

# *Thoughts and Observations of Punishment in Contemporary Criminal Law\**

Received: January 21st, 2019 • Approved: September 4th, 2019

<https://doi.org/10.22395/ojum.v19n38a14>

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## **ABSTRACT**

The present work is seeking to summarize the discrimination line between crime and punishment through a group of situations that still today continues to provoke questions of particular complexity. This guilt "nature" requires a reconstruction of the meaning of controversial hypothesis that is able to express wide-ranging evaluations that go beyond the purely literal profile of the normative formula. It would be enough to remember the "objective elements of guilt" to measure the extent of such a warning in depth.

*Keywords:* punishment of crimes; discrimination; causes of exclusion; unlawfulness; guilt; crime theory; criminal policy.

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\*\* This work stems from an advanced research carried out by the author, which originated in the questions of his students during a class taught by him in The Hague (Netherlands).

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## ***Pensamientos y observaciones sobre el castigo en el derecho penal contemporáneo***

### **RESUMEN**

El presente trabajo busca resumir la línea de discriminación entre crimen y castigo a través de un grupo de situaciones que aún hoy continúan provocando preguntas de particular complejidad. Se trata de una "naturaleza" de culpa que requiere una reconstrucción del significado de hipótesis controvertidas, capaz de expresar evaluaciones amplias que van más allá del perfil puramente literal de la fórmula normativa. Sería suficiente recordar los "elementos objetivos de la culpa" para medir en profundidad el alcance de tal advertencia.

*Palabras clave:* castigo de delitos; discriminación; causas de exclusión; ilegalidad; culpa; teoría del delito; política criminal.

## ***Pensamentos e observações da punição no direito penal contemporâneo***

### **RESUMO**

O presente trabalho busca resumir a linha de discriminação entre crime e punição por meio de um conjunto de situações que ainda hoje continua a provocar questões de complexidade particular. Essa "natureza" de culpa requer uma reconstrução do significado de hipótese controversa que é capaz de expressar um amplo espectro de avaliações que vão além do perfil puramente literal da fórmula normativa. Bastaria lembrar os "elementos objetivos da culpa" para medir a extensão de tal aviso em profundidade.

*Palavras-chave:* punição de crimes; discriminação; causas de exclusão; ilegalidade; culpa; teoria do crime; política criminal.

## INTRODUCTION

The difficulty of finding a director capable of justifying the complex and multiform phenomena that constellate the category of punishment, has not discouraged the international and European doctrine from the attempt to offer a classification of the same within an (at least relatively) homogeneous dimension, to which it is possible to define with due precision the systematic collocation, and to verify, at the same time, the plausibility of the normative choices placed at the base of their recognition.

What must first be remembered, for the purpose of our research, are those conceptions that do not renounce to include in the "crime theory" the same "punitive" dimension, and which can be subdivided, with some approximation, into two theoretical positions, moreover, of a certain contiguous measure: The first, favorable to the insertion of additional connotations denoting an appreciation, either in "axiological" or "teleological" terms, regarding the requisites of the fact, of the anti-juridical nature, and of guilt; the second, rather, to conceive as a "fourth" element of crime the punisability, in the light of the conditions from which the order (of course, in line with the principles that define the "face" and the physiognomy) comes to make the inapplicability of the penalty dependent.

As for the "need of punishment" and/or its "merit" (Roxin & Schönemann, 2017, p. 71; Schmidhäuser, 1984; Stratenwerth & Kuhlen, 2011, p. 29; Langer, 1972, p. 275; Wolter, 1996, p. 207; Kleszczewski, 2016; Rönau, Hohn, & Zieschang, 2011; Freund, 2013), a solution which would seem singular at first glance (Volk, 1985, p. 887. Günther, 1983, p. 240; Bloy, 1976, p. 229; Jescheck & Weigend, 1996, p. 50; Kunz, 1984, p. 156; Otto, 1978, p. 53; Kempf, Lüderssen, & Volk, 2013, p. 104; Pfaffinger, 2015, p. 270; Bott, 2016; Wessels & Beulke, 2011; Asholt, 2016; Griego, 2018; Hallmann, 2017; Schmitt-Leonardy, 2013; Sinn, 2013, p. 77) could hardly be both a typical "element" of the "crime" and on the other hand to "enter" the basis for legitimizing the offense in a "circuit" of its own relevance, so as to avoid undesirable arbitrary configurations of non punishable mechanisms.

It is true that the relevance of the category in question to the essential components of the crime is affirmed without further qualification profiles, rather than appealing to "pre-normative" considerations such as those underlying the *Strafwürdigkeit* (Giannoulis, 2014) and *Strafbedürfnis* (Sickor, 2014). Indeed, it is limited to recall the requirement of punishment as a necessary "complement" of the criminal phenomenon, placing it in direct correlation (and exclusive) with the conditions under which the order subordinates its choices about the final evaluation's "entry".

It cannot be forgotten, how, in cultivating a similar objective, the assessments concerning (above all) the "need of punishment" and the boundaries of their legitimacy on the constitutional and political-criminal level come to register significant

convergences with those evaluations of opportunities on the repressive plane that qualify, within the second current of thought, the identification of the "casuistry" of the hypotheses of non-punishment. It can be seen that the second approach seems to be oriented towards a more decisive and convinced "equalization" of the causes of non-punishment, where the former reveals some differences between the groups of phenomena from time to time examined, variously connoting them according to "points of view" of more complexity.

Threats of punishment would come to operate "with reserve" in the sense that they would be such as to apply "to the anti-juridical and guilty facts only in the presence of a series" of additional conditions, intended to create a space for further political-legislative choices on the existence of crime: In the sense of "found" and of "excluding" the punitive dimension.

## 1. IS PUNISHMENT AN ELEMENT OF CRIME?

For admission of the same proponents of this approach, its roots would find significant support in the elaborations developed by the same "progenitor" of the modern theory of crime: Ernst Beling (1906, p. 47). In fact, it is not possible to forget among the elements of crime, beyond its typicality, anti-juridicality and guilt, the necessity that the conduct provided with such qualifications could be considered a "threat of punishment", as well as the further, particular, "conditions" (of punishment, in fact) possibly required for this to operate (Beling, 1906, p. 47).

As Theodor Rittler (1930) observed, the contraposition between crime and punishment clearly emerged in the thought of Karl Binding thanks to the distinction between Norm and *Strafgesetz* (Jacobs, 2011). Once this conception has been overcome and its link with the typicality to criminal law recognized, then it will be "inside" the latter that the demarcation line between *Tatbestand* and (punctual) conditions of punishment must be identified. However, due to now being entrusted to the regulatory (criminal) system, that delimitation cannot prove to be more difficult and inaccessible, as Beling himself, while considering it indispensable, did not fail to recognize.

It is important to add that the profile relating to the "threat" of punishment, once compared to the triple "qualification" of the conduct referred to above, still continues to gravitate, in Beling's thinking, in a perspective not completely comparable to that currently shared. It is emphasized that the logic underlying the category of *Tatbestand* should be satisfied, even if a threat of punishment is not always specifically recognizable: For example, the *Tatbestand* of crime would be recognizable even in the case of a violation attempt, or in that of a negligence, although these behaviors do not come to form the object of a "threat of punishment". In essence, *Tatbestand*, and the conduct consistent with it, seem to express, in author's thought, a "to be" not always,

necessarily, integrated and "completed" with the "legal" sanction that such threat comes to predispose. From this point of view, we can therefore assume that the "particular conditions" of the threat (of which we are just talking) come to denote, rather than an element of the crime, as distinct from the Tatbestand, the fruit and the prerogative in which the "positivization" of the *jus puniendi* expressed. It was, however, a threat of punishment destined to an orbit around a defined "object", and as such, it was removed from discretionary or even arbitrary evaluations; but this does not alter the fact that the plan in which the problem of punishment was situated shared only apparently the quality of a "crime" requirement, concerning it, rather, the legislative profile of that choice to punish it or possibly punish it to certain conditions it came "side by side" and juxtaposed to its intrinsic structural connotations (Roxin & Schünemann, 2017).

Now that the issue of punishment no longer lends itself to being framed in the scenario still "in progress" of such theorizations, the fundamental question that emerges can only concern the identification of the nature and physiognomy of political-criminal choices held in that are able to support the last qualification profile attributed to criminal responsibility. Therefore, it would seem difficult to offer an answer for such question, if not "shifting" the angle of observation in line with the modern developments of criminal reflection on problems inherent to functions or purposes of the sentence; or for those who tend to distinguish the two notions —those related to the functions of sanction— resulting in the "ends" of the same, as "ideal" programs never fully achievable, *a fortiori* little significant in terms of the plausibility of particular forms of renunciation related to the phenomena considered here.

Moreover, while denying that the punishment becomes "part" of the components of crime, the heuristic profile underlying this preliminary survey seems to postulate the need to grasp the close connection between the function of punishment, on the one hand, and of the objective and subjective structure of the offense, on the other, in the sense that this connection would represent "the indispensable basis not only for the qualification of that as a crime, but for the same attribution of meaning to the penalty. This consideration comes to recall these cases depending on a fall of general prevention underlying the protection of legal assets, on a connection to the implementation of the threat edict, or even on the need for special and general prevention attributable to the execution of the sentence.

From this point of view, however, a fundamental question seems to arise: Its relevance is expected in terms of even greater problems, assuming the category of punishment as an element of the crime. Indeed, since the function of punishment cannot be separated from the same *ratio puniendi* at the base of the offense, under what conditions will the autonomy of punishment be recovered compared to other profiles of qualification of the offending fact?

On the other hand, and at least at a first glance, it would not be easy to observe how the Zweckgedanke profile subtended to the category of punishment would concern "additional" interest balances (Jacobs, 2011) compared to the founding profile of the crime based on typicality with respect to which political-criminal assessments would, on the contrary, assume an exclusively "precodificatory" character, and as such, they would no longer be capable of being further rediscussed. Actually, the assessments on whether to punish would always arise from a confrontation between opposing interests and objectives of criminal policy, and there would therefore be no reason to consider, in a completely recognisable way, the question about their meaning definitively closed, where the presence of further needs, capable of legitimizing the abstention from punishment, is outlined. So, for example, why should the reasons of family politics be considered as "other" when it is not meant to punish the theft between spouses, but to protect the family, and when not even a certain family morality, and the same necessity of assuring the integrity of the relationships of which the family is intertwined, are nothing but a set of incriminating prepared norms?

Similar reliefs, destined to make the "holding" of the same essential requisite and (still) called to play the role of distinction regarding the phenomenon of non-punishment, seem problematic at least. In this regard, it is well known how the criterion generally invoked to define the field of typicality, i.e. the offense category, in order to construct further evaluations in terms of anti-juridicality and guilt (Höpfel & Ratz, 2011, p.10).

A category, in fact, should be considered an expression of a "negative" sanction, on which a "positive" sanction that decrees the effect of non-punishability may intervene, "retraining" the offense (as a whole) that such offense involves.

Now, if this approach is undoubtedly suitable to overcome, thanks to the appeal of the nature (still) of "criminal" norms of the same causes of non-punishment, the ancient idea of indissolubility between precept and sanction seems to leave the questions on the example mentioned above (or others, which we leave aside for the moment) open. In fact, could not do without a research aimed at probing the usability of further and much more varied hermeneutical criteria. The latter offering (think about the reference to the regime and the significant consequences from a procedural point of view) does not seem able to allow the elaboration of sure and precise "distinction" between the constituent dimension of offense and evaluations regarding the (only) choice of punishment.

In order to bring order into this complex and delicate matter, it seems necessary to put in evidence a general premise which is not always clearly postulated in the context of studies dedicated to punishment.

Even in the second field of phenomena the relationship between the illicit and the "reasons" to (not) punish cannot disregard motivations pertaining the way of posing protection, and to elements from which the insufficiency of certain data can be inferred as ends of punishment. But this does not detract, however, from the differences between the two areas of considerable importance. Also regarding the sphere of powers of evaluation inherent to them (think of the profile of "discretionality" that qualifies the second category of situations), it would be inadvisable, if not actually misleading, to adopt an essentially homogeneous perspective. A perspective which would leave in the shadows the question concerning the belonging of punishment to "elements" of crime in the sense that, without wishing to exaggerate the importance of this problem, it would seem, on closer inspection, to offer elements in favor of the first solution, only regarding the area occupied by the verification of "thickness" of offense (in one with the evaluations concerning the teleologism of the sanction) in the context of the eventual ascertainment of the existence of a "small" fact.

## 2. CONDITIONS OF PUNISHMENT OR NON-PUNISHMENT FOR FACTORS THAT HAVE OCCURRED, AND PERSONAL REASONS FOR EXEMPTION FROM PUNISHMENT

Given the causes of "non-punishability", and once the persistent uncertainties in identifying criteria on the "axiological" plan (Schönke & Schröder, 2014.: p. 124; Schönke & Schröder, 2019, p. 1187; Höpfel & Ratz, 2011, p. 10) that are relevant to our problem are found, the question that is legitimate to appear would seem to be the following: Are there connotations on the structural plan, that without imposing a reconstruction disseminated in a plurality of indices (perhaps of only indirect relevance) scattered here and there in the order, are able to link that even frequent reference to the offense to a data of greater consistency and "pregnancy" on the denotative level? It seems to us that a substantially positive answer may arise from this question, even with the precautions imposed by the difficulties of the matter.

On closer inspection, and remaining for the time being in the field of typicality, it is important to point out that the unflinching moment from which the relative evaluation arises seems to be identified in the proper dimension of conduct as the essential "fulcrum" of the incriminating option. In this way, the *actio finium regundorum* between offense and punishment would, in fact, be able to benefit from that parameter of relevance that would not be possible "to substitute" in any way with the variegated phenomenology of the situations from which the order descends, precisely, the (only) outcome of the abstention from punishment.

In order to test the validity of such a hermeneutical cue (Liszt & Schmidt, 2013), but without fully evaluating its significance and systematic scope, it seems necessary to focus first of all on the particularly problematic category of objective punishment conditions.

At first glance, one could observe, in a case of murder, that the event-death, as an element separate from conduct, is constitutive of the crime, and not instead a condition of punishment? To such a doubt it is not difficult to answer, however, that the same structure of conduct cannot be grasped but in an intrinsically "causal" dimension, since it is otherwise impossible to define the same typical meaning.

It is not a question of accessing the opinion according to which the conditions of punishment are not necessarily, but only possibly connected to the offending behavior of causal plane. It is rather to point out that, in the hypothesis under examination, the physiognomy of the conduct comes to be "conditioned" (but to "backward", if one may say so) from presenting itself in connection with the event, and in a relationship of strict dependence with this. Besides, it is enough to think about the importance attributed to the attempt to realize the fact that the behavior is colored in different terms, where death does not occur, in the sense that its own structural requisites must then be captured in a dimension of a prognostic nature that conforms to the parameters of fitness "and" non-equivocality. The fact changes, and changing is not only the outcome (the failure to produce of the event), but the same physiognomy of the human behavior deduced in the indictment.

Going further, one comes across those hypotheses, in which the physiognomy of the controversial element suggests a different order of evaluations about its role and meaning. Consider the declaration of bankruptcy. The latter (*rectius*, the declaration of bankruptcy) is but an essential element, but not in the technical sense of an element of crime (of bankruptcy), this being centered on the offense already expressed by (and typified in) constitutive conducts, but of insolvency which, to be legally relevant for bankruptcy purposes, must be judicially established. The conduct in question does not postulate, moreover, an evaluation in causal terms: those conducted assume importance "of mere danger" for the thinning of the guarantee creditor, without thereby "a verification of actual connections" with the circumstances set for the purpose of verification carried out at the bankruptcy stage. If everything conspires to suppose, in short, that failure as such does not "feedback" on the structural dimension of the conduct (Schonke & Schroder, 2014, pp. 124, 194), we can well assume that the aforementioned connotation is to form a condition of punishment in these hypotheses.

Regarding the public scandal of incest, and in the perennial dilemma about the interest pursued through the indictment, it cannot be denied that a significant index derives from the normative reference, to the "way" through which the incestuous conduct has been realized, and which comes to accentuate the connection link with that further event: A reference, in short, which, coming to affect the appearance and dynamics of the same incestuous behavior, makes it then advisable to assign the aforementioned result of the role of a constitutive element of the case in question.

We will now give a brief look at the “penalty thresholds” in tax criminal matters. In this regard, it is difficult to question the configuration of these thresholds, in case of evasion, as punishment conditions. More precisely, while the physiognomy of the conduct regarding the event-evasion *tout court* cannot but assume a causal dimension, as it regards, conversely, the extent of tax evaded, it does not seem able to affect that dimension, already structurally ensured by the occurrence of the event, configuring, rather when considering that this measure is largely independent of a specific “act” of taxpayer, a necessarily distinct and separate qualification (*mutatis mutandis* is a partly analogous phenomenon in the same case of bankruptcy, in which the relative declaration translates into a judicial “appreciation” of the situation in which the enterprise, only intended to “condition” the relevance of the existing imbalance).

Despite a certain assonance on the linguistic-lexical level, a different conclusion must instead come in the case, for example, of the significant alteration of the price of financial instruments in the case of manipulations of the market. In this regard, and moving from an economic analysis sensitive to the real mechanisms of the market, Fischer (2018) stresses in a perspicuous way that “[it is not] conceptually possible to establish, between two different prices, which is natural and altered”; the pretended “event (of danger)”, that the “sensitive” profile of alteration should increasingly remark, “is actually revealed as a pseudo-event, mere verbal amplification of the only conduct, which dissolves in the conduct” (Fischer, 2018, p. 138).

The reference to the connotation of sensible alteration, although at risk of indeterminacy, is revealed to be indispensable not only to enrich an agent’s will, but also to exclude the relevance of the facts of uncertain qualification, from which a real dangerousness of the conduct could not clearly emerge. In short, there is no shortage of good reasons to be able to believe that, once the structure and the relevance of the offense on the characteristics that characterize the manipulative behavior have been focused, there must be a constitutive element and not a punishable condition in this case.

More and more controversies have given rise to the normative hypotheses centered on the reference to the occurrence of a “damage” (think of some of the cases aimed at protecting the inviolability of secrets). Such a contrast of opinions moves from the “harmfulness” assumption that is conceived in the same way as any kind of prejudice (patrimonial, moral, health, physical or psychological, and so on). It may also derive from an attempt to disclose the data covered by secrecy, and to qualify the aforementioned result as a condition of punishment. It may pose as an attempt of revelation and it will lead, in spite of the fact that the damage has occurred, to the ability to influence the physiognomy of the conduct, considering that the aforementioned attempt (while it would be such with respect to revelation) could not refer to the further prejudice, however realized.

The solution should be now outlined. We can deduce where the revelation of professional secrecy becomes relevant if "it can derive harm" from it. In this case, the prognostic configuration of the prejudice in question assumes a "modal" note of the conduct itself, resolving the structure in a sort of "typed" attempt directly from the legal model. And it is precisely such a legislative choice that seems to suggest the different option adopted regarding the contiguous hypotheses expressly conditioned by the occurrence of that prejudice. An option, in short, that would be substantially disregarded if it were claimed to report a similar attempt, even to cases planned for the verification of an actual harm.

We now come across those hypotheses that a part of the doctrine did not hesitate to consider "absolutely peculiar" (Bellamy & Dunne, 2016), those in which the controversial element is configured by law. The thesis in favor of affirming its conditional nature is based on the fact that the law does not require the guilty character of the failure (or non-compliance), not taking into account the fact, however determined, that such an outcome results in the impossibility of meeting the obligation to fulfill. On the contrary, we point out that the non-observance of the obligation is the object of the agent's original intention, who configures the conditional data as an element unrelated to guilt. The need to enhance the characterization of the fulfillment in the guise of omissive conduct is emphasized, with the consequence of having to provide it with all the requisites necessary to recognize (currently) its criminal relevance.

In our opinion, where due importance is given to the express reference to conduct supported by the intention not to fulfill, the thesis favorable to the recognition of a constituent element should be considered, in any case, more better founded. Actually, nothing can prevent that the non-fulfillment, once separated from the confirmation of the characteristic characteristics of a conduct (think of cases of force majeure), can act as an event of the crime. An event, however, not necessarily further and "conditional"; this, by virtue of the reference in order not to fulfill, in the guise of a qualifying note of the "finalistic" orientation imprinted in the conduct that is connected to that event. Indeed, it is true, as it has been observed, that it does not seem to be a specific malice, since the case contemplates the actual realization of the purpose. However, on closer inspection, it is precisely from the "synthesis" between the concretization of the event and the finalistic dimension expressly conferred on the conduct that the most profound sense emerges, already on the structural plane (as well as on the axiological one, and on reverberation), of the normative provision. There is a conjunction, a "bridge" that structurally and teleologically connects those two moments: The finalistic tension, in the guise of an element of the fact, comes to model and "type" the conduct according to a certain outcome, and the latter is in turn to connote the picture of the story in line with those same developments towards which the behavior of the agent had to be, by definition, addressed and directed (Fischer, 2018).

Without claiming to carry out an investigation covering all the controversial hypotheses of punishable conditions, we limit ourselves to considering the figures focused on the occurrence of a "danger" regarding certain outcomes variously contemplated in the individual indictments. Consider the controversial hypotheses of "indirect danger" in which the danger is reconnected to the incidence of the conduct on certain material entities: The framework of the circumstances to be evaluated is the unique and exclusive naturalistic connotation, to which the same conduct comes to participate thanks to its influence on its concrete morphology. If it were considered to be in the presence of conditions of punishment, it would arrive to postulate a frankly indecipherable systematic scenario. It is evident, first of all, that the mode of attitudes of the "factual" circumstances cannot but influence the individuation of the same physiognomy of the conduct, since, outside of these, it would lose its role and meaning on the plane of typicality. To give just one example of the latter, how to "dissociate" the extent of the conduct consisting in firing the fire from the circumstances determined by the flare of that fire? To understand these circumstances as a condition of punishment, what would remain of the typicality of a conduct whose structure is captured by the law precisely from the perspective of its impact on the material reality connected to the factor-fire?

The objection is predictable: It is not the situation inherent in the *res attinte* by the fire, but the "danger" that is given is to be understood, eventually, as a condition of punishment. However, it is precisely at this point, on closer inspection, that the construction turns out to be completely unfounded. The danger, precisely because it consists of a "judgement", although formulated on the basis of the concretely existing circumstances, does not have any connotation of a material nature: It resolves, in fact, into a mere hypothesis or conjecture about possible further outcomes currently not verified. And then it seems frankly arduous, already in the light of an elementary common sense, to configure that judgment in the guise of an "event", or in any case, of a relevant factual fact as a condition of punishment.

It must be recognized that, even for different reasons, neither the "material" situation, nor the danger, lend themselves to reproducing a pattern that can be traced back to the sphere of conditional events. And if it is true that —compared to the danger— the adoption of such a model leaked, in the logic of the legislator, the clear intent to "overcome" the difficulties inherent in the test of malice, the fact remains that such a choice is revealed systematically impractical in terms of an evaluation carried out in purely objective terms, we can say that those who —excluding the writer— think today to share similar concerns, should devise a different path from that based on the alternative conditional (Bellamy & Dunne, 2016).

### 3. RELEVANCE ON THE TELEOLOGICAL LEVEL OF THE PROPOSED SOLUTIONS

Apart from re-examining all the cases considered up to now (on which, moreover, certain topics which can be used in a teleological key) have emerged, we are referring,

in particular, to hypotheses such as incest, the types of danger, crimes linked to the presence of an injury or (vice versa) to the "possibility" of this. Well, while having to reiterate that the only axiological profile could offer the right for different hermeneutic solutions, being it conditioned, as noted above, by "precomprehensions" almost inevitable towards the specific "object of protection", our purposes will suffice to highlight the compatibility of choices made with a rationally and teleologically-founded value appreciation.

As regards the connotation of danger, the idea of ousting its relevance from the fundamental substratum of indictment still arouses serious perplexities. Indeed, the inclusive case of danger cannot fail to color the conduct of a negative value profile aimed at asserting that the latter belongs to the "world" of constituent elements. Rightly in his absence, the fact does not present itself as significantly and understandably detrimental to any juridical good, or in any case as distinct from other illicit offenses of another juridical right already punished in a different way. Even if in some cases it favors the conditional nature of the danger, it does not fail to warn, for example, how "it must be selected in terms of" teleological "relevance both the pipelines and the objects on which they are affected" (the dike is not a simple concrete wall, and its "break" does not coincide with a scratch of a few millimeters produced with the launch of a stone). Let us note the following: The conduits and the material objects, the latter coming to "interpenetrate", so to speak, in the meaning assumed by the same conduct, making that one constituent of the empirical base (the only one that is really relevant for the purposes of the relative judgment) on which the prognosis of danger is modeled, *ex ante*.

Finally coming to the hypothesis of "harm" and indeed, first of all, to the one of "possibility", it seems difficult to deny how, in this case, it comes to present a close correlation with the "instrumental function of protection of the underlying interest of freedom of recourse to performance of necessity or quasi-necessity, which can be threatened by revelation or employment" (Freund, 2017, pp. 382, 536). It is true that there is no need to specifically reconnect the "nature" of that requirement to such premises be it real or potential, as a constitutive element of the crimes contemplating it. However, just moving from the reference to the role and scope of that "instrumental function", it seems reasonable to assume that it gives rise to a significant difference compared to the cases of actual harm. That said, in these there is not a "constraint" connected to the reliance placed in a third party, instrumental to the needs mentioned above, so the disvalue of the aforementioned cases seems to focus on the injury to confidentiality (although declared punishable), not to make the criminal response excessively invasive, only in the presence of a "further" confirmation in terms of injury. In the first, vice versa, (also) the only possibility of a prejudice is conceived as immanent data to the same foundation of protection, which, for the note, will come to assume or

less meaning, depending on whether the lack of a condition of "privacy" about certain news may or may not play as a factor that can limit or make more uncertain the real possibility of recourse to the contribution of the professional.

At this point, it would remain to be questioned about the conditions necessary to be able to "impute" the occurrence of a condition of punishment. The observations made so far seem to lead, however, to a substantial downsizing of such a problem. And this, in the first place, because if it is true that, as it would seem to emerge from the aforementioned cases, the area of conditions must be considered tendentially limited (especially if a significant number of intrinsic conditions is "converted" into as many constituent elements). The idea of placing them outside the guilt area should no longer cause excessive concern. Beyond this observation, it must be added that as inspired by a "reading" of the conditional phenomenon in terms of strangeness with respect to the structure of the conduct and its teleological meaning, the choice of separating conditional events from the sphere of reproach on the subjective level seems to be confirmed.

What is said does not mean that, following such an approach, we must return to a personal model *Unrecht* forgetful of the reasons for an offense perceivable in terms of objective relevance. On the contrary, it means insisting on the need to grasp the meaning of the conduct in its dynamic interaction with the other elements of the offending case, in order to verify which ones of its requirements are able to illuminate the offensive projection, and which ones lend themselves to act as a limit to punishment without involving a "manipulation" of the real anti-preceptive core underlying the single illicit act.

On the other hand, and to conclude on this point, also the "recovery" of causality, or in any case of the material substrate on which the conduct comes to affect (think of the "danger of danger"), to a hermeneutical logic sensitive to the "disvalored" action of the subject on the perspectives and possible developments of their choices and determinations; it does not act as a relevant connotation in an "external" and further dimension, but where the context requires it as an "attributive of meaning" paradigm to an objective and subjective dynamic that is consistent with that of the offense as a "mode of injury" in which, as it is well known, the same basic legitimacy of the criminal instrument is detected.

#### **4. CAUSES ARISING FROM NON-PUNISHMENT: CONFIRMATION OF THE ROLE OF THE CONDUCT AS AN ESSENTIAL REFERENCE CRITERION**

Notwithstanding the above, the numerous issues affecting such a phenomenon do not seem likely to seriously question the fundamental hermeneutical directives that were considered as the basis of the present survey. If it is true that the hypotheses

analyzed from time to time do not always allow their "automatic" ascription to the field of non-punishment, it is not in fact that their structural "conformation" already shows the need for placing them in a dialectical relationship with the conduct of the facts' author with respect to which they come to operate.

In particular, it is a phenomenon in which the implementation of such behaviors is accompanied by the realization or not (no more than events, but) of further conduct of "antagonistic" meaning in relation to those first considered: while it leads to ensure that the provisions that express it are in principle, assuming the same characteristics in terms of objective materiality with respect to those on which they depend, it is nonetheless to foster its autonomy thanks to the fact of opposing them to the latter by retrospectively neutralizing" or reducing the related harmful aspects. This also explains why their very different structural profile is to be sculpted thanks to the aforementioned contrast so that, ultimately, the postulate (so far) needed to erect the typical conduct at the heart of the crime is not denied, but rather corroborated, precisely by the fact that such an "antithesis" between pipelines lends itself to the role of a criterion hermeneutic to distinguish the sector of the constituent elements from that inherent to the causes of non-punishment (Jager, 2017).

The "posteriority" of certain behaviors regarding the crime, rather than being able to assume a chronological dimension, should rather express a relevant connotation in logical-systematic terms: That is, to "invest" a crime in all its constituent elements. An integration, in fact, that, in order not to appear as the result of an entirely "apodictic" vision, should, if necessary, be compared, to recognize its existence, also with the meaning of "antagonistic" conduct, in order to establish if this should not, in reality, be conceived as a requirement of a constitutive character. Thus, for example, by pouring in the case of desisting from the attempt, it will always be necessary to determine whether the interruption of the conduct should be conceived as a supervening cause of non-punishability, or instead—as, moreover, we did not fail to hypothesize—as a preventive factor of the same attempted crime.

It seems evident that such an argument does not touch the extent of the findings made so far. Structurally, and by reasoning in objective terms, desistence cannot fail to appear opposed to acts directed to the commission of the crime; therefore, while for the latter it will obviously never be possible, the alternative between essential or non-essential elements of the case for the former will always remain logically and systematically plausible.

On the other hand, one cannot help observing how the reconditioning of "antagonistic" conduct to the logic of non-punishment is, in principle, frankly more reasonable even under further points of view. First, and without prejudice to what has already been said about the desistence, in the same cases in which a different solution

might appear not entirely unfounded, the inconsistencies that might derive from it might not be negligible. Suffice it to recall, even if it is *en passant*, the case of "omitted reclamation" of the sites of which the pollution was caused, to notice the many (and almost insuperable) questions on the systematic level, and in terms of fundamental guarantees that would emerge if the meaning of the crime was "focused" on that form of omission; and this, even to suppose that the only relevant conduct should be the omissive one, while the pollution should act, in this case, as a mere assumption of the crime.

It is not inappropriate to point out the fact that a forecast like the one under examination increases its ambiguity profiles, also because of the (questionable) normative technique used by the legislator, while, in truth, and at least in the vast majority of cases, the normative formulation (variously inspired by an ad hoc reference to forms of "withdrawal" from the illicit) induces to opt with sufficient margins of certainty in favor of the solution of non-punishment. In fact, although the legislative formula cannot always be considered to be direct (as has been more often noted with regard to the conditions of punishment), this importance does not mean that it should be considered completely irrelevant, constituting it, however, a useful starting point to correctly address the issues on the mat.

The "polar star" to look to decipher this set of phenomena cannot be represented by the specific way of posing the functions attributed to the sentence. The same relevant regulatory provisions on the matter show, in fact, how the ratio pursued by the same derives its lifeblood from that profile of "cultural orientation" of the criminal threat, which causes that the violation of the original command is not-rightly assumed in a mere ethical-political dimension (as a rupture of a *vinculum subjectionis*), but concerned in its political-social projection (as a rupture of a balance capable of being reintegrated). It is the "dynamism", in short, on the teleological level expressed by the non-punishment of rendering justice the choice to enhance the "dialectic" of the assessments that intercede between the two "poles" of the affair.

On the one hand we have the crime, which in its typical physiognomy demands to be anchored to a clearly defined selection of primary interests and to their "crystallization" in a legal model that establishes its relevance. Moreover, that is a definition of paramount importance in order to appreciate with due rigor those "counter-interests", which, in necessary harmony with the former, can explain their effects on the adjoining ground of the causes of justification, elevating them to the rank of "permissive norms" of the same offending conduct.

On the other hand, we have the (supervening) causes of non-punishability, which, in their appointment on the initiatives of the same recipients of the threat, allow to probe the real opportunity to persevere in a position of rigor, opening them a window

on the “management” of the criminal conflict by those who have aroused it, and on its concrete determinations in the presence of the possibility to remove it due to a “repentance” behavior. The latter can ultimately reach a decree of “success”, that is the appeal to preserve legal assets, in line with expectations of protection intended in this way to receive an (even more) significant confirmation and positive reaffirmation. The essential conditions of the phenomenon of non-punishment occurred: their manifestation, that is, through conduits distinct from those considered “typical”, but which legitimize, albeit due to the fact of re-linking to the “contexts” in which the former were able to express their original meaning.

In the face of the phenomena hitherto outlined, fewer problems, at least systematically, about the structure of relations with the category of punishment, are delineated in some adjacent sectors, and yet characterized by significant differences. So, if it is true that not a few perplexities regarding their legitimacy pose the forms of “procedural” repentance (less consistent, to be true, where they still imply some connection with the impediment of “further consequences”, or even with the destabilization of associative structures), it is still evident that the same accentuation of a logic of the type of trial makes manifest their gravity in a perspective separate from the physiognomy of the indictment, and first of all, that of the conduct on which it rests.

The causes of extinction of the crime are clearly pertinent to the non-punishment sector, in which very different institutes coexist, and on which the scholars of our discipline have long been questioning. Since this is not the place to investigate similar issues, one can, first of all, observe that the hypothesis in which the subject is given the possibility of keeping a “reparatory” attitude, which is not in line with the logic of the causes of non-punishability, must be considered a “betrayed” relationship of correspondence with the choices that govern the punishment of the conduct held *contra legem*. The extinctive models concerning the contraventions in the field of work or environment outline restorative behaviors functional to the “neutralization” of the offense (in a broad sense), expressed by the previously discussed behaviors.

It is opportune to remember that such extinctive causes do not imply *per se*, to differences in the “classical” hypotheses of supervening causes on which we have just discussed, the assumption of a criminal responsibility for the fact that we preach the extinction. And this character recurs, on the other hand, in an emblematic form, for some of the more traditional extinctive causes, such as amnesty and prescription. Regarding, although in principle shareable, the regulatory models related to the post-factum activation by the author, we must guard against the choice to accentuate beyond measure the extent of the “prescriptions” to be fulfilled, on pain of risk —not entirely amendable by virtue of the “consensual” nature of their application to create excessive tensions with the constitutional principle of presumption of innocence: a risk from which, perhaps, the recent discipline of “suspension with trial” does not appear

completely immune, at least where we do not care to interpret with due care (as it has also tried to make the most sensitive doctrine) the procedural hubs that characterize it, and the content of the evaluations that are grafted.

As regards certain extinctive mechanisms related to more or less occult forms of "monetization" of the debit (just think of the frequent use of the "amnesty" instrument), it seems difficult to deny how they should be considered without an adequate basis of legitimacy. As we have clearly observed, the "credibility and functionality of the system" cannot, under any circumstances, allow the non-punishability to be resolved, beyond appearances, into a sort of exchange goods in consideration of advantages that the order proposes to reach on eccentric plans with respect to the offense or the sense of punishment (Kindhauser, 2017, p. 228).

## 5. "PERSONAL" CAUSES OF NON-PUNISHMENT AND THEIR RELATIONS WITH THE "EXCUSES" AND REASONS FOR JUSTIFICATION: GENERAL PREMISES

It is intended to allude to those cases of exemption from punishment that relate to the qualifications held by certain categories of persons and/or to the relationships between such subjects (Maurach *et al.*, 1999, p. 98; García Pérez, 1997, pp. 33, 104, 237): in other words, to those phenomena that go under the name of "not to be or not original punishable" personal causes.

The most significant problem that arises in this regard consists, as it is well known, in defining the conditions for distinguishing the real circumstances of (only) exemption from punishment with respect to those likely to be traced to the bed of the sub-criminal offense species of hypothesis of exclusion of guilty, and in particular of "inexcusable" reprimand.

Then the hypothesis under examination would give rise to a typical case of "non-punishability", in the strict sense. Actually, while the action of a child who takes money from his father to profit from it cannot be called a licit action, on pain of being considered "right" and "not impeded", the impossibility of qualifying it as a "justified" behavior should also recognize the unreasonableness of a choice favorable to conceiving it as a cause destined to affect the requirement of guilt. This, because it would be difficult to admit that the perpetrator of illicit can escape the rebuke by reason of a particular existential situation that can condition the "motivation process", as it should happen if it were to be considered as an "excuse" hypothesis.

However, it should be given attention on the "relationships" inherent in the family or, if desired, on the "qualification" of the subjects between them are established an approach, in the sign of (mere) not punishable, in the case in question of those contemplated, which exempt from punishment the one who lends assistance to a next joint guilty of participation in a conspiracy association, an armed band, or a "common"

criminal association or mafia type. Even wanting to believe that the one who lends help to his own joint can be considered worthy of an excuse, the circumstance hardly compatible with the logic of the exclusion of guilt that the regime of impunity comes to be sanctioned, on the basis of an absolute presumption, would still be undeniable, founded on the existence of a relationship of kinship between the author of the fact and the participant in the criminal association. In particular, that presumption should be considered completely foreign because it explicitly alludes to a situation of "constraint" connected to the "need" for saving the joint from the occurrence of an inevitable prejudice, according to the logic of a situation of "uncollectibility" that allows a judgment of guilt in a normative key.

However, similar findings have not appeared fully shared with other respected scholars of the subject. Who to agree with? Those who privilege the datum for being true undeniable, set in a normative choice in principle indifferent to the concrete re-encounter of the requisites to exclude guilt? Or with those who show themselves to recognize their own characteristics as an "excuse", relying on the meaning, in substantive terms, of the reasons for impunity?

## **6. (FOLLOWS) SOME INTERPRETATIVE KNOTS TO BE DISSOLVED**

Why postulate a clear line of demarcation when, in both cases, it does not go beyond the mention of the relationship of kinship (or to it normatively equated) between the persons referred to? Indeed, it is interesting to observe how such a dilemma does not result totally extraneous even to the acute and sensitive systematic reconstruction offered, in the sense that, while expressing doubts about the opposing thesis, the legislator ends up recognizing, however, the intrinsic difficulty in the question that this dilemma underlies. Particularly significant in this regard is his explicit reference to the circumstance that the personal relationship would only be "probably" compatible with a possible influence or conditioning on the choices of the subject, so that, not being similar factors capable of forming the object of an effective confirmation, it would then be difficult to deny the choice of the national and international legislator to favor, in the aforementioned cases, a model inspired by an evident "standardization of roles or relationships" (Lackner & Kuhl, 2014).

That is to say: What should be, before any further systematic assessment, the arguments able to show that in the aforementioned cases the "non-punishable" subject must have been aware of the "next joint" qualification, despite this knowledge appears indispensable for the purpose of the same recognition as an "excuse"? Truthfully, this question is anything but secondary if one considers that, for a rather widespread opinion, the hypothesis which would really give rise to a real cause of justification, such a perspective, it would then be possible to apply in accordance with what was established. On the other hand, a similar conclusion—that of retaining the

above-mentioned knowledge irrelevant— could be reached, hypothetically, even if the irrelevance of such a requirement was made to interact with the identification in the instance of a cause of not punishable in the strict sense; not otherwise, precisely, in relation to which the statement regarding the relevance on the objective level of the relationships contemplated therein is the subject of unanimous recognition.

It would not be sufficient to object to these remarks what has been done, moreover, with more specific reference that on the level of the assessment, the concrete awareness of the existence of that specific interpersonal relationship seems destined to be, so to speak, presumed (*juris tantum*), in the measure in which the objective existence of such a relationship results. It is the absence of such awareness must be made to state (proven) in order that the applicability of the excuse (which seems rather remote) is lost. In fact, it is evident that such a solution, apart from the mechanism of presumption, ends by giving for what was supposed to be preliminary: The cases in question are, in fact, of the excuses, and not already of the causes of mere exemption from punishment.

## 7. THE MEANING OF REASONS FOR THE CONDUCT AS A CHARACTERISTIC FEATURE OF EXCUSES

The findings made so far should not lead, of course, to believe that, for the purpose of recognizing any “excuse”, only an explicit indication of the need that the subject has perceived the conditions and that they have specifically “influenced” the conduct, would be able to assure its corresponding physiognomy. It seems to have to say that the choice of qualification to be reserved for the considered phenomena may be less difficult and inaccessible, where it moves from the exploitation of that profile of the case in which, in our opinion, the line of discrimination between crime and punishability is not accurate.

It seems difficult to deny precisely how in such a perspective would it be implausible to separate the meaning of the conduct from the characteristics of the “motivation process” that prompted the agent to carry it out. On the contrary, it is interesting to observe how, while, in particular, the properly “psychic” elements of the crime — that is fraud and guilt— essentially act as coefficients of imputation of the “fact” as a whole, the author’s motivations present themselves in a closer correlation, precisely with the behavior that has arisen from them and which is to concretize and invert its fundamental dimension (also) from an axiological point of view. On the other hand, as is it well known, the fact that the reasons for action may also influence on the verification of the existence of malice and guilt, does not seem to shift the terms of the problem: that influence is indeed appreciable, essentially under the probative profile, and does not assume in itself a characterizing role for the purposes of the structure and the role attributable to the “psychological bridge” between the subject and the fact.

A further confirmation of this connection derives from the observation that the problematic of motives has often intersected, even in the awareness of some differential profiles between the two phenomena, with that relating to the crimes of "specific fraud". In fact, the teleological profile that accompanies the motives of acting, and which characterizes them in the same way as resolutions that go "beyond" the purely psychic profile connected to the fact, comes to disengage them from the assumption of the actual integration of the data to which the motivation can refer from time to time: not otherwise, precisely, from that projection in a teleological key that illumines and enriches the meaning of the conduct proper to certain cases and which results as such appreciable precisely because it is independent of the achievement of the objective. The "disvalue of action" that is expressed in the physiognomy of such cases seems to authorize, in short, the recognition of a significant parallelism with those reasons for action that intrude the meaning and scope of the conduct, and which lend themselves to assume relevance also with a view to assessing its reproach.

From a second point of view, the fact that the motivation process behind any possible excuses does not appear to be a negative reversal to "positive" configurable requirements as elements of guilt is also not unimportant. In fact, a similar opinion, although formulated in a different thematic area, seems to sink its roots into the impossibility of making the motivation play in a different perspective from that linked to conduct as the object of the criminal reproach. The latter because, for the note, that motivation could not represent the "negation" of a requirement already defined in a positive key (as happens, for example due to malice and error), for the very good reason that, far from excluding it (?), it contributes to directly define the same relevance of conduct as a term of reference for the guilty judgment.

Actually, any institute or category of criminal law always requires to be forged and specifically defined with the chisel of typicality. However, the magnum sea of the reasons for action, combined with the difficulty of selecting the qualifying contents, does not lend itself to integrating, as such, a relevant factor for the purpose of recognizing the specific "value" of certain motivations in view of the judgment of criminal responsibility. This is clearly confirmed in the face of the need to erect those reasons for the evaluation of the conduct, not unlike what happens for the conscience and will, where the doctrine has long been concerned to characterize the causes of "exclusion", rejecting the idea of configuring that requirement in a positive key, under penalty of excessive latitude of cases in which conduct should be irrelevant (Lackner & Kuhl, 2014). Thus, *mutatis mutandis*, also as regards the "normality" of the motivation, it is necessary to identify it only in a negative key, so as to make it compatible with the necessarily "typical" and defined character of that same element (still the conduct) that intervenes to qualify for criminal purposes. In essence, there can be no positive element, because it would be identified with a profile of the conduct, but inherent to it,

but not such as to ensure, even under this further aspect, the fundamental guarantee of typicality. Thus, if typical conduct must also be under the profile of the reasons that have characterized it, and therefore require a prior selection in accordance with the "value" that they are called to express hence the need to give to them, already in departure, that qualifying content that results from having identified a "type" of motivation capable of fully affecting (also) the reproach of guilt (Fischer, 2018).

And in this same perspective, the legislator points out, the way of posing the motivation process linked to the guilty judgment should be estimated precisely in light of those "typical" factors of abnormality of this process, that are generally indicated as functional requirements for the determination of the relevance of human conduct. This is to demonstrate (in precise terms, and also in order to disregard the full adherence to such a line of thought) the validity of the link here postulated between the meaning, expressed by the author's conduct, and the verification of the influence on it is aimed to explain the profile related to the corresponding motivation.

At this point, it would seem then this time, really! I really believe that the assessment of the meaning of the reasons for action can, and must necessarily be made on, the basis of the indices that the individual cases contemplate, and even when they are not supported, an explicit reference to the motivational profile that those indices could suggest should also be made. In fact, only in this way it will be possible to exhaust and "complete" the investigation of the meaning of the typical conduct in order to assess its overall relevance in the context of a "personalistic" assessment in conformity with the principles; only in this way, the deciphering of the "causes" of exemption from punishment may emerge in the context of an intimate connection with the negative plan of the conduct —or of its positive "value"— once set in the "existential situation" (Frisch, 2015b, p. 284) of the one who has turned its contents and the corresponding dynamics.

On the contrary, it is necessary to underline a further reverberation from a systematic point of view, destined to bring out its intrinsic coherence with the basic choices that mark (at a substantial and procedural level) the "path" to be carried out in order to evaluate the extremes of responsibility criminal. In particular, if it is true that (as we authoritatively observed the assessment in terms of guilt deserves to precede that inherent in the verification of a (mere) cause of non-punishment, a similar circumstance should be considered relevant, not only where the nature of the controversial hypothesis has already been identified, but also with a view to inducing, in an interpretative way, the choice that is more in line with the rank on the axiological plane, and the more favorable alternatively configurable penal treatment. In our case, this means that the analysis of the possible contents of motivation where these translate into a positive evaluation of the behavior of the author should lead to prefer the solution aimed at drawing the plan of the elements constituting the

crime, and of guilt, in particular. In short, it is a "scalar" method which, in homage to fundamental guarantee requirements, seems to be more and more advisable in the light of a systematic scenario outlined so far, and we are now also "completing" it thanks to a renewed critical examination of the problematic hypotheses from which the embrace was taken.

## 8. TESTING OF THE PROPOSED SOLUTION IN RELATION TO THE REGULATORY HYPOTHESES REFERRED TO

More precisely, it seems that the investigation to be carried out has to be aimed at probing the role performed by those particular interpersonal "relationships" expressly referred to in the individual cases, once they are placed in "contact" with the meaning expressed by the unlawful behavior of these relationships.

Reasoning from this point of view, it is easy to perceive that these relationships do not seem able to "shift" the meaning of conduct as a core of relevance of the crime, and in particular at this time, the guilty character of the corresponding "motivation", where you have regard to situations such as the one outlined. In this case, to truly count are only those relationships objectively considered, not differently, *mutatis mutandis*, from what happens in relation to the figures included in the category of so-called punishment conditions. Since, in these, the only conditional event assumes truly relevance, without this leading to a different evaluation of the meaning and role of the author's behavior, thus, in the context of those that deserve to be considered as "original" causes of (mere) not punishable, from any point of view the conduct held by the agent is able to inhibit the qualification as "external" factors to the illicit content expressed by the circumstances on which the exemption from punishment is based.

In other words, and returning to consider the aforementioned normative hypothesis, it is easy to see how, by way of example, the relationship of descent cannot play as a motivating circumstance (assuming that a real motive may be) capable of appreciation in the sense favorable of the conduct explained, if anything and quite the opposite as a symptom of a merely "opportunistic" attitude, based on the "exploitation" of an affective relationship (perhaps shared by the agent, but still imbued with a profile "selfish") insensitive to an evaluation in terms of "excuse". From this visual angle it seems necessary to consider the latter, since the profile pertaining to motivation cannot (positively) affect the assessment (in a "personalistic" sense) of the conduct of the offense that must be considered relevant, in purely objective terms, of the crime intended to support the facts detrimental to the assets to which the law refers.

In this regard, no appreciable differences appear to exist. If anything, the first provision could generate doubts about its membership in the cause of justification or that of the excuses. But, once such a doubt is resolved (based on arguments that this is

not the place to recall) in favor of its qualification in terms of excuse, it seems difficult to deny that the same solution should be adopted for the other two hypotheses. In fact, considering that the relations contemplated therein may well be conceived as a factor that is anyway appreciable from the point of view of the motivation process, it seems legitimate to affirm, in the light of the above observations, that they must also necessarily be able to rise to the plan of relevance of an "excuse". On the other hand, if it is true that the agent could be benefitted from the fact that the basic requirements of impunity can take on relevance already on an objective level—even in the sense that it would not be necessary for him to know how to help—, it is much more significant to observe (in addition to the fact that the author will usually be aware of the recipient's quality) that the configuration in terms of excuse will make it possible to affirm its relevance, even if the agent erroneously assumed the existence of related requirements. Considering the fact that the motivation of the conduct will express the same contents in any case, it would be unreasonable to deny them a substantially equivalent scope and meaning.

An additional profile still needs to be assessed adequately. In particular, the reconditioning of hypotheses such as those to the plan of as many "excuses" could find, at first glance, some difficulty in the relief, already mentioned above, according to which, unlike what has sometimes been stated, they would not come here in evidence of the requisites to signal the presence of a "conditioning" on the psycho-emotional level connected to the objectives of the intervention carried out for the benefit of a family member.

However, it should not be forgotten that, in the context of excuses, the conviction that the evaluation parameter applicable to them would still be based on a certain "normative" level of generalization, founded, on what can reasonably be demanded, a model of agent (extensible to the average of the subsidiaries) operating under the conditions indicated by the fact that is an integral part of the "excuse". Once this approach is followed, it would then seem plausible to deduce from it not only that the aforementioned form of conditioning can be disregarded, but also that the more or less precise indication of the phenomenology of the excuse is not decisive. In fact, it is sufficient for certain, however laconic, normative indices, to allow to recognize its physiognomy and to give it the importance it deserves. Ultimately, the figure of "juridical nature" is fully in line with the exclusion of guilt, to the extent that the dimension of the excuse does not require to "penetrate" the intimate process of motivation.

In any case, it would be at least debatable to suppose that a configuration of the excuses like the one (also) outlined here could put into the necessarily "personal" profile of the guilty judgment. This is an old and long "story", so there is no point in retracing it now. However, one cannot fail to note how difficult it is to desist from sharing the thesis aimed at denying the possibility of an extreme level of "individualization" of the reproach, considering the latter frankly unrealistic both from a theoretical-scientific

point of view and a practical-applicative one. The necessary process of (albeit partial) "homologation", tended to a responsibility still imbued with "socially" normative evaluations, cannot but invest the same appearance of guilt, and not only that its "part" occupied by the category of excuses. In the alternative, in particular, if these, according to Roxin's well known thesis, still leave a "certain guilt" still remaining (Roxin & Schünemann, 2017), even if insufficient to punish for lack of preventive reasons, or if they are still intended to exclude their existence, it is perhaps best party to adhere to this second solution. Even those who are particularly sensitive to the "personal" content of the criminal rebuke did not fail to observe how the alleged distinction between different "sectors" of guilt —specifically, imputability and defect of excuses— is not based on truly reliable motivations: That distinction does not convince, on the one hand because even those who are considered not imputable by the law remains not so often motivable by the regulatory appeal, and on the other hand because what is relevant is only the abstention of the legal system a guilty verdict based on a balance, previously carried out (and as long as it conforms, of course, to the "face" of criminal responsibility as it emerges from constitutional principles) between the preventive needs and the freedom of self-determination for the recipients of precept.

## **9. CONSTITUTIVE ELEMENTS AND PUNISHABILITY AS A "COMPONENT" OF CRIME: DYNAMICS OF PUNISHMENT COMPARED WITH THE IDENTIFICATION OF "SMALL" FACTS. THE SMALL "NON-PUNISHABLE" WRONGDOING**

It is necessary to premise that we do not intend here to proceed to a punctual and exhaustive examination of the normative content of the "new" provision; nor do we propose, moreover, to develop a comparison between the latter and the less recent disciplines applicable to the juvenile process, or to the participation of minors as victims to international tribunals (Baumann, 1974, p. 5; Dreher, 1974, p. 933). Despite a brief final treatment of some interpretative profiles of the new discipline, our interest will be directed above all to the question of principle inherent in the meaning and scope of an exemption from punishment due to the same attitude of the components of the crime: The latter is "not punishable", not because it is accompanied by "external" evaluations of its being such as those expressed by purely conditional events, by successive antagonistic behaviors, by qualities or "personal" inexpressive relations of the illicit paradigm, from "temporal" factors unrelated to its realization (like the prescription) or of origin leniency *sensu* (like the amnesty), but because it is characterized by the "less serious" level of its own constitutive requisites.

In the face of such an overall picture, we cannot fail to point out, first of all, how the logic underlying the prediction of the "tenuousness" of the fact as a cause of impunity can take nothing away from the substance of the phenomenon. Not that, in particular, of the well-known objective of criminal pro-nature "deflation" (Diakonis, 2011, p. 24; Kühbne, 2015, p. 232) of the cause of "non-punishability".

On the other hand it should be emphasized the circumstance that the tenuousness can be invoked and syndicated even in the hearing, gives the interpreter a model of evaluation that in no way should differ from the judicial ascertainment of any crime. In this perspective, the crime will therefore be ascertained, since it is not required that the evidence, so to speak, of the smallness of its components, even if the object, the latter, of an evaluation dropped by more in-depth verification further, had been revealed *in limine iudicii*; thus, the judge of cognition, if on the one hand can certainly have more elements to "test" the validity of the accusation, he may well find himself, on the other, faced with the unequivocal confirmation of all the constitutive requisites of a criminal responsibility, and yet be "forced" to acquit the accused instead of condemning him. Not only, therefore, a "briefly" deliberation that would let *ictu oculi* emerge the superfluity of a prosecution of the judicial issue, but also the possibility of a process that is anything but rapid and summary, and, if anything, made more demanding. as a function of the need to "measure" the coefficients of crime and make it descend into a qualification capable of assuaging its concrete value.

The "small" illicit, in short, while presenting its own physiognomy (which the same reference to the *quantitas delicti* alone cannot fully decipher) does not present itself as a hybrid and elusive entity, and even less manipulable in function of pure efficiency goals. And even if the verifications in this regard, provided that they are adequately "guaranteed" even when filing, in the interest of the same prevented, should also legitimize an "early" conclusion, this will not mean that the latter must represent the emblem of an intrinsic connection of smallness with a necessarily *prima facie* judgment, as if it were an enclave completely separate from the context, in which rules other than those underlying the essential dynamics of the law (e) of the criminal process are in force.

## 10. METHODS OF RECONSTRUCTION OF QUANTITAS DELICTI

As Krümpelmann (1966, p. 62) observed, at this point the question arises the real central point of the whole problem concerning the definition of "criteria", thanks to which it is possible to give the illicit a "small" dimension, so as to allow an evaluation of the judicial organ anchored to sufficiently determined and teleologically compliant presuppositions to the basis of legitimation which should exempt from punishment. However, it seems necessary to dwell on some preliminary profiles, able to point out the path on which the progressive definition of the number and the relevance of the aforementioned "indices" reveal a fact of "small" consistency.

From a general point of view, the essential components of the crime tend to present themselves in the guise of elements characterized by a sort of necessary "invariance" and abstract "fixity", so to speak, of their arrangement on the definitory and systematic plan. The achievable results are very different when we start to consider the peculiar way

of posing the "picture of life" emerging from the single criminal model, in contact with the phenomenal reality that the model is called to reproduce, and which is destined to revive in a constantly changing form and changing, imposing on the interpreter a constant effort to adapt to the protection needs implied by such variations. From this visual angle, it cannot therefore surprise that the single "episode" is coming from time to time precisely to highlight that coefficient of more accentuated flexibility and "gradability" of the elements of the offending fact, that are the ratio and the very foundation of the definition of "smallness" indices. Just think of the emblematic examples of the occurrence of a more or less substantial economic prejudice in the crime of theft, or the occurrence of a more or less serious offense to the other's physical integrity in the facts directed against the other's safety, or again in the explanation of a more or less appreciable intensity of violence in the crime of private violence.

The possibility to grasp and bring to light a particularly rich and varied range of different quantitative "scales" (Zimmerl, 1930, p. 65; Basile, 2015) within the criminal event is destined, however, to open the way to a broader problematic horizon, connected to the different angles and perspective dimensions from which a similar phenomenon can be examined from time to time.

First, a perspective of observation of an essentially naturalistic nature can be envisaged; secondly, the aforementioned constituent elements can instead be measured according to a criterion of value; thirdly, it is finally possible to submit the aforementioned requirements to an assessment criterion in more strictly functional and teleological terms, as these are more intimately linked to the purposes assigned to the sentence. It follows, in essence, that it will therefore be necessary to establish the conditions under which the aforementioned "measurement" of the event that occurred similar to the different perspectives now outlined, makes it possible to obtain a final result capable of legitimizing an abstention from the application of penalty.

## 11. CONTENT AND LIMITS OF THE OFFENSIVITY PRINCIPLE

It seems fair to affirm how the concrete way of behaving in a particular element of the case is unlikely to translate into an appreciation of its specific relevance. If, for example, a bunch of grapes were taken from a rich vineyard, or that person has "wobbled" in the void due to a push, no one could deny that, on the phenomenal appearance, the vineyard was however deprived of one of its components, or that the person has nevertheless suffered the effects of the energy released by that push. And yet, it is hardly necessary to observe how such a purely naturalistic consideration cannot be considered significant for the purposes of the aforementioned alternative if it continues to punish that fact or not. The logic of criminal imputation cannot be satisfied with purely phenomenal data, since these are not relevant, neither to found, nor to graduate, nor, finally, to exclude the responsibility of the subject. And this for the

essential reason that, resulting all inexpressive as regards the purpose of protection, one would otherwise arrive at the incongruous consequence of placing on the same evaluation plan any other profile of the (even if) non-qualified (e.g. even the time or place of action), considered as such—that is, regardless of their possible influence on the significance of the episode—should be taken into account for the purpose of a judgment of criminal relevance).

Quite different, and indeed specularly antithetical, is instead the type of evaluation placed at the base of the second model outlined above. In a “value” perspective, it is a matter of asking whether the interest protected by the law has suffered an actual injury. In other words, it will be necessary to establish whether, for example, the economic value of that vineyard has been significantly affected by the subtraction of a bunch of grapes, or the integrity of the person who has received that thrust has been to a certain extent compromised by the gesture of the one who was the author. We are in the field in which the questions relate to the “offensiveness” of the crime. Interrogatives, as a matter of fact, are very delicate and complex, and beyond the general appeal to a “realistic” vision of the juridical good, they are accompanied by three different interpretations about the postulated need to refer to the offense as an offensive fact.

In fact, this is a problem of an essentially political-legislative nature, concerning, that is, the need or not to proceed with the creation of criminal cases that would require an indefectible link between the incrimination of the fact and its presentation in terms of “injury”, or at least as a “concrete” danger to protected interests. From a second visual angle, instead, recourse is made to the application choices aimed at further enhancing the damaging dimension of the offending fact, also in light of a less abstract and formalistic interpretation of the relative contents. All this, provided, however, that the content of the normative formula is not such as to preclude in its root a possible “reading” (also) in terms of offense.

Finally—but it is actually the perspective of greater impact on the application dynamics—, the use of offense (complicit, for real, the same jurisprudence of constitutional source) was, and still is, frequently operated in order to attribute a “real” consistency to facts described by the law in terms of “abstract” danger, of mere “risk”, and of formal transgression of obligations related to certain “functions” due to the competent authorities in the individual fields of activity. With that, in essence, we think only of the exclusion, due to a lack of offense or real danger, of the punishment of conduct, of mere failure to comply with certain provisions, or in any case lacking sufficient axiological depth in relation to the needs of the protection (possession of minimum quantities of explosives or narcotic substances, construction activities that are “not allowed”, but such as not to affect the equilibrium of the territory, or on the landscape, behavior of slightly exceeding certain “thresholds” of relevance, and so on). The criterion of the offense seemed to go beyond the role originally conferred upon it,

and even under the pressure of undoubted aims of a guarantee type and of suggestions deriving from the canon of the extreme ratio of criminal intervention (Basile, 2015).

On the other hand, it should also be remembered that, even in the second perspective, the appreciation of the offense in its own terms has sometimes led to results on the hermeneutical level likely to be in tension with the regulatory frameworks of protection. That happened, for example, to some cases falling within the case of theft, where the removal of sums of money, though not irrelevant in itself, has been traced to the parameter of the offensiveness of the crime, giving the impression of "forcing" in this way scope of the case, so as to "convert" it into an "oversized" model of protection compared to the one postulated by the current legislation on the matter (Frisch, 2015a, p. 112).

Moreover, the tendencies of a more "extensive" nature (the third, above all), despite the perplexities just mentioned, leave the substantial ineffectiveness of an "orthodox" reading of the offense criterion clearly leaked. In effect, the need to appeal to the "teleological" interpretation makes it difficult to deny how the adoption of the offense criterion, if circumscribed within extremely strict limits, could have little or no impact on an effective delimitation of the area of punishment. In other words: The question whether similar "praetorian" tendencies deserve to be shared the massive proliferation of purely "artificial" crimes, insofar as it is connected to the logic of "risk society", must or cannot be tolerated without reserve, can certainly be discussed and reviewed in the perspective of the immanent "tension" between the guarantee of the offensiveness and that, not less important, of the necessary legality and "typicality" of criminal forecasts. However, it is a certain fact that, insofar as it insists on wanting to appeal, even *de iure* seasoned, to the criterion of the offense, it will be very difficult for its supporters to escape the temptation to use it in addition to the limited "school" cases of coarse forgery, or the subtraction of a grape, a paper napkin, a bottle cap, or an old rusty nail.

## **12. THE PERSPECTIVE CONNECTED TO THE FUNCTIONS OF PUNISHMENT. ELABORATION OF THE CATEGORY OF "MEDIATED DAMAGE"**

The "measurement" of elements of offense would not, in other words, exhaust its relevance into a mere quantification of the corresponding negative value, requiring it to be further deciphered in light of the role and significance that the purposes of the penalty are in fact able to express, when they are placed "in contact" with the manner of posing such requirements.

Once admitted this possibility, it would then derive that, even if one wanted to suppose that in certain situations an offense would appear to be still evident, it would be legitimate to state (for now reasoning, outside of specific normative "restrictions")

that the offense, however existing, should be considered incapable of (continuing) to embody the immanent reasons for the teleologism of criminal sanctions. It is at this point, on closer inspection, that the basic question about the autonomy of the phenomenon of the illicit nature of the illicit, left unresolved at the beginning of the present research, seems destined to emerge in all its scope and significance.

In particular, it seems to us that the idea of postulating a "fourth" element of crime alongside the requirements traditionally linked to its structure finds its own reasonable foundation in this context. And this foundation —on which the investigations on the subject seem to show more than a few uncertainties— came to be already cultured and fully delineated in a work now distant in time, but that nothing seems to have lost its high thickness on the plane systematic and political-criminal.

The fulcrum of the punishable nature of the offense should have been specifically attributed to the category of "mediated damage". This means that the behavior is due to the fact that it generates an "alarm" among honest citizens and encourages "evil" to the inclined crime, were destined, thanks to the possibility of their "repetition", to turn into a prejudice for the whole society. A prejudice which only the maximum penalty would have been, in fact, able to remove, with the return trust to those who have been impaired in their own safety and to discourage those who were tempted by the path of crime. It must indeed be noted that the media damage is reconnected by the author to all the elements of the illicit, not only objective, but also (and indeed, above all) subjective, on the assumption that only certain psychological attitudes are able to arouse "fear" or "bad example" inherent in the reference to that damage.

It is also important to remember that the facts committed with "very slight negligence" should be exempted from punishment, since they must be excluded, in fact, because they could "intimidate" the associates, since they would hardly have been disturbed by a minor incidence, in which citizens feel that most of them would easily have incurred. Moving in this perspective, the appreciation of guilt in relation to a preventive requirement related to "mediated damage" exerts an important discriptive function regarding the relevance of the corresponding rebuke. The level of guilt comes to express a significance that is not negligible even in the perspective of the amount of crime, in the sense that the mode of attitudes of the former does not only determine the recognition of the damage mediated, but, since the latter is closely connected to the social implications of the offense, also serves as a criterion for estimating the differential of "gravity" between offenses even if equivalent to the entity of the offense immediately caused.

However, it could be assumed that such a negative reverberation connected to the illicit lends itself to being always framed in the bed of the "functions" generally attributed to the sentence: The latter, as is well known, coming to focus on the need

to prevent the commission of facts that the social conscience perceives as intolerable, so as to devolve to the state the task of threatening its potential authors and of intervening, once committed, in order to assure the content of the threat, and to further guarantee its effects.

The aforementioned damage represents “reflected” damage, as it regards those who are not directly affected by the action; but despite this—and indeed, on closer inspection, precisely for this—it comes to play the role of an element strictly dependent on the same way of behaving as the offender. It interferes with the contents of the latter when it becomes “part” of it, in the sense that it comes to “enter” within it that negative profile arising from the danger of its repetition (more or less appreciable, more or less susceptible of diffusion), that justifies and establishes its criminal relevance, and that, precisely because of the effects connected to this circumstance, it comes to reflect, in turn, the intrinsic *ratio essendi* of a criminal sanctioning response.

Following the lines of this approach, it is the same Zweckgedanke dimension attributable to the sentence to receive, in short, a meaning and a “interpenetrated” role in the crime itself. Even better, it is, ultimately, the “punishable” that that damage mediated it subtends to act as a “correlative” to the function of punishment as an instrument that the same damage is called precisely to neutralize.

### **13. THE ENTRY INTO THE CRIME OF IMMANENT NEEDS TO THE REASONS FOR PUNISHMENT. A COMPARISON WITH THE ROLE OF “CRIMINAL POLITICS” IN SOME CONTEMPORARY TRENDS**

The underlying data on which it is necessary to reflect is, in fact, that punishment lends itself to making its “entry” into the crime, as it comes to relate to the same profiles inherent to its content for how much, nowadays, to be understood in terms more “flexible”, because of the same teleological dynamics related to the “concreteness” of the event. In other words, provided that it moves from the assumption that the perspective of punishment would come to interfere with the same dimension attributed to the latter, so as to allow to recognize in the first a “projection” of the correlative disvalue, and to condition, therefore, the operativity of the threat on the assumption that such value exists (and comes to endure). The function of punishment is therefore to irradiate, one may well say, on the “fate” of its own reference object inducing to evaluate its thickness and consistency so as to “preserve” the ratio of punishment as a dialectic relationship in which the aforementioned function has (and must have) a way of manifesting itself.

Correlatively, it cannot be surprising that, as punishment sees its function actualized by neutralizing that negative component of the offense that shifts from all its requirements, the same sentence would end, as it were, with the “turn blank”, whenever that component was lost, because, given the inconsistency of the effects

to which the punishment is connected, even the reason why this function should be activated would be ungraspable.

Those phenomena seem more difficult to reconcile with a view of punishment as a further aspect of crime, for the very fact of being substantially inexperienced with respect to the manner of presenting the related requirements. In some cases they may be able to put themselves in closer correlation with the latter—as it occurs, for example, for the “antagonistic” conduct compared to those typical of the crime—, but, nevertheless, their nature and physiognomy cannot fail to presuppose independent evaluations regarding the illicit, and for this reason they are not even able to be properly joined to those subtended by the elements of which are consisted and expressed their value.

In this case, the inexperience of the punishable crime is due to its connection with the very elements of the crime, on the assumption that these can and must be evaluated in relation to the manner of production of the related effects within the social community, and in which the function of punishment is understood in relation to the effective need to implement the threat that depends on it. However, it seems necessary to follow a similar observation with a view to further clarifying the systematic scope.

While analyzing the theme of “excuses”, we had the opportunity to recall that a different opinion, authoritatively supported, was placed next to the position aimed at affirming the suitability to exclude the penalty for lack of guilt, according to which such an effect should to be necessarily connected to considerations that can be deduced from the purposes of the sentence. It is, as is well known, the conception, developed in particular by Claus Roxin, in favor of introducing the category of “responsibility” (*Verantwortlichkeit*) as the expression of a judgment, but of less guilt, but flanked, however, as a condition to exclude the penalty, from the observed lack of appreciable needs in terms of general or special prevention.

The notoriety of this elaboration exemplifies us here by reviewing its origins and evolutionary stages. Rather, what is important to highlight is the fact that this concept has been approached in an *avant-laden* perspective: Remedying the “dogmatic path” it is clear that the punishment is teleologically oriented to elide the “mediated damage”, and that, on the other hand, this damage depends essentially on “objective moral force”, as well as on “objective physical force”. The whole doctrine of the crime is thus shaped in relation to the purpose of punishment, according to a model which, from a methodological point of view, can consider itself surprisingly modern.

In truth, it is difficult to deny how, unlike what happens in Roxin, the preventive dimension that lurks in the call to the mediated damage is considered as essential “precipitate”, so to speak, of the same characterization impressed by the requirement

of guilt, besides that —it is good to remember it— to the objective component of the “immediate damage”, the “deontological” vision of the crime that the great criminalist shows to cultivate comes to “directly”, in other words, in the same area of illicit ability to reveal the sense of punishment as an instrument aimed at affecting the existence of that “damage” (Roxin & Schünemann, 2017).

Similar findings do not justify, of course, the recognition of a total homogeneity between the two currents of thought illustrated so far. In any case, the consideration remains, in accordance with the maximum exponent of the classical school that supports the teleological dimension of the punishment which originates from the way of presenting the same elements of the crime. But the matter is not just about this. In fact, no less interest is presented by the fact that the reconstruction leads to admitting the existence of a link of the preventive needs with a broader consideration of the elements of offense; in particular, if it is true that the legislator comes to postulate a privileged link between the damage mediated and the element of guilt, it is not less true that the profile of punishability that follows from this damage is still conceived as a reflection of the same objective component of the fact, so as to lead to the widening of the angle of observation to which it is possible to evaluate the “duty” of the sentence.

In any case, from the picture outlined above seems to emerge the problem of punishment from the perspective of the relationship between the elements of crime and the need to highlight the *ratio puniendi* that thanks to those elements can be positively recognized. The further question that derives from it, and which it represents an obvious and “natural” corollary, would seem, at this point, to present itself in the following terms: The existence of that relationship will have to be considered “given” once for all; or even when it springs from a careful and thoughtful choice, from an axiological and political-criminal point of view, about the actual need for recourse to the sentence, it must instead be considered to be “re-discussed” in the light of the meaning expressed from the criminal episode in its concrete and “current” methods of realization.

#### **14. REVERBERATIONS OF THE SETTING ON THE ISSUE OF ILLICIT NATURE OF THE ILLICIT: A WORK IN PROGRESS IN THE DIRECTION OF THE “FACT IN CONCRETE”**

The answer to this question cannot but imply a necessary stance regarding the influence that on the punishment of the fact can be recognized to the attitude of the unlawful in a dimension of “minor” relevance.

Once the possibility of “juxtaposing” the elements of the crime has been recognized, a further verification of their relevance for the purposes of “punishment” is needed. It would seem, however, difficult to avoid the task of assessing the concrete way of posing these requirements. This assessment seems, however, destined to acquire a

more evident legitimation, since the ever more extensive and variegated increase of incriminable facts is one of the difficulties to “managing” the mass of offenses through the “tool” of criminal process, which favored the tendency to alleviate the burden of repression beyond the confines of a possible political-criminal choice, consisting in individual “decriminalization” interventions.

On the other hand, these findings allow us to highlight one aspect of the question whose importance would be difficult to exaggerate nowadays. The thought runs to the progressive expansion of “jurisprudential law”: Although it does not fail to arouse some perplexities, it represents a phenomenon with which it is necessary to confront, and which should, if anything, increase efforts to assess the eligibility boundaries, depending on the outcomes it seems legitimate to expect as well as on the individual sectors or “fields of intervention” in which it is from time to time to manifest itself. To deny, in any case, an attitude of preconceived closure against such a phenomenon, worth the following warning of principle: Without respecting the canon of legality, the appreciation of the contents of the offense can only occur “by questioning the historical fact that stimulates that evaluative operation”, inspired, but rather, to the “value expressed by the law”, but which necessarily postulates an opening and a verification conducted on the bench of social experience: so that it may well be said, in the end, as a similar judgment requires the “mediation that the interpreter” comes to operate between abstract profiles of protection and the sense orientations of society.

In this perspective, it is hardly necessary to observe, then, how, if there is a field in which the “legitimacy” of the justifier seems to be able to sink its roots, this is represented (as well as by the general “methods” of interpretation, increasingly characterized by the abandonment of archaic formal visions) from the actual analysis of the thickness and consistency of the illicit, in order to establish whether or not it has taken on a teleologically appreciable dimension for the purposes of punishment.

The “rite of passage” from the law or from international criminal sentences to the judge really seems to represent, in other words, the expression of a need that is now unavoidable, and it would be hypocritical to challenge it in the name of a claim —necessary “immanence”, so to speak— of the category of punishment within the original “shell” in which he had also found a clear and evident recognition. In short, while it is true that “classical” criminal thought captured the relevance of this requirement in the same way as the incriminating prediction, this cannot mean that, under the impulse of a renewed way of conceiving the tasks of the jurisdiction, one should renounce to extract from time to time that shell-reviewing its relevance in concrete the meaning assumed by the illicit in light of the social experience in which they come to manifest its different levels of gravity. In addition to relating the profile of determination of punishment, increasingly sensitive to the search for a “measure” appropriate to the concrete case, a perspective of the kind ends with the investment,

as a goal and further goal, also, and precisely, any sanction of irrelevance of the small facts. The basic idea remains, the dialectic between crime and punishment, as a further evaluation yet rooted in that, is still to designate the germ of the whole problem; but this develops, evolves, is articulated in an increasingly "visual" way in the binomial between punishable offenses and non-punishable facts: Crimes too, for real, but to which it has always come to be lacking "road making" that support or "complement" necessary for the sanction to intervene.

## 15. THE APPLICATION IMPLICATIONS OF A TELEOLOGICALLY ORIENTED VISION

It seems appropriate to reconnect with what has been observed previously on the tendencies to leverage, to exclude the relevance of the fact, on the possible lack of the requirement of the offense. It is usual to state that, in fact, the inoffensiveness of the crime must be distinguished from the phenomenon of smallness. While the former would make the crime less, the latter would instead leave it, given that the offense, however tenuous, would not be entirely lacking.

It would therefore be correct to assume that the verifications concerning the smallness of the offense must lead, at least, to a more detailed assessment than that inherent in the (in) offensiveness plan. A solution, however, that raises the further question of whether this difference should involve only a verification extended to other elements of the crime that is not only the offense or the danger, but also, hypothetically, the intensity of the crime. A psychological element with which the deed was committed or if it should suggest attributing importance to parameters of judgment of an even wider scope than those now considered.

However, it is easy to see how all the above argument cannot fail to demand, to be fruitful, a more decisive overcoming of the type of approach still to be found in the most widespread elaborations. In fact, it appears to point out that the starting point from which it generally moves —i.e. the offensivity of the crime— ends up representing a term of comparison substantially devoid of real meaning. We have already noted how it could offer the right to exclude the relevance of the fact in completely marginal cases, and how, moreover, its wider use would be removed from the same original logic placed at the base of a similar postulate. All this, in essence, to say and reiterate that the problem of offense has little interest in achieving a reductive effect of the area of punishment; as shown, moreover, the preference, now often granted, to teleological method in the interpretation of the case, in view of a clarification of the same scope of extension of the "typicality" of the fact.

The project that should be cultivated instead reveals itself much wider and more significant than the limited spaces inherited from the weight of tradition. Who intends to do seriously with the exclusion of a criminal intervention for a conspicuous number

of “minor forms” of the way of posing the wrongdoing must know how to “dare” much more; the acquired awareness of the need to make the exemption from penalty play beyond the borders of a minimum offensiveness should suggest, in other words, a much more flexible and flexible vision when planning a concrete enlargement of the area of non-punishment.

It is difficult to deny how precisely the investigation of the functions of punishment can mark the separation from such narrow and limited horizons. The function of the sentence, once assessed in relation to the fact to be prevented, must, in other words, continue to illuminate the path of the crime, so as to make the *ratio puniendi* emerge “diachronically” in its poses, and recur in concrete in the context of the story in which that function waits to find a lasting recognition. It follows that once the possibility of following such a path has been admitted, the test of relevance of the fact cannot, reasonably, from a specific verification —by the same organ proceeding— of that fundamental correlation. That, then, the law is silent in this regard, or that, conversely, it offers “indexes” of assessment able to guide the investigation, nothing detracts from the need to carry it out: To review and specifically motivate, in other words, to what extent and under what aspects the “practical” finalism of the sanction can be considered, if any, no longer recognizable by virtue of the aforementioned comparison between the overall size of the offense and the lack of a current interest to punish him in the given circumstances.

## 16. RELATIONSHIP BETWEEN GENERAL AND SPECIAL PREVENTION IN THE RELEVANCE TEST

Moving in this perspective, and in order to make it concretely practicable, it is worthwhile dwelling on the meaning that for the purpose of a functional verification of the aforementioned needs can legitimately cover the two essential profiles that qualify the teleologism of the criminal sanction: Namely, general and special prevention, or, possibly, both the functions in which the finalism of punishment is articulated.

In the elaboration dedicated to such questions, the main perplexities, in spite of the tenor of not a few models of exigencies present in other systems, have been manifested in relation to the criterion of general prevention: This, on the basis of the complication, for moreover, an undeniable link with the dynamics of the commissure of the sentence (even if, in this case, with the effect of rendering it inapplicable), the aforesaid criterion would leave to the proceeding organ the faculty to make a “political” use difficult to reconcile with a truly selective evaluation, and free from arbitrary exploitation, of an effective need for punishment (Armenta Deu, 1991, p. 126; Beulke, 2012, p. 224; Heger & Pohlreich, 2018; Esser, Heinz & Hilgendorf, 2018; Schwabembauer, 2012). On the other hand, such fears would be far less consistent if we are dealing with evaluations based on the call for special prevention. Being inspired by a consideration inherent to the individual author, this criterion would allow, to be true, to satisfy the need for

an adequate "personalization" of the judgment for the purposes of prognosis about a possible "reiterability" by that same subject of future anti-juridical conduct. On closer examination, such concerns, if appreciable of appreciation, end instead by revealing themselves to be insufficiently justified.

It can indeed be observed that the general prevision optics, of which one tends increasingly to valorize additional profiles with respect to those that are merely dissuasive and "intimidating", do not tolerate being defined and made operative irrespective of the relationship—very close indeed—with the same dimension (not only of guilt, but also) of the penalty conceived as a special prevention key. The incriminating norms are addressed in a preventive function to a generality of subjects, not so much in order to intimidate, but rather to solicit the acquisition by everyone of the personal awareness of certain behaviors to be considered socially intolerable. However, when a crime is committed, the application and enforcement of the sentence already imposed simply intends to re-establish and develop more concretely this relationship of close interlocution and accountability initiated by the state community with its members. It follows, as a logical corollary, that the re-educational function of punishment (apparently only) at this point represents the natural continuation of a process of cultural orientation to intrinsically unitary values, being therefore inadmissible, from this point of view, to postulate a sort of *caesura* between the two profiles expressing the preventive tension proper to the criminal order.

It seems then possible to enrich its contents by comparing it, in order to test its lasting value and meaning, with the "expectations" likely to be reasonably referred to the whole of the associates, once they are induced to fall in line with the horizon of a common "participation" in the events of the other, in the teleological perspective connected to the circumstances in which the event took place, and which should orientate on the final decision to be taken regarding its punishment. In this regard, it is good to specify, moreover, that such a verification should be made through a judgment related to the individual fact, without claiming to place it in a larger "plot" of assessments that can be referred to the "conduct of life" of the author offense. The attention to the preventive aspect should, in other words, derive from the meaning expressed by that episode, limiting, correlatively, the prognostic evaluation within a perimeter marked by its own way of presenting itself, and thus assuming, essentially, this last with a symptomatic index of an appreciable value (also) in preventive terms.

It is hypothesized that a crime of theft is to be carried out under circumstances of frequent commission of facts of this kind (just think of the thefts in department stores or in open-air markets, often based on the same phenomenology of smallness). Well, where the general profile is to be appreciated in terms of perception on the (also) "socio-cultural" level of the relevance of the fact, nothing can prevent the

assessment criterion mentioned above—once made interact with the same dynamics of prevention special—from playing in favor of the choice to decree the impunity of the author of the unlawful. Imagine, in this regard, that the theft (*e.g.* the removal of a garment from a market banquet) has been committed by a subject from some time “short” of money, in order to better cope with the rigors of an icy winter. In such a context, it does not seem unreasonable to admit that the conduct of that subject can hardly imply, if it remains unpunished, a reaction on the social-evaluable level, at the same time, in terms of general and special prevention likely to result in an attitude of fear or widespread condemnation. Rather, there will be good reason to believe that a renunciation of repression does not seem intolerable, in view of the substantial inability of the circumstances to generate a loss in value of the contents of the threat as to their ability to still evoke the sense and prospects of protection.

The social and institutional significance of a lack of repressive “response” really seems to represent, in such cases, the result of a “synthesis” between the aforementioned preventive assessments, so as to confirm and assure their underlying inspiration; it configures, so to speak, a further “precipitate” of the judgment about the need for a “validation” of the criminal threat, by acting this time no longer the same as a need connected to the application of the penalty, but rather as the basis for the legitimization of a renunciation of the same, to the extent that such renunciation is in tune with the same teleological scenario expressed by the individual affair of that subject, otherwise punishable for the accomplishment of the offense.

## 17. INSUFFICIENCY OF A “GRADUATION” OF THE CRIME INSPIRED BY “MATHEMATICAL” CANONS

The need to give input to assessments focused on the functions of punishment leaves to emerge, on closer inspection, a vision of the presuppositions of “non-punishability” capable of legitimizing choices less conditioned by some limitations (more or less widely) postulated up to now.

It seems to us that once the teleologism of the sanction comes to be the object of a “renewed” verification conducted in the light of the historical concreteness of the event, the judgment about the irrelevance of the fact must albeit partly detach from a measurement of the unlawful conduct as a “gradualistic” perspective of the type generally adopted in the elaboration in the matter. Of course, even in these the question is still debated whether this graduation should be made, placing on the same level the individual elements of the illicit, or if it can instead be reconciled with a “hierarchical” scale between them, such to be concluded, for example, when faced with a small offense, a guilt that is not, in line with an injury that is not so small (except for the cases in which the degree of guilt is really “minimal”, so as to offset in some way the objective negative value of the fact).

And yet, the idea of favoring such an "arithmetic" of the crime seems, on closer inspection, to overlook the fact that the "review" of the functions of the sentence in practice is hardly compatible with a choice aimed at anchoring it to a comparison "point per point" of the consistency of the tort.

It is already recognized, for the truth, that, for the purposes of such an assessment, the profiles characterizing the single episode, not unlike what happens for the commisure of the penalty, go beyond the "components" in the strict sense of the crime (reaching investing, for example, even the further consequences of the conduct, even if not expressly "typed").

But above all, much more important and significant appears the importance according to which the consideration of the ends of the sentence seems to postulate an investigation released from an excessively "stringent" path, such as the one often hypothesized. To take up the example above: Why, hypothetically, to decree not to be punished when that item was priced at thirty euros, and not fifty, or a hundred? Notwithstanding the obligation of restitution and of any compensation for damages, to that to evaluate otherwise the "sense" of that gesture, as one perceives in having acted under the influence of sensuous "sensible" reasons, and considering that it is difficult, will the fact come back? If you really want to talk, in this case, of "prevalence" of the subjective aspects of the fact on the pure patrimonial offense, you could, indeed, also do it; having clearly, however, that it would not be sensible to request a "very low" or "minimum" guilt according to predetermined levels of graduation *in vitro*. Rather, it is that, insofar as the motives and circumstances of the conduct appear to demonstrate the "fall" of a preventive need to be pursued through punishment, nothing could reasonably prevent an eventual renunciation of a conviction verdict.

Think again, as regards the profile inherent to the "modalities" (in a broad sense) of the offense, to a return of the subject to the place of occurrence after a few minutes, with simultaneous delivery of the goods subject to theft, or to the declared availability to constitute itself where the injured person does not consider himself satisfied by the remedial behavior. It would be difficult to understand, in the face of a "context" of this kind, the reasons why the decision could not be accepted regardless of the use of criminal sanctions. If justice, without losing its role and its vocation, must avoid a blindly "extremist" vision, it is necessary, however, to leave the horizon of a superficially punitive criminal system, to give the offender responses perceivable by individuals and the community as a whole satisfactory of the injured interests, and therefore more effectively re-educative and reconstructive of the social fabric and of the stability of the legal system, than the application of a penalty.

Excessive discretion on the part of the judge? The objection is likely to sound paradoxical. The European system is largely entrusted to discretionary assessments,

as it emerges not only from the choices related to the commensurate sentence, but also from the wide range of discretionary models regarding mitigation, conditional suspension, and of the process in trial, of alternative solutions to condemnation in the context of "peace jurisdiction", to limit itself to some particularly significant hypotheses.

And it is not enough: Can we believe that an alleged "mathematical" finality in "graduating" individual profiles of the illicit is able to prevent the judge from having recourse to a wider sphere of discretionary evaluations? In fact, a review of the subject-matter addresses, as these have often felt the need to elaborate a "logic-logic" so rich and articulate, to suggest the effort to provide a "grid" in advance, compared to the thousands and upon thousands of situations, as (and indeed, precisely because) not easily predictable, that the practice is having to manage.

On closer inspection, the central problem does not consist, however, in deciding whether to rely or not on such directives. Instead, it consists in taking note of the fact that they cannot give rise to a definitive and necessarily binding "catalog", and on the other, that it would be incongruous to claim to "order" the elements of offense according to a decreasing scale in which they can "classify" based on strict measures. Reality seems to be different, and it is not out of place to insist on it further. In the concreteness of the episode, even a single teleologically meaningful aspect will be able to "spread", so to speak, on the whole of the story, in such a way as to give it a favorable "light" towards the guilty party; just as a concrete profile of the illicit may well be configured, although influential on the whole of the story, but with effects, unfavorable to the author this time (think, for example, the theft of an object exposed in a jewelry shop, from which an enrichment patrimonial purpose is worthy of a very different evaluation also from the point of view of a possible repetition of similar gestures). Even a non-exhaustive, but at the same time particularly dense, point of view of observation that the fact can be assessed will legitimize, in short, an "understanding" (to put it in a language dear to hermeneutical thinking) of the "sense" of the episode in line with a teleologically inspired approach to a choice of exclusion, or otherwise, of punishment.

The substance of the foregoing reliefs seems to have found, although connected to the specific regime of the tenuousness of the fact (but, on closer inspection, particularly significant for the choice to remove this disposition for a "graduation" of the purely abstract illicit and formalism), the merit of envisaging a general model of reference for the future "life" of the institute. In this regard, the consideration on the basis of which it would not be admissible to recognize the existence of "a tenuous or grave offense in an archetypal key" is really effective, given that the concrete form of manifestation of the crime would take on a decisive role; unlike that evoked by the "tradition" embodied by the "principle of offensiveness", it would go beyond the logic of a measure still linked to "typicality", to extend to the whole of the "historical" affair,

as such inclusive of the guilt that in it is incarnated up to allow to evaluate the gravity overall, and consequently the need for punishment. Nor can it be forgotten that the supreme court concludes its examination by stating how the possible balance between the elements expressed by the "historical fact" should be operated "prudently", that is, in essence, trying to grasp the meaning of the episode beyond cogent constraints in weighing the "sizes" in comparison.

## **18. SOME COROLLARIES CONCERNING "ABSTRACT" DANGER CRIMES AND CASES WITH SPECIFIC "THRESHOLDS" OF RELEVANCE**

The greater flexibility of the evaluations connected to the matter under examination appears to be confirmed, also from a more circumscribed visual angle by the analysis of further phenomena with respect to those concerning the more "traditional" forms of anti-judicial behavior.

In particular, as evidenced by the inclusion of a special "clause" of smallness regarding the basic case of "false social communications", the relative judgment is even referring to elements unrelated to the "typical" dimension of the crime; it is affirmed that, in the verification of the tenuousness of the fact, the judge must evaluate albeit "predominantly" (confirming the still discretionary nature of the relative judgment) "the extent of any damage" caused to the company, to shareholders or creditors; in spite of such a damage, there is no confirmation in the tenor of the incriminating rule. On the other hand, it would be implausible to believe that such an "external" parameter to typicality must be considered as operative within the limited, and restricted boundaries of the particular discipline now mentioned. Disengaging itself from a blind obedience to the ancient brocardo *ubi lex voluit*, it is important here to highlight how this "extensive" logic of judgment of irrelevance assumes, in effect, its undeniable importance with regard to a much wider series of crimes based on the danger, even when, in hypothesis, the law comes to characterize the latter in an "abstract" dimension.

The legislator does not only refer to situations in which the "degree" of the offense comes to be identified "within" the same logic that presides over such an abstraction. That is the case, for example, of the significant difference between a constructed construction "in discrepancy" by the relative permission, and the fact of having performed it in the total absence of the latter. On the contrary, it is important to note how the profile of the smallness can be affirmed in the wake of experiences already partially manifested also in the light of an assessment less conditioned by the "artificial" and prodromal character of the protection provided; if such experiences could raise perplexities in the light of reference to the criterion of offense, they are, in fact, more compatible with a reading of the "non-punishability" inspired by a teleological vision such as that sketched up to now. The appreciation of the meaning of the offense in a "synergistic" perspective with the dynamics of the sanction seems

to allow, in other words, the recourse to the paradigm of tenuousness to look the "concrete" character of the peer-to-peer, and even without neglecting the presence of additional circumstances (mostly "indicted" by the same tenuousness of danger), such as an error on the prohibition very close to the margin of inevitability, assuming them as symptomatic elements of the current lack of the "necessity" of a punishment (Frisch, 2015b).

It seems to us, in reality, that such a current of thought, in spite of the commitment on the hermeneutic plane that led to its elaboration, comes to develop conclusions that are to some extent antithetical to those which should instead find acceptance. In fact, if we are faced with a threshold of importance such as to give rise to a condition of punishment, it would seem that the fact that the illegal conduct is accompanied by a further assessment by the order specifically based on the conditional event, renders difficult to make that threshold play for the purpose of the judgment of smallness. And indeed, if it is true, in particular, that, as it can be seen from the most accredited opinions, the condition of punishment arises as the precipitate of a political-criminal choice that poses itself objectively in favor of the guilty (since the crime is still existing), it would seem consistent to believe that such a choice prevents not only from going to "measure" the level expressed by the same condition, but also to make it possibly inoperative by virtue of a judgment concerning the actual relevance of the lesion and/or other elements of the illicit. The insistence of the choice to punish on the same condition as such, that is, as a phenomenon still "additional" compared to the components of the crime seems destined, in short, to preserve its role and meaning as an inseparable parameter of "feeling" of a further appreciation able to exclude the criminal intervention, with the consequence that, to the extent that the crime results (still always) integrated, the presence of the condition, we forgive the tautologism "will condition", the recognition or hypothesis of the need to punish him, regardless (not only from the entity of the conditional factor, but also) the same gravity assumed by the contents of the offense, since the condition has been verified.

On the other hand, even by reasoning in the light of the recently introduced legislative provision, it does not seem that the reference to the offense may sound like a decisive criterion to confirm the trend mentioned above. And indeed, this reference lends itself to be interpreted, but from the point of view of a verification inherent in the degree of offense, but on the assumption, however, that elements that make the *ani puniendum* dependent on evaluations that result from it are substantially unrelated. In this case, the dynamics within the indices of smallness would seem, in fact, already made *ab initio* irrelevant, precisely because of the inclusion of a requirement from which the punishment is made to descend once and for all.

Indeed, the fact remains that the way of presenting the thresholds of punishment, even if they come to gravitate in the offense, does not always make it easy to

hypothesize a degree and a "measure" likely to lead to a judgment of exigency. In fact, if such a result could well be considered, in hypothesis, in the road traffic sector (as happens with the alcoholic rate relevant for driving under the influence of alcohol), the recognition of such a small amount in the matter would seem much more problematic, *i.e.* tributary violations, and also regardless of the problem of qualifying the threshold (if, in other words, as a constitutive element or a punishable condition). Nor can we add that the offending case (part of a possible verification about the habituality, or otherwise, of the offense, however, considered existing) could lend itself with more difficulty to an assessment referred to the modalities of the conduct, seen and considered that the dealings of the latter in terms of pure omission will lead, at least, to reduce the possibility of manifesting the episode .

#### **19. THE RECENT DISCIPLINE ON THE "TENUOUSNESS" OF THE FACT: CRITICAL REMARKS ABOUT THE "MINOR" ROLE RESERVED FOR GUILT AND THE LACK OF REFERENCES TO PREVENTIVE NEEDS**

The reference to non-habituality would have the advantage of making more stringent the assumption linked to the serial character of criminal conduct, and for this reason to avoid introducing into the evaluation circuit unavoidable judgments, defined by unpredictability and arbitrariness. In a substantially analogous perspective, there are not a few to point out, moreover, how the change in the formula would lead to a lower "spend" of process energies compared to those otherwise necessary to probe and decipher the aforementioned "occasionality" of the fact.

Referring to a later point by a critical note to these positions, however, it should be noted that even more convincing is the further consideration according to which the reference to occasionality would imply a more restrictive solution in order to the recognition of the cause of non-punishment. Actually, the logic of the criminal records (or, in any case, the existence of other facts attributable to the author), which is found in the discipline, could often result in less favorable outcomes than those deducible from the call to occasionality. Thanks to this, in fact, a sanction of irrelevance may well arise from the wider space given to evaluations in a prognostic key, even if derived from those characteristics of the single illicit, which appear symptomatic of the loss of the purpose of the sanction. First of all, the occasionality of the fact allows an "synergistic" assessment to emerge with the profile of guilt, as well as with that of the conduct, in which the former tends to be reflected. Moreover, it is a type of assessment that, in "looking" at the committed fact, is well suited to grasp the "projection" towards the future, if one wants to be serious about the idea according to which the logic of prevention cannot be made "to orbit" in a universe separate from the idea of purpose that illuminates the very foundation of the illicit. Thus, a less reprehensible process of motivation (think, for example, of a theft, even if committed by a subject who is already the author of a similar crime, but due "occasionally" to the loss of work due to dismissal) should not preclude a favorable attitude towards the agent, since the meaning

under the social profile that must animate the logic of prevention (general and special) cannot stand that the "sense" of the episode is taken outside of a negative evaluation about the use of the penalty in the specific context inherent to the fact to be judged.

Privileging the profile of habituality, the risk that is proposed is that of ending up with the unreasonable "automatisms" in delineating the preconditions of non-punishability, as a function of a deflationary perspective—or vice versa, of rejection of the same—operating "to the blind": A view, on the other hand, that seems to emerge already from the call to archaic (and frankly hateful) regulatory hypotheses, beyond everything informed by an "eccentric" logic with respect to the institution's ratio, such as that of social danger, concerning the habituality and professionalism in the crime, as well as the tendency to commit crimes. It is true that it is sometimes held, albeit with more specific regard to the hypothesis of the commission of several crimes of the same nature, that the latter must form, this time, the subject of the same procedure in progress, so as to make evident the "serial" character, outside of a possible recidivism or otherwise of judicial impedimental precedents. And yet, apart from the difficulty of justifying this conclusion in the light of the normative dictate (indeed, of a much broader and more generic content), and the further obstacle represented by the tendential "overlap" that would result from the subsequent recall of the norm to the conduct "reiterate", the fact that nothing prevents the claim "seriality" of the episodes does not imply their inscription in a framework of homogeneous circumstances, not only from a temporal point of view, but also under the peculiar characteristics of the single event. Nor do things go better, when one has to do with the exclusion of the tenuousness of the fact in the presence of multiple and repeated behaviors, where, in addition to the critical profiles so far highlighted, the question arises of how to justify a choice that even prescind from the same "character" of the illicit, and therefore, hypothetically, also from that substantial dimension based on the "nature of the facts" and "reasons" on the basis of these that could, at least, subtract the judgment to the mere observation of the existence of a plurality of crimes.

An orientation that should emerge from the indication as parameters relevant to the recognition of a small fact, of the only requirements of the "methods of conduct", and of the extent of the "damage or of the danger". In order to be able to explain the choice adopted by the legislator, there is no shortage of those who place the aforementioned psychological moments in correlation with the same modalities of conduct, in the sense that these, by the very fact of embodying the "action disvalue" proper of the illicit, they would be modeled (also) according to the intentional or negligent attitude that in them would still find a significant confirmation. However, according to the statements of its supporters could be shared, that thesis only admits (in the wake of a widespread opinion) that the fraud and the guilt must be "incardinated" in the same (typical) fact, so as to allow to evaluate its meaning in a dimension divorced from the judgment, to be kept distinct, concerning the reproach of guilt.

Interpreting the norm from the point of view of the genus, and yet without contesting the influence of malice and blame on the methods of extrinsication of the illicit, it seems, however, to define the risk, not just arbitrarily amputating the will and blame of their "subjective" dimension, but also to reach, once again, a "monastic" and reductive vision of the connection of the phenomenon under examination with the finalism proper to the sanction. And indeed, that well-known contrast (*e.g.* the one of the malicious attitude with the aim of protecting legal assets as such), intended to consciously put the same objectives of the criminal law into question, seems to impose to enhance their role and meaning also on the level of guilt and the relative "degrees" of intensity. And it is no accident, in fact, that a scholar such as Claus Roxin, precisely in order to accentuate the connection, in a criminal political key, with the preventive needs, underlines that only in this way it is possible to evaluate the "gravity" of the fraud, both in terms of its level of intensity, and culpable debts: Only in the light of a "teleological system" (Roxin & Schünemann, 2017) able to express the sense of punishment, in its foundation and in its measure, the malice once brought back to the sphere of guilt will it be able to reflect how the agent behaves towards the protected interests, making sure that his psychological substance comes to be combined with that broader perspective, in which the consideration of the purposes that qualify the relevance may be fully appreciated. Even in this matter, indifference towards the teleologism of the sanction risks translating itself not only into a "closure to criminal policy" as a harbinger of vacuous conceptual "abstractions", but, "even more generally, in an interest for the particularities of the concrete case, therefore in the fact that the certainty of the law is often reached at the expense of justice". And in fact, how to deny that the culpable or culpable fault can and should illuminate that "concreteness" of the judgment, which can be seen emblematically in the verification of the "thickness" of the reproach necessary to justify the use of the sentence?

## **20. THE QUESTION OF "PRESUMPTION OF NOT GUILTY". SKETCH OF A PROPOSAL DE LEGE FERENDA**

The considerations made up to now, as had been previously announced, have the need to decipher the subject matter of the judgment, in terms that make the purely "efficient" objective inherent in a deflationary intervention free from obstacles appear less "obsessive" and from rigorous audits. And indeed, apart from the consideration that already the same "edictal" limit of the sanction provided for access to a judgment of "tenuousness" represents an obstacle of not a little moment (moreover, as founded on the maximum and not on the minimum of the sentence, intimately contradictory) with respect to a similar "streamlining" process, it is no coincidence that the same authors of the reform have repeatedly stressed how, in reality, the criminal policy stance of the last ratio", together with "fundamental principle of justice constituted by the proportion" of punitive intervention should be considered as the actual sources of legitimacy of the institute in question.

*Facere de albo nigrum* coming to an artificial "obscuratio" of the components of the illicit is therefore not admissible, neither on a purely rational level, nor (and it is what matters most) from the constitutional and political-criminal point of view. Particularly regarding the latter profile, the "instrument" set up to limit the criminal intervention is destined to be registered within the system on the basis of motivations different from those that govern the finding or not of the existence of a crime, it would be improper, as well as misleading, to assume the "non-punishability" as a remedy and surrogate with respect to the task of making a preliminary verification about the same requirements from which this choice depends.

In order not to leave in the shadows the fundamental problem of how an illicit can conceive of all its requisites, but at the same time devoid of sanction, that choice cannot do without attributing relevance to the same purpose of the sentence, so as to be able to "read" in the episode an effective "contradiction" between the aforementioned purposes and the characteristics with which it came to present itself. In short, it is a "negative dialectic" which belongs to the judge concretely decipher, in such a way as not to make it seem inexplicable, and this time really without purpose, the interruption of a "sequence" otherwise destined to develop towards its natural epilogues. If anything, and unlike the formula aimed at establishing that "no" needs of a preventive nature should exist, it would perhaps be advisable, in order not to "dissociate" the meaning of the offense from the teleologism of the sanction, and to avoid that mere requirements of social defense can pollute the corresponding work of "selection", to follow the indication of the assumptions of the small fact the reference to the fact that the latter is such as to induce to make the purposes of the sanction non-existent. Thus, it could be established, for example, that the punishment remains excluded when the crime, having regard to the concrete circumstances in which it was committed, presents, on the objective level and under the guilty profile, a small content also in relation to the established lack of preventative measures related to the application of the sentence.

## 21. ILLEGALITY OF THE ILLICIT AND RESTORATIVE JUSTICE: THE POSSIBLE INTERFERENCES

It is a matter of asking, at this point, whether a possible "reparatory" attitude (in a broad sense) by the guilty party can contribute to define the conditions for non-punishment.

In this regard, it must also be remembered that regarding the growing importance attributed to the restorative justice and its more "ambitious" model, embodied by the techniques of "criminal mediation", the need has been affirmed to attribute particular significance to post delictuous conduct, to the point of suggesting the introduction of a case of "crime" repaired in the form of a forecast intended to flank, in an attenuating function, the type of incrimination configurable from time to time. This solution would not exclude, however, a choice aimed at confirming the hypothesis of exclusion of the sentence connected to those "antagonistic" behaviors with respect to the offense

to which we have already had the opportunity to dedicate part of the research. And indeed, such a proposal, in the intent of the person who formulated it, should come to be placed in a broader scenario on the political-criminal level, such as to make often the incisive and penetrating role played by the non-punishment as an expression of the complex of reasons, distinct from the choices of criminalization in the abstract, that converge to select the system in view of an effective implementation of subsidiarity and the personalization of responsibility: The reasons, in sum, to promote a degradation of the punishment threatened towards mitigating sanctions (as in the case of the "repaired crime"), as well as precisely and with much greater consistency than the fragmentary and episodic regulations in force towards the increase in forms of "renunciation" of the conditional sentence on additional services.

Similar proposals in one with the growing influence of the experiences, particularly rich and varied, matured in other systems make, therefore, more and more inescapable an answer to the question concerning the relations between the institute under examination and the "reparatory" logics that go spreading and ramifying within the criminal universe. And indeed, precisely in this regard, expresses strong perplexities about the normative choice to dis-anchor the pronouncement of "tenuousness" from the burden of activating concretely in favor of the victim or of the community as a whole; a choice that would feed, to be true, the consolidation of a purely "indulgent" logic, as such destined to leave on the field the unpleasant sensation of a "dispensation" from punishment without any appreciable "counterpart" (Frisch, 2015b).

However, and without wishing to neglect the weight of such arguments, it seems possible to say that, once the aforementioned preventive assessments are put in place in the institution under examination, the concern now reported seems destined to be considerably reduced; firm the importance under the criminal profile and at the level of overall strategies of the criminal reform, of the relevance played after all, it does not seem incongruous to believe, in fact, that the proprium of the phenomenon of tenuousness can still be grasped in this role of "contrasting" with respect to the punitive need, in this profiling itself as the negation, already *in apicibus*, of the penal sequence, even if not without some reverberations (first of all, as we already remembered in the past, those relating to civil relationships) that are not negligible.

## CONCLUSIONS

What, if anything, deserves to be highlighted, is the fact that the possible presence of reparatory conduct cannot be considered devoid of any relevance for the purposes of the judgment on non-punishment. If it is true, in fact, that such an opinion cannot completely overcome (despite the appreciable teleological reading that it proposes) some obstacles deriving from the normative formula, it cannot be denied that, to an approach less conditioned by the discipline in force, the fact that the aforementioned

behaviors have been explicitly above all, if in a temporal context (as we observed) strictly contiguous with respect to the unlawful can still contribute to make the requirements underlying the application of the sentence scarcely appreciable. Moreover, it does not seem to be a case that, not only in some elaborations of the other side of the Alps (Bruns, 1973, p. 72), there have been a few ideas favorable for enhancing (though with some reservations) such a line of thought; it has been noted in this regard as the element of guilt—an element, therefore, of the illicit act—, but that, according to the thesis developed so far, should “coordinate” with the reasons for prevention could be decipherable in its consistency, even in light of the subsequent methods of utilization of the results of the committed fact, in the guise of a connotation of agent’s way of acting as early as the moment of its realization. It is an index, therefore, or if desired, a “clue” of the dimension assumed by the same components of the crime, able to reveal its teleological depth, and to eventually lead to decree of its inadequacy for the purposes of punishment.

Too much or too little (depending on your point of view)? It is a question that, in the perspective of a broader “system” intervention (today, unfortunately, still futurable), could certainly find answers more up to expectations at both the theoretical-scientific and “government” levels in the judicial phenomena of non-punishability; in the awareness, however, that, especially in this sector—where the “dynamism” of valuations makes a premium on the formal abstraction of the categories—, it would be unrealistic, as well as frankly improper, to cultivate a sort of rigorous “closure” and lack of communication between the multiple levels of “selection” of the sphere of criminal intervention.

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