and Legal Process*, in *Cardozo Law Review*, 15/1994, pp. 2217 ff.; R.J. ALLEN, *Expertise and the Daubert Decision*, in *Journal of Criminal Law and Criminology*, 84(4)/1994, pp. 1157 ff., especially p. 1164; B. LEITER, *The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence*, in *Brigham Young University Law Review*, 4/1997, pp. 803 ff.

criticism³⁵, its underlying rationale deserves to be valued as a means to foster the dialogue between science and law within the judicial process.

This prompts the question of whether this approach might allow for disregarding the epistemic authority of science in trials, as occurred in famous controversial European cases³⁶, where the judge acted as a wizard's apprentice³⁷. This is not the case, as it will be further elaborate.

Indeed, the contested neuroscientific evidence was a memory detection technique, which was requested to substantiate the defendant's claim of an absence of pedophile instincts prior to the onset of cancer. The employed technique was the autobiographical implicit association test, which is an adaptation of the implicit association test. This test quantifies the strength of associations between concepts (e.g., black people, gay people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy). The underlying assumption is that making a response is easier when closely related items share the same response key. There is a substantial body of peer-reviewed literature supporting the technique's validity³⁸. However, upon closer scrutiny – due to their gatekeepers' role – the judges determined that the technique had been adapted to the domain of autobiographical memory, in the absence of empirical evidence to substantiate its analogical application. When confronted with the need to acknowledge this neuroscientific evidence, the judge undertook a meticulous examination of the scientific credibility of the technique. This practice was also employed by another Italian court, the Court of Appeal of Salerno, who had characterised the technique as a fraudulent scheme, providing a detailed rationale for this assertion³⁹.

³⁵ S. HAACK, *Trial and Error. The Supreme Court Philosophy of Science*, in *American Journal of Public Health*, 95(suppl. 1)/2005, pp. 566 ff.

³⁶ In Case C-621/15, the European Court of Justice addressed the issue of establishing liability for defective vaccines under Directive 85/374/EEC. The Court held that, in the absence of scientific consensus, a vaccine defect and the causal link between the defect and the damage suffered can be demonstrated through serious, specific, and consistent evidence. This allows national courts to consider factors such as the temporal proximity between vaccine administration and the onset of a disease, the individual's prior health status, and the lack of a family history of the disease, when assessing liability.

³⁷ M. TARUFFO, *La prova dei fatti giuridici. Nozioni generali*, in *Trattato di diritto civile e commerciale* (dir. L. Mengoni), III, 2, 1, Giuffrè, Milano, 1992, p. 309.

³⁸ A.G. GREENWALD, D. MCGHEE AND J.L.K. SCHWARTZ, *Measuring individual differences in implicit cognition: the implicit association test*, in *Journal of personality and social psychology*, 74(6)/1998, pp. 1464 ff.

³⁹ Court of Appeal of Salerno, 16 December 2016, Valenti, available at the following link:

The aforementioned judges did not acquiesce to the deferentialist approach, which regards experts as the epistemic authority par excellence. Drawing on Foucault's genealogy, it could be posited that the democratic value of truth-seeking, which initially legitimated the introduction of science at trial, runs the risk of turning into its very opposite: the blind reliance on experts, which was avoided by the Italian court, presents itself as a renewed form of authority principle. Conversely, the Italian judges categorically rejected the notion of expertise in compliance with their new role. And they did it by adopting a scientific argument.

6. *Humanizing punishment through science*

Scientific expertise has thus far demonstrated a dual vulnerability in its capacity to provide a theoretical foundation for *ius puniendi*.

Firstly, and in direct opposition to its democratic origins tracked with Foucault, the use of deferentialist approaches results in the absence of democratic control, thus undermining the very foundation of the right to punish. Secondly, and equally problematic, is the fact that the judge, unable to fulfil the role of gatekeeper due to a lack of appropriate epistemological tools, may discredit scientists and experts during trials. This could, in turn, result in the validation of forms of "junk science"⁴⁰ that have little to do with the legitimation of punishment.

Nonetheless, the example of memory detection techniques gives rise to a further pertinent question concerning the validity of the *nemo tenetur se detegere* principle, which states that individuals cannot be compelled to

<https://www.penalecontemporaneo.it/upload/3744-corte-appello-salerno-revisione-aiat.pdf>.

⁴⁰ This expression was made famous by P. HUBER, *Galileo's revenge. Junk science in the Courtroom*, Basic Books, New York, 1991. It is noteworthy that the call for better science in legal proceedings was closely tied to Peter Huber's concerns regarding Mass Tort Litigations, in which large groups of plaintiffs seek compensation for alleged harm caused by defective products, environmental exposure, or pharmaceutical drugs. Huber, in his critique of what he termed *junk science*, argued that courts were increasingly accepting questionable scientific evidence to justify compensatory claims, even in cases where the broader scientific community had not reached a general consensus on the validity of a given principle. This concern highlighted the tension between ensuring justice for victims and maintaining rigorous scientific standards in legal decision-making, ultimately influencing the adoption of stricter evidentiary standards, such as those established in *Daubert*. For this line of criticism see: K.J. CHESEBRO, *Galileo's Retort: Peter Huber's Junk Scholarship*, in *American University Law Review*, 42(4)/1993, pp. 1637 ff.

reveal themselves. A growing body of scholarship is considering the potential conflict between the right to truth – assuming we succeed in evolving current techniques to the point of “scientific reliability” requested by the Daubert test – and the right to personal integrity – in relation to which *nemo tenetur se detegere* is a *species* – which is undermined by the access to one person’s thoughts, even with her consent⁴¹.

More in general, the principle of personal integrity, as articulated by Michel Porret and Marco Cicchini⁴², has been identified as the theoretical basis for the growing significance of expert witnesses. Contrary to Foucauldian genealogies of expertise in legal proceedings, alternative foundations can be postulated, not necessarily contingent on the pursuit of truth⁴³. Porret’s explanation is particularly compelling as it provides an opportunity to acknowledge the role of humanization of punishment played by science in the courtroom.

Science, in this context, is not merely a tool for pursuing the truth, but also a means for applying knowledge in a way that enhances personal integrity and humanizes punishment. As previously seen, in some Italian cases involving neurotechnological applications in courtrooms, offenders have been identified with neurogenetic diseases, which involve the impairment of a specific gene that affects the neural area responsible for controlling aggression. In light of this finding, Italian judges elected to reduce the offender’s sentence, acknowledging his diminished capacity for full competence⁴⁴. These sentences were welcomed by some commentators as a way to acknowledge the vulnerabilities of criminal population, by

⁴¹ On the historical origins of the principle see J.H. LANGBEIN, *The Origins of Adversary Criminal Trial*, Oxford University Press, Oxford, 2003. A recent look at the evolution of the principle, in the light of European framework can be found in: P. FERNANDEZ, D. GALLO AND A. NATO, *Stocktaking on the principle of nemo tenetur in the case law of the ECtHR and CJEU*, in *EUROJUS*, 11(2)/2024, pp. 406-429.

⁴² M. PORRET AND M. CICCINI, *Objectiver la vérité ? L'autorité de l'expertise judiciaire (XVIe-XIXe siècles)*, in *Carnets de bord*, 7/2004, pp. 5 ff.

⁴³ One such alternative historical explanation pertains to the negotiation of jurisdiction, which resulted in the involvement of various corporations, notably the medical sector, in the administration of justice. The objective of this involvement was to obtain the legitimation of *ius puniendi* in a consensual manner. On this see M. ASCHERI, “*Consilium sapientis*”, *perizia medica e “res iudicata”*. *Diritto dei “dottori” e istituzioni comunali*, in *Monumenta iuris canonici*, 6/1980, pp. 533 ff. An interesting recollection of the emergence of medico-legal experts is in S. DE RENZI, *Witnesses of the Body: Medico-Legal Cases in Seventeenth-Century Rome*, in *Studies in History and Philosophy of Science*, 33/2002, pp. 219 ff.

⁴⁴ Court of Appeal of Trieste, 18 September 2009, n. 5; Court of Como, 20 May 2011.

humanizing the criminal judgement in light of new neuroscientific findings⁴⁵.

Of course, a crucial question is whether reducing a sentence genuinely serves as a sufficient tool for humanizing punishment. While it may contribute to a more proportionate and rehabilitative approach to justice, it is unlikely to fully achieve the goal of humanization on its own. Instead, its significance lies in its role as an indicator of the evolving relationship between scientific knowledge and legal decision-making.

This interaction exemplifies how the integration of scientific insights can influence judicial determinations, ensuring that punishment is tailored to the individual's cognitive, behavioral, and social circumstances. By incorporating empirical evidence into sentencing decisions, the judicial process might move away from rigid, retributive frameworks toward more flexible and evidence-based approaches.

If scientific rationality plays an increasingly legitimizing role in judicial decisions, it may redefine the very foundation of legal judgment, suggesting a move toward an alternative justificatory paradigm – one where legal legitimacy is derived not only from adherence to procedural and evidentiary rules but also from the capacity to acknowledge individuals' vulnerabilities also as criminal offenders.

Thus, while sentence reduction alone may not be sufficient to humanize punishment, it represents a broader transformation in the way law, science, and justice intersect, potentially reshaping the philosophical foundation of *ius puniendi*.

⁴⁵ For a deep understanding of this argument see F. COPPOLA, *The Emotional Brain and the Guilty Mind: Novel Paradigms of Culpability and Punishment*, Hart Publishing, Oxford, 2021.