The Making of insane offenders in the Western Tradition

A comparative approach to the birth and enforcement of criminological positivism (1870-1940)*

Yves Cartuyvels
University of Louvain site Saint-Louis Brussels
ORCID ID: 0009-0002-3419-6120

Aniceto Masferrer
University of Valencia
ORCID ID: 0000-0002-4193-0541

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Abstract

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Introduction

The end of the 19th century was characterised by the emergence of a new penal rationality in the Western world that was oriented towards protecting society against various categories of dangerous individuals. Under the influence of the Italian positivist school, the focus shifted from the crime to the criminal, at the core of a social defence project that broke away from the principles of classical criminal law.

Exemplary figures of dangerousness, considered a significant source of crime and recidivism, were the focus of new policies oscillating between care and security. Among them, the insane criminal, a specific figure taking place in the broader category of "abnormals", quickly became one of the privileged targets of this new positivist-inspired penology.

This journal issue is dedicated to this deviant group, characterised by a lack of reason and oscillating between guilt and sickness. By examining the debates and initiatives that concerned them in Europe and Latin America at the turn of the 19th and 20th centuries, we aim to improve our understanding of the questions posed by their ambivalent status to criminal justice and the responses provided by States to the threat to social order that they are supposed to represent.

But before entering a discussion that engaged lawyers and psychiatrists in a polyphonic dialogue, it seems useful to present the political, epistemological and penal contexts that generated a real fascination with criminal madness. Three major transformations created, throughout the 19th century, a favourable framework for this new securitarian discourse that targeted insane and abnormal criminals as emblems of dangerousness. The first is, in the context of industrial society, the emergence of a utilitarian social project described by Michel Foucault as the birth of biopolitics (I). The emergence of a project designed to manage (social) life in its different aspects, relying on regulatory and disciplinary mechanisms, produced a significant shift in the interventions of the State: drawing on the rise of positive sciences and statistics, the State became more interventionist and law more consequentialist, oriented by the goal to achieve. In this context, the abstract and retributive frameworks of classical penal law were questioned by a new ideology insisting on the need to prioritize the management and control of (deviant) populations, based on empirical knowledge derived from reality (II). As a result, awareness grew that, beyond the crime, it was necessary to focus on the criminal in order to provide an effective response to criminality. This would be the core of the "positivist revolt" that spread its discourse of social defence in both Europe and Latin America from the end of the 19th century onwards. Addressing the gaps of classical criminal law in defending society against crime, criminological positivism[1] challenged the spiritualistic approach of the (neo)classical penal school and its seminal fiction of free will and the rational subject, just as it challenged its guarantistic principles (legality, proportionality) seen as obstacles to the efficient prevention of crime (III).

It is on this complex scene that the question of insane criminals developed in a period also frozen by the fear of degeneration and social uprising. Largely shaped by psychiatry, criminal madness emerged as a central issue for the positivist project: it was the source of heated discussions between lawyers and psychiatrists on the limits of criminal responsibility, the role of medico-psychiatric expertise or the kind of measures, between punishment, care and neutralization, to be taken in order to protect society against dangerous and degenerate citizens. Through the questions it raised, criminal madness actually embodied the quintessence of the positivist project, emphasising at best the tensions between positivism and classical penal law from a social control perspective.

1. From the Liberal State to the birth of biopolitics

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[1] We have chosen to use the term "criminological positivism", acknowledging that in certain countries, the term "criminal positivism", and sometimes even the term "legal positivism", is used instead.

1.1 Birth of biopolitics: from the realm of Law to that of Norm

The 19th century liberal State was dominated by the rule of law. In this political system based on Law and Reason (both based upon nature)2, which broadly adopted the Modern Natural Law inheritance, the State aimed to be minimal and law merely set the limits of "what is permitted and what is prohibited" to regulate exchanges between citizens[3]. The police State or Etat gendarme acted on a principle of limitation rather than organization, such organizational ambition being entrusted to civil society. The legal fiction behind the juridical regulation was that of a unique legal subject, equal and accountable before the law. It also presupposed, both in civil and criminal matters, the representation of an individual endowed with free will and reason, gifted with "autonomy of the will", which gave him the capacity to enter into legal commitments.

Such a narrative was gradually questioned during the 19th century: the increasing complexity of social and economic exchanges inherent in the development of industrial society required a more interventionist State. The minimal police State, acting as a guardian of sovereignty, was gradually replaced by a regulatory State driven by a "biopolitical" imperative. As explained by Foucault, the State's focus shifted to "managing life", relying, on the one hand, on "regulatory controls: a biopolitics of the population", carried out (notably) through statistical mappings and hygienist interventions within the cities and, on the other hand, by developing "disciplines"[4] aimed at shaping human behaviours according to a principle of utility. To the realm of Law, biopolitics added the realm of Norm: the wish to organize life according to a principle of utility made it necessary to categorize groups and to classify individuals in order to sort them and to operate "distributions around the norm". The counterpart of this utilitarian organizational principle was identifying the "abnormals", as they did not comply with the norm of utility. "Abnormals" were to be identified, classified and sorted, either to be rectified and incorporated into the overall social project if possible, or to be kept aside if not[5].

1.2. The emergence of a consequentialist (criminal) law, grounded in reality rather than abstraction

In such a context marked by the return of the "real world" and its requirements, the abstract fiction of an abstract legal subject endowed with free will and reason weakened. It was challenged by growing awareness that behind such a fiction there existed a great diversity of "living beings" whose diversity was not correctly apprehended by the juridical mythology. Increasingly, both science and law made room for the intertwined interplay of social conditions and individual determinisms to allocate total resources, refine assessments of responsibility and distribute positions to one and all as a function of their real life experience. Behind the abstract fiction, the "real subject", perceived as an individual in context, took its revenge.

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[2] Masferrer, A., "The Role of Nature in the Secularization of Criminal Law in Europe (17th–19th Centuries): The Criminal Law of the Enlightenment Revisited", *Criminal Law and Morality in the Age of Consent: Interdisciplinary Perspectives* (A. Masferrer, ed.), Dordrecht-Heidelberg-London-New York, Springer (Collection '*Ius Gentium*: Comparative Perspectives on Law and Justice'), 2020, pp. 97-144.

[3] Mazabraud, B., 'Foucault, le droit et les dispositifs de pouvoir', *Cités*, 2010, n°42, pp. 143-145.

[4] Foucault, M., *Histoire de la sexualité*, *Vol. I La volonté de savoir,* Paris, Gallimard, 1976, p. 183.

[5] Foucault, M., *Sécurité, Territoire, Population*, Cours au Collège de France, 1977-1978, Paris, Gallimard, 2004, pp. 47-48; see also Foucault, M., *Surveiller et punir. Naissance de la prison*, Paris, Gallimard, 1975, p. 259.

On a societal level, three major phenomena encouraged this evolution that prompted legal regulation to focus on the "real individual". The first one was the development of scientific positivism that introduced, under Comte's influence, a new scientific epistemology. In natural sciences first, in social sciences subsequently, the grand metaphysical or spiritualist constructs were contested by an empirical approach based on experimentation and verification. The second phenomenon, complementary to the first one, was the emergence of statistics, or the application of probability calculation to the study of social questions. From the early 19th century onwards, the management of social issues related to industrialization and urbanization fostered the development of counting techniques for mapping reality with the help of quantifiable and measurable data. Statistical science also encompassed the study of the "penchant for crime", considered to be a central issue to master in order to organize social life efficiently[6]. Finally, the real inequalities generated by industrial capitalism drove the States to act to safeguard the most vulnerable citizens against the various risks of social and work life. In this context, law became insurance-oriented, deploying mechanisms of no-fault responsibility aimed at transferring the burden of risks from the individual to the State[7]. The judiciary also followed this more concrete-oriented evolution: raising the blindfold of justice, a symbol of distance and neutrality, the judge opened the eyes of Lady Justice and dissected "files" in order to weigh the opposing parties' interests and claims. Adopting a less Jupiterian and a more Herculean attitude, the judge tried to construct a fairer and more balanced decision based on the concrete case file[8].

This triple movement went along with a shift in the legitimacy of the law. In a society governed by biopolitics, the law became teleological, guided by the end to achieve (Zweckgedankte). Its legitimacy no longer rested upon the unshakable authority of the sovereign or on an original truth anchored in some "Sinai"[9]. It was now assessed downstream, by its ability to achieve the set goal. In line with this teleological logic, the law relied less on a spiritualistic or metaphysical source than on scientific truth to guide and legitimize its action.

This transformation, contemporary with the birth of the Welfare State in Europe, was also noticeable in criminal law. From the 1860 onwards, the dominant "metaphysical" approach of the (neo)classical school was questioned due to the combined effect of **three** cumulative movements, namely, the birth and development of psychiatry in the 19th century, the enthusiasm for scientific positivism **associated with** the development of statistics in the field of human sciences, and the political fear aroused by the "dangerous classes" for the social order. These three elements contributed to shifting the focus from the crime to the criminal as an ontological but also socially situated individual. They contributed to the enshrinement in criminal law of the consequentialist logic that developed more generally in law, shifting the answer to crime from punishing a committed act and seeking retribution for a moral fault towards protecting society against the risk of future crimes.

2. From crime to criminal, or the shift from the realm of abstraction to the real world of the offender

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[6] Quetelet A., *Sur l'homme et le développement de ses facultés ou Essai de physique sociale*, 1835, reprint Paris, Fayard, 1991, p. 421.

[7] Prins, A., *La Défense sociale et les transformations du droit pénal*, Bruxelles, Misch et Thron, 1910 (reprint Genève, Médecine et Hygiène, 1986), pp. 56-57.

[8] Ost, F., 'Jupiter, Hercule, Hermès : trois modèles du juge', in *La force du droit. Panorama des débats contemporains*, (Bouretz, P. (Ed.)) Paris, Ed. Esprit, 1991, pp. 242-291.

[9] Ost, F., *Du Sinaï au champ de mars : l'autre et le même au fondement du droit*, Paris, Lessius, 1999.

2.1. Challenging the legacy of the classical school: a dual individualisation of the sentencing process

The classical criminal law school – a legacy of penal enlightenment – is consistent with the liberal rule of law project that dominated the early 19th century. Unified in a Penal Code, referred to as a "complete body of legislation"[10], 19th century criminal legislation proposed a succinct and concise corpus of offences and penalties incarnating the State's interest in repression. In conformity with the spirit of its time, it assumed the abstract fiction of a free-will subject of rights: as depicted by Beccaria and his contemporaries, the criminal was an autonomous rational actor who freely decided to commit an offence following a balance of interests.

The classical school did not offer any ontology of the criminal and showed little interest in the criminal individual behind the offender. Within this disembodied framework, punishment aimed to be retributive and (mostly) deterrent, logically linked to a principle of proportionality between the severity of the penalty and the objective seriousness of the offence.

Such an abstract and rationalistic approach proposed a binary interpretation of responsibility that excluded those who lacked free will and reason from the scope of criminal law. In such a framework, punishing an insane individual has neither legitimacy, nor sense: the retributive function of punishment is irrelevant since no "fault" has been committed by an irresponsible person; its specific dissuasive function is illusory towards an offender deprived of free will or reason; and the general deterrence function of punishment is weak, since the public, consisting of rational citizens, does not identify with offenders marked by madness or irrationality.

In perfect symmetry with the theory of autonomy of the will supported by the French Civil Code of 1804, the Napoleonic Penal Code of 1810 was the first criminal code to emphasise in an exemplary manner this binary interpretation of criminal responsibility. Soon followed by different other Penal Codes, it proclaimed, "Il n'y a ni crime ni délit lorsque le prévenu était en état de démence au temps de l'action ou lorsqu'il a été contraint par une force à laquelle il n'a pu resister" ("There is neither crime nor offence if the accused was mad at the time of the action or compelled by a force that he could not resist"). The message was crystal clear: only the individual who enjoys the lights of reason can be guilty of an offence and punishable. The absence of either one of the two elements, cognitive or volitional, precludes criminal responsibility. The principle of the insanity defence, tracing its origins back to Roman law[11], was asserted here with all the more strength that the penal project inherited from the Enlightenment was entirely underpinned by Reason[12].

However, the abstract logic of the classical school evolved during the 19th century to consider, beyond the committed crime, the criminal, following a double individualization inflexion. On the one hand, the neoclassical school introduced the idea that concrete circumstances can influence free will and mitigate the moral responsibility of the offender. Symbolised by the mechanism of mitigating circumstances, a preliminary form of

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[10] Bentham J., 'Of laws in general', *The Collected Works of Jeremy Bentham* (Hart, H.L.A. (Ed.)), London, Athlone press, 1970, p. 232.

[11] Gorevitch, D., 'Le fou dangereux sous l'empire romain', *Criminologie et psychiatrie* (Albernhe, T. (Ed.)), Paris, Ellipse, 1997, pp. 478-483.

[12] Cartuyvels, Y., *D'où vient le code pénal ? Une approche généalogique des premiers codes pénaux absolutistes au XVIIIe siècle*, Brussels, Montreal, Ottawa, De Boek, PUM, PUO, 1996.

individualization tied to the offender's situation gained prominence, driven by considerations of both justice and the effectiveness of the punishment. In order to deliver a "just penalty" and to punish "no more than is just, no more than is necessary", it became essential to take account of the degree of moral responsibility of the author in *concreto*[13]. But on the other hand, starting in the early 19th century, inexplicable crimes fed the chronicles and raised questions about the individual beyond the crime itself. Emerging from the "degree zero of madness"[14], inexplicable crimes perpetrated by seemingly rational individuals challenged the criminal justice system and the classical dichotomy between the "sane" and the "insane". A second form of individualization of the sentence stemming from criminal insanity and its various manifestations emerged, this time no longer from a moral justice perspective but with the aim of protecting society against dangerous individuals[15].

2.2. Criminal insanity and psychiatry, a driving force behind a deterministic reading of the criminal

A significant shift in the interpretation of madness took place with the birth of psychiatry at the beginning of the 19th century. Crediting Antoine Pinel, the founder of French psychiatry, for this discovery[16], Hegel explained at the time that madness was not the "Other of Reason", as Kant still believed at the end of the 18th century, but represented "a contradiction within reason"[17]. As a consequence, madness and reason could perfectly well cohabit within the same individual. Such a conception has two consequences: First, a gradation in the states of madness or mental insanity may exist, depending on the amount of reason that persists in the afflicted mind. This also means that, in the case of a crime, recognition of diminished or partial responsibility becomes conceivable. Second, whereas Kant considered exclusion and confinement to be the sole response to madness, Hegel – along with Pinel – considered the possibility of a "moral treatment" that appealed to the portion of reason that remained within the insane person[18].

In this context, psychiatrists were fascinated by attempts to understand criminal insanity and its various stages, against the backdrop of an interpretative conflict between two types of approach: in the first part of the 19th century, a mentalist reading conceived madness as a disease of the mind[19] and was challenged by an organicist perspective that made insanity a deficiency of cerebral organization[20]. Faced with the explanatory deadlocks encountered by both approaches and confronted with the resulting uncertainties of forensic expertise, psychiatry turned towards a third explanatory grid in the second half of the century. Combining

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[13] Ortolan, J., *Eléments de droit pénal. Pénalité, Juridictions. Procédure*, T.I, Paris, Plon, 1886, p. 94.

[14] Foucault, M., 'L'évolution de la notion d''individu dangereux' dans la psychiatrie légale', *Déviance et Société*, 1981, n°5, pp. 404-406.

[15] Regarding these two forms of individualization of the penalty, see Saleilles, R., *L'individualisation de la peine. Etude de criminalité sociale*, Paris, Swinnen, 1898.

[16] Pinel, P., *Traité médico-philosophique sur l'aliénation mentale ou la manie, an IX* (1801), Paris, Richard, Caille et Ravier.

[17] Kant, E., *Anthropologie du point de vue pragmatique* (1798) (French translation of *Die Anthropologie in pragmatischer Hinsicht*, 1796-97), Paris, Vrin, 1964, p. 82.

[18] Hegel, F., *Encyclopédie des sciences philosophiques en abrégé* (1817) (Abridged French translation of *Enzyklopädie der philosophischen Wissenschaften*, 1st Edition, 1817), Paris, 1970, pp. 376-377.

[19] French psychiatry, driven by Pinel and Esquirol, embodied this mentalist approach that considered madness a disease of the mind.

[20] Initiated by J. Lavater in the second half of the 18th century, this movement was extended into the 19th century by phrenology, with its major proponent being F. J. Gall.

the organicist tradition with the evolutionary perspective promoted by Darwin[21], psychiatry made the theory of degeneration the prevailing explanation for (criminal) madness. In so doing, psychiatry laid the foundations of criminal anthropology, as symbolised by the publication of Lombroso's "Uomo delinquente" in 1876. Similarly to the insane, the "criminal man" was seen as an entity determined by a specific ontological nature, characterised by abnormality, lack of evolution or regression and predisposed to its fate, in this case to crime. The contrast with the classical fiction of a rational offender who freely chooses to violate criminal law was radical.

2.3. The rise of scientific positivism in the penal field: understanding the causes of crime

The fascination with criminals was also linked to the development of scientific positivism in the field of human sciences. Emerging within the scope of natural sciences, the epistemological shift introduced by scientific positivism quickly extended beyond this disciplinary boundary. Opposing the "spiritualists", the "positivists" proposed an empirical and positive scientific knowledge, freed from any philosophical and moral underpinnings or normative ambitions. The aim was to promote an explanatory knowledge that employed methods of observation, experimentation and verification to grasp the causes of phenomena and establish laws that could predict their occurrence.

As emphasised by the founder of statistics, the Belgian A. Quetelet, this experimental approach had to be applied to the study of human and social phenomena in order to comprehend their causes and predict their recurrence, in the same way as astronomers can predict the convolutions of planets[22]. Seen from such a perspective, which E. Ferri extended to the study of the penal question[23], the "penchant for crime" became a social phenomenon whose causes needed to be explained beyond its individual and moral dimensions.

Positivism thus took on a sociological dimension and diverged from psychiatry and its individualizing approach to crime and the criminal. In contrast to the anthropological school stemming from psychiatry, a sociological school rooted in scientific positivism emerged, with both schools nevertheless sharing a common presupposition, to wit, to fight crime effectively, it was necessary to focus on the "real offender" and to understand the individual and social causes of his act. In a way, the two schools shared the field: while the first one sought to identify the psycho-physical causes of the criminal personality, the second investigated the environmental causes that contributed to the production of crime. In both cases, however, the explanatory approach was driven by the same profound conviction: whether determined by its ontological nature or its environment, the criminal, much like the insane or the criminal insane, was a danger for society. In line with the emerging utilitarian bio-political project, the identification, classification and sorting of various categories of "dangerous individuals", at the intersection of madness, abnormality and crime, became a priority for social hygiene.

2.4. Criminalizing the abnormal or the political dimension of a social control project

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[21] Darwin, C., *On the Origins of Species by Means of Natural Selection*, London, Murray, 1859.

[22] Digneffe, F., 'Problème sociaux et représentations du crime et du criminel. De Howard (1777) à Engels (1845)', Debuyst, C., Digneffe F., Labadie J.M., Pires, A.P., *Histoire des savoirs sur le crime & la peine*, t.1., Brussels, De Boeck, 1995, p. 143.

[23] Ferri, E., *La sociologie criminelle*, Paris, Alcan, 1905, p. 10: "This new school... is the application of the experimental method to the study of crimes and punishments".

A last factor contributing to the fascination with dangerous abnormals was the diffuse fear triggered at the end of the 19th century by a collection of at-risk groups with which crime was associated. At the time, an indistinct mass of floating individuals – beggars, vagrants, alcoholics, prostitutes, habitual delinquents, insane criminals, juvenile delinquents, anarchists, etc. – was perceived as a threat to the social project. There was a growing concern to prevent an underclass of lost citizens from contaminating the rest of the working class, at a time when the latter could be tempted by the revolutionary promises contained in class struggle. In Europe, at least, these deviants were indeed sometimes presented as the potential vanguard of a revolutionary uprising, insofar as their criminalized acts were in reality acts of social warfare[24].

The social issue played a significant role in the criminalization of this reified and essentialized urban underclass, a group that even Marx himself occasionally deemed irredeemable for the class struggle[25]. Labelled with various and interchangeable stigmata that regularly referred to categories of abnormality and degeneracy, this floating underclass was classified, sorted and managed through specific and complementary control mechanisms, with the ultimate aim of "maintaining order"[26]. The Italian Positivist School, which developed from the very beginning as an administrative science in the service of the social order, immediately assumed the political dimension of the social defence project. The criminalization of "abnormals" of all sorts also served to separate the chaff from the grain in order to uphold the existing social order.

3. The positivist revolt: determinism, dangerousness and social defence against crime

3.1. A twofold critique of the classical school, floundering in laxism and metaphysics

The "positivist revolt" developed in the penal field against the backdrop of this triple evolution, in the late 19th century. From its inception, the Italian "scuola positiva" distanced itself radically from the classical school perspective on two main points.

First, it denounced the laxity of the classical school in the face of crime, particularly as regards recidivism. In several countries, recorded crime statistics, the reliability of which was not questioned[27], highlighted a significant increase in the number of recidivists and habitual delinquents. These two categories of offenders, often associated with insane criminals and other abnormals, fuelled a form of penal populism. Positivists held that the neoclassical school, seeking retribution and a "just punishment", had forgot that the primary goal of criminal law was to protect society against crime and dangerous criminals. For them, this priority had to be reinstated, even if that meant deviating from the fundamental principles of liberal criminal law doctrine, to restore the effectiveness of the war on crime.

Second, the positivist school challenged the spiritualistic approach of the classical school, against the backdrop of the debate between free will and determinism. Advocating a

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[24] Engels, F., *La condition de la classe laborieuses en Angleterre* (1845) (French translation of *Die Lage der arbeitenden Klasse in England*, 1845), Paris, Alfred Coster, 1933, 140-145.

[25] Digneffe, F., 'Problème sociaux et représentations du crime et du criminel. De Howard (1777) à Engels (1845)', p. 207.

[26] Prins A., *La défense sociale et les transformations du droit pénal*, Bruxelles, Mish et Tron, 1910.

[27] As early as 1835, Quetelet had already drawn attention to the phenomenon of the "black number" of crime, and the gap between "known crime" and the "unknown total sum of crimes committed", so to say, between committed crimes and recorded crimes (Quetelet, A., *Sur l'homme et le développement de ses facultés ou Essai de physique sociale*, p. 422).

deterministic anthropology, the positivist school deemed it impossible to punish the criminal according to their moral responsibility without forcing judges to engage in "metaphysics". It fundamentally opposed a criminal law of the act in which the penalty was determined by the offender's moral responsibility and framed by the principle of proportionality. This kind of logic led judges to engage in philosophy rather than law and also to excessive leniency. To protect society against crime and its reproduction, a radical change of perspective was needed.

3.2. From "penalty" to "measure": protecting society against dangerous individuals

Within their deterministic reading of the criminal, positivists proposed replacing the logic of punishment, with its principles and limitations, with an arsenal of measures of indeterminate duration based on the "dangerousness" of the offender – social responsibility replaced moral responsibility. Placed in the service of social defence, criminal law became prospective. Focused on the risk of crime, it could even consider intervention before the act to prevent a potential offence and proceed with the confinement of a potential criminal candidate[28].

The new penology promoted by the Italian school found a significant sounding board within the International Union of Criminal Law (IUCL). Established in 1898 by the Belgian Adolphe Prins, the Dutchman Gerard Van Hamel and the German Franz Von Liszt, the IUCL contributed greatly to the dissemination and discussion of positivist themes and proposals. Faithful to the dogmas of positivism at its birth, the IUCL then evolved towards a more eclectic position, seeking a third way between the extremes of positivism and the alleged shortcomings of classical criminal law[29]. Prins and Von Liszt, in particular, played an important role, influencing the debate and the concrete social defence evolutions well beyond the borders of their respective countries[30]. The discussion, which was widely disseminated at the international level, contributed in various ways to the development of a shared social defence project throughout the Western world.

This general statement also applies to the specific case of insane criminals. These individuals raised, in an exemplary manner, issues such as the tension between free will and

[28] It is interesting to note that the free will versus determinism debate and its consequences on the criminal question resurfaced in the field of Freudian psychoanalysis in the 1920s. On the one hand, Marie Bonaparte, a disciple of Freud, advocated for a strictly deterministic view of the madman and the criminal. She dismissed the question of responsibility as irrelevant in favour of that of dangerousness. In line with the prevailing positivist ideology, she concluded that "the ideal would be social prophylaxis, meaning to frequently provide diagnosis and prognosis in a timely manner and to intern as many candidates for crime as possible". However, she tempered this view by highlighting the potential infringement on liberties inherent in such a stance: "But which physician would have dared institutionalize Madame Lefèbvre before her crime? There would have been an outcry against individual freedom...". Finally, she concluded that "a medical jury would be ideally preferable" (Bonaparte, M., Le cas de Madame Lefèbre, *Revue française de psychanalyse*, 1927, Issue 1, 144-145). But, at the same time, the Hungarian psychoanalyst Sándor Ferenczi introduced the concept of "psychic determinant", which opens the door to a less absolute conception of determinism and reintroduce a role for responsibility: for Ferenczi, psychic determinism, unconscious in nature, does exist but it does not mechanically lead to an action and therefore leaves the question of responsibility for our actions open. Ferenczi quoted Freud in support: "And yet, to the question of whether we should take on the responsibility for our instinctual actions, Freud responds with the perplexing counter-question: 'But what else can we do?'" (Ferenczi, S., Psychanalyse et criminologie, *Psychanalyse, IV, Oeuvres complètes, 1927-1933*, Paris, Payot, pp 224-225).

[29] The revision of the UICL bylaws at the Lisbon Congress in 1897 led to a more moderate positioning.

[30] Regarding Prins' influence on the debate in Spain, see A. Masferrer's contribution in this volume; on Von Liszt's influence in Germany, Austria, or Switzerland, see the contributions of K. Haerter, M. Schennach & U. German.

determinism, responsibility and irresponsibility, punishment and measure. It thus comes as no surprise to see cropping up in Europe and Latin America generally the same questions surrounding the criminal (ir)responsibility of insane offenders, the same discussions around forensic expertise, the same tensions in the relationships between psychiatrists and lawyers or the same hesitations about the responses to be provided to the "abnormal's" dangerousness.

4. The insane offender: the Trojan horse of criminological positivism

4.1. The insane criminal, between reason and unreason: the issue of "half-insane", "morally insane", or "abnormal" individuals

The perception and treatment of the insane criminal offer a striking illustration of the influence of penal positivism and also illustrate the main tensions between the classical school and the new positivist discourse. Still rooted in a Kantian conception of madness, the classical school excluded the insane from criminal responsibility. Benefiting from an insanity defence, the latter escaped the logic of punishment reserved for those endowed with free will and reason. The Napoleon Penal Code of 1810 was the first modern penal code to embody this binary logic, rapidly followed by other criminal codes worldwide[31].

This two-track approach soon presented a dual problem, stemming from the judicial practice in various countries: first, offenders recognised as insane by tribunals were acquitted and, if considered as dangerous, were generally, at best, transferred to the custody of civil or administrative authorities, joining the cohort of non-criminal insane individuals; second, "semi-insane offenders" posed inextricable problems for judges and juries: should these abnormal offenders, who oscillated between reason and unreason, be declared irresponsible and also acquitted? Should these "half-mad" be granted the insanity defence when, aside from the criminal episode in question, clearly driven by an irresistible impulse, they seemed to behave rationally, enjoying cognitive and volitional capacities, or to have regained reason and sanity? In many cases, faced with such borderline situations, judges and juries opted for a middle path: they declared the offenders criminally responsible but acknowledged their diminished responsibility and thereby granted them reduced penalties. With time, such an option was gradually perceived to be paradoxical, as these abnormal offenders – psychopaths, for example –, were potentially more dangerous than "normal" offenders and very often predisposed to recidivism due to their psychological or psycho-biological abnormality, yet nevertheless received lighter sentences than normal offenders, which appeared counterproductive for public safety.

The issue of diminished responsibility ignited debates between lawyers and psychiatrists. While lawyers were asking the physicians for a clear answer ("tell me if the offender's state of insanity justifies criminal irresponsibility or not"), forensic experts answered that their science could not provide a definite answer to this question, except in obvious cases of madness. As already mentioned, psychiatry was no more a unified science in its early years than it is today. Swinging between mentalist approaches (such as those proposed by Pinel and Esquirol in France and Prichard and Maudsley in Great Britain)[32] and phrenological

[31] On the influence of the 1810 Criminal Code on European and Latin-American Codes, see Masferrer, A. (ed.), *The Western Codification of Criminal Law. A Revision of the Myth of its Predominant French Influence*, Cham, Springer, 2018.

[32] Arveiller J., 'De la folie morale', *L'Evolution Psychiatrique* , 2001, n°66, pp. 614-631.

explanations (Lavater, Gall)[33], psychiatry proposed at the time fluctuating and evolving nosographies, leading regularly to divergent or contradictory diagnoses in the courtroom. Psychiatry was in a way escaping such undecidable question, stating the impossibility to offer a conceptual grid allowing one to settle the matter of responsibility that interested judges.

As already said, the case of the totally insane did not pose a real diagnostic challenge. For "mad" people affected by a continuous and constant delirium, their irresponsibility was evident. But what should be done with those who suffered from partial or intermittent insanity, who committed a crime under the influence of an irresistible, momentary and unpredictable impulse? This category of offenders, categorized as affected by "mania without delirium" (*manie sans délire*)[34] or "monomania" (*monomanie*)[35] in French psychiatry, associated with "moral insanity" in Great Britain[36], presented delicate issues for the courts. Labelled as "abnormal" or "defective", psychopaths, sexual offenders, homosexuals, feeble-minded individuals, vagrants, beggars, unrepentant drug addicts, alcoholics and other antisocial deviants constituted an expandable intermediate category between reason and unreason. Not mentally disturbed enough to be considered insane, these "borderline" individuals were, however, too strange to be treated as normal delinquents.

Partial madness was the core of the problem. It was all the more sensitive as it introduced a form of continuity between madness and normality that could lead to a principle of generalized irresponsibility. If the line between crime and madness isn't clear-cut, cannot every criminal claim a form of partial madness and invoke the insanity defence? This question arose in various countries where the interpretation of a crime committed by insane or feeble-minded individuals was rooted in the "theory of passions"[37]. In terms of criminal responsibility, where was one to draw the line between the crime of the homicidal monomaniac driven by a "passion in delirium" (irresponsibility) and the "crime of passion" committed under the influence of an "irresistible impulse" (liability)? As pointed out by a physician, anchoring criminal insanity in the theory of passions leads to a dangerous gradual logic, as it carries within it the end of criminal law and punishment:

> "What does punishment against the mentally ill mean? Erase then your penal code, overturn your prisons, shatter all your instruments of torture, there are no longer any culprits; but establish hospitals everywhere, summon doctors instead of executioners, and nurses instead of policemen; there are only sick people..." [38].

Addressing in an archetypal way the question of criminal responsibility, the insane criminal and the various variations thereof were the Trojan horse of criminological positivism. The insane criminal was the focal point around which positivists proposed to build a securitarian project aimed at replacing a punitive logic based on responsibility, guilt and punishment with a system of security and care, based on irresponsibility, dangerousness and safety measures. The insane criminal also concentrated all the debates that fuelled the general conflict between the (neo)classical school and criminological positivism on the criminal

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[33] Renneville, M., *Le langage des crânes. Histoire de la phrénologie*, Paris, La Découverte, 2020.

[34] Pinel, *Traité médico-philosophique sur l'aliénation mentale ou la manie, an IX*, *op.cit.*, p. 16.

[35] Esquirol, J.E., *Des maladies mentales considérées dans les rapports médical, hygiénique et médico-légal*, T. I, Paris, Baillière, 1838.

[36] Prichard, J.C., *A treatise on insanity and other disorders affecting the mind*, London, Sherwood, Gilbert and Piper, 1835, p. 330.

[37] See, a.o, the contribution of S. Vinci in this volume.

[38] Royer-Collard, H., Du degré de compétence…, *Journal hebdomadaire de médecine*, 1829, Vol. XIII, pp. 199-200.

question: free will/determinism, moral responsibility/social dangerousness, punishment/measure. And its treatment reflected in an exacerbated way the influence of positivism, practically imposing almost everywhere the principle of care and/or security measures, either in lieu of or in addition to punishment.

4.2. From penalty to measure: filling the gaps in penal law to protect society against crime

While the insane criminal stimulated debates around criminal responsibility, he also raised the issue of the societal responses to be given to the danger he represented for society. In the second half of the 19th century, psychiatry became, under the influence of Morel[39] or Kraepelin[40], less philanthropic and more focused on degeneration, hygienism and security. Insane and abnormal criminals were included in the same diagnosis of dangerousness and, while the intention to treat or to cure them did not disappear, the priority became to protect society against the threat that they represented. That priority was taken up by the positivist school, which proposed resorting to a system of security and care measures supposed to replace or to complete punishment. Largely advocated by two of the three founding fathers of the International Union of Criminal Law, Adolphe Prins and Franz Von Liszt[41], the social defence doctrine imposed the principle of indeterminate security and care measures to contain criminal abnormality and its multiple manifestations in both Europe and Latin America.

The principle was clear, leading to a two-track system that distinguished between insane criminals and other abnormal delinquents on the one hand and normal offenders on the other. However, the concrete implementation of the social defence measures was more complex and far from unified. In most Western countries, an archipelago of diverse control and care measures and institutions emerged as a result of reforms of the criminal code or the promulgation of laws to complement the existing criminal code. Generally, the adoption of measures and their concrete organization were structured around a dual spatial-temporal axis, taking a logic of classification and sorting of the groups concerned into account. The first issue concerned the institutionalization sites: Where should the insane criminals be interned? In specialized secure asylums or in the general asylum system, eventually mixed there with the non-delinquent insanes? Within "asylum-prisons" (secure wings inside the asylum) or within "prison-asylums" (psychiatric wards within the prison)? Should insane criminals be accommodated with the other "abnormal" offenders or should different institutions be provided for each category, with adapted care and/or security regimens? Depending on the answers, a complex assemblage of "special wards, criminal asylums, asylum prisons, asylums or shelters for beggars, correctional homes for work, agricultural penal colonies, special institutions for alcoholics, and prisons for 'hard-to-correct offenders'" developed, as seen in Portugal, for example[42], their various aims being to neutralize, moralize, treat or rehabilitate these different at-risk groups and their members. The second issue, which also gave rise to various options, was a temporal one: When should these hybrid system of security and care measures be applied? Should they replace or complement punishment, taking effect after the sentence had been executed in the case of ongoing dangerousness? Seen from the perspective of prevention, was

[39] Morel, C., *Traité des dégénérescences physiques, intellectuelles et morales de l'espèce humaine et des causes qui produisent ces variétés maladives*, Paris, J.B. Baillière, 1857.

[40] Kraepelin E., *Introduction à la psychiatrie clinique*, 7e ed., Paris, Vigot frères.

[41] The writings of Prins and von Liszt circulated and influenced the debate in many countries. The influence of the Dutchman van Hamel, the third founder of the IUCL, appeared less decisive.

[42] Voy. M. J. Antunes & P. Caeiro, *Insane and dangerous offenders, positivism and social defence in Portuguese law between 1852 and 1936*, in this volume.

it thinkable to impose security measures and the deprivation of liberty before the perpetration of a criminal act, at the cost of a fundamental break with a cardinal principle of criminal law? On this point, as on others, unanimity was far from achieved.

All these questions were extensively debated, leading to the adoption of various security measures and institutional settings according to the historical traditions and cultural contexts of each country. All those innovations nevertheless shared a common characteristic: they gave priority to the deprivation of liberty and confinement. Both the 19th and the 20th centuries were characterised by the conviction that treating and neutralising the abnormal, whether delinquent or not, involved detention in a closed institution. It was not until the 1950s that a counter-discourse began to emerge, with a radical critique of the institutionalization of madness, epitomised by Goffman's work Asylums[43] and the (relative) success of anti-psychiatry[44]. But that is another story…

4.3. Lawyers and psychiatrists: a complex dialogue

The discussion of the responsibility of the criminally insane also resulted in intricate relationships between lawyers and psychiatrists. In an era where nascent psychiatry was largely shaped by the issue of criminal madness, the interactions between lawyers and psychiatrists regularly generated power conflicts. However, to consider these interactions to be a binary opposition between two homogeneous professional groups would be a mistake. In many cases, different competing conceptions of criminal madness clashed with each other, among both lawyers and psychiatrists. The criminal irresponsibility of insane criminals, for example, divided the world of advocates and magistrates, who were sometimes torn between humanitarian principles and concerns for protecting society against crime. Likewise, the grounding of madness in the theory of passions divided both lawyers and psychiatrists, sometimes leading to cross-alliances between specialists in both disciplines. And in the second half of the century, the security-oriented shift in psychiatry triggered criticism from neoclassical penal lawyers but also garnered approval from others supporting the social defence logic.

This diversity of opinions led to complex changing alliances between representatives of both disciplines, shaped by their theoretical references and practical priorities. In practice, judges, lawyers and psychiatrists were caught in a form of adversarial cooperation. Sometimes opponents, sometimes allies, they were required to collaborate, both in courtrooms and in discussions surrounding criminal law reform projects. Nevertheless, radical conflicts opposing the two groups were not absent, as highlighted in Belgium by a direct clash between lawyers and psychiatrists over the reform of the 1930 Social Defence Act. In this specific case, psychiatrists denounced a "power grab" by legal experts and claimed that "decisions to be made regarding abnormals will always, like it or not, be matters for medicine before law"[45].

These tensions and sometimes head-on clashes between lawyers and forensic psychiatrists largely foreshadowed their future interactions within the criminal justice system, where they still had to work together. Their relationship has not fundamentally changed even today.

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[43] Goffman, E., *Asylums. Essays on the Condition of the Social Situation of Mental Patients and Other Inmates*, Anchor books, 1961.

[44] Cooper, D., *Psychiatry and Anti-Psychiatry*, Tavistock Publications, 1967.

[45] Ley, J., *L'opinion médicale concernant la réforme de la loi de défense sociale*, *Revue de droit pénal et de criminologique*, 5 (1950), pp. 506-510.

5. The making of insane offenders in some Western jurisdictions (1870-1940)

This special issue deals, as the title of the article reads, with the making of insane offenders in the Western Tradition (1870-1940), aiming at contributing to the study to the birth and enforcement of criminological positivism from a comparative perspective. In doing so, some jurisdictions from Europe and **Latin ?**- America are covered, namely, Italy, Belgian, Germany, Austria, Switzerland, Spain, Portugal, Poland, Russia, Brazil and Argentine.

Stefano Vinci, from the Università degli studi di Bari Aldo Moro (Bari), in his article entitled "Insanity and criminal justice in **Italy** at the end of the 19th century", explains that, after a very long debate based on comparisons with previous pre-unification penal codes and foreign experiences, the new Italian penal code provided for the concept of 'infirmity of mind' to bring insanity back into the exclusive sphere of pathological situations and eliminated any reference to 'dangerous and equivocal' irresistible force for the sake of general prevention. The final wording of Article 46 was as follows: 'A person who, at the time he committed the act, was in a state of infirmity such as to deprive him of the consciousness or freedom of his acts shall not be punishable'. The judge, however, if he deems it dangerous to release the acquitted defendant, shall order him to be handed over to the competent authority for legal measures'.

In his opinion, the new wording pleased the followers of the Classical School (represented by Lucchini and Impallomeni, proponents of the new Codes), but was notably criticised by exponents of the Positivist School. The positivists wanted the exclusion of free will from the concepts of criminal responsibility and imputability. Furthermore, they demanded recognition of the influence of emotions and passions in the vices of the mind (emotions as psychic causes of mental illness). In particular, Lombroso stated that the new formula of Article 46 was considered unscientific as it was still based on free will. In fact, the altered state of mind envisaged by the Code excluded a certain number of alienated persons (such as the paranoid, the morally insane, epileptics) who might have intact, in appearance, the mind, but had instead altered volition and above all affectivity. The concept of free will was thus preserved, since 'suppressed at the door' it had re-entered 'through the window' with the possibility of operating differently.

Enrico Ferri also criticised this text. In his essay *Intorno al nuovo Codice Penale*, 1889, Ferri considered the imputability formula accepted in Article 46 to be not very innovative, as it was still based on the 'consciousness and freedom of one's own acts', using words almost identical to those of the Tuscan Code of 1853, neglecting the progress made by psychology and anthropology in the last forty years. The latter sciences, in fact, had shaken to the core the idea of an imponderable 'moral responsibility' that jurors unfamiliar with philosophical disquisitions would never have encountered, 'especially in the most ferocious and monstrous criminals'. According to Ferri, the much more positive concept of 'social responsibility' (i.e. of the offender towards society) should be included not according to the degrees of a nebulous moral guilt, but according to the quality and intensity of his more or less dangerous anti-social tendencies, manifested by the offence, in those specific personal and real circumstances.

Beyond the criticism, Vinci argues that Article 46 was emphasised by many jurists of the classical school, who were pleased with the effectiveness of the rule adopted compared to pre-unification precedents. Minister Giuseppe Zanardelli had emphasised the clarity of this formula, which was an improvement on the one contained in the Tuscan code, in that it

established that it was not sufficient that the lack of conscience or freedom of one's own acts was considered not imputable, but that this lack of conscience or freedom derived from madness. The solution accepted by Article 46 thus made it possible to 'exclude more emphatically that human passions can be taken into account and that 'irresistible force' independent of a morbid state of mind, as was recognised by the 1859 code, can be used'.

Vinci maintain that early jurisprudence tested the scope of this provision, whose difficulty in application stemmed from the extension of the concept of mental infirmity in the new code compared to earlier formulations. In the first judgments of legitimacy following the entry into force of the new penal code, a defining effort was made with respect to the concept of infirmity enshrined in Article 46, which (according to the ministerial report) was limited to mental illnesses and excluded states of passion. These efforts by the Supreme Court were in response to the need to correct certain erroneous pronouncements received from the judges of merit, who continued to recognise the crime of insanity on the basis of states of passion or irresistible forces. The Court of Cassation clarified the content of Article 46 of the penal code, specifying that 'all the facts, for which an action, which without their concurrence would be criminal, is not punishable, and irresistible force is not among them, have been precisely designated in the current code'. On the contrary, after repeated and extensive discussions on the subject, nothing was more certain 'than the legislator's intention to exclude it absolutely from the list of offences'. With the new formula, in fact, the intention was 'emphatically' to exclude that human passions could be taken into account and that irresistible force independent of a morbid state of mind could be used, as was recognised in the previous text of 1859.

On the basis of these considerations, the Court of Cassation dismissed the proposed appeal, holding that, based on the literal wording of the law and constant jurisprudence, it should be considered *jus receptum* that 'in the absence of a true pathological state of mind, one cannot speak of infirmity or semi-infertility of mind that cannot be legally substituted by a merely passionate state'. Thus, without explicitly denying the progress of anthropological science, the judges of legitimacy concluded by stating that the insane person was always responsible for his acts and that, in the state of doctrine and jurisprudence, he could not be considered to be in a state of infirmity such as to diminish or exclude his responsibility, all the more so when this so-called moral infirmity derived from a 'reprehensible passion'.

The **Belgian case** is studied by Yves Cartuyvels, from the Université Catholique de Louvain - site Saint-Louis-Bruxelles, in an article entitled “Criminal justice and abnormals at the end of the 19th century in Belgium: sources and principles of a social defense system”. The author argues that the fate of insane criminals in Belgium at the end of the 19e century and beginning of the 20th century was part of the new discourse on crime and criminal promoted under positivist influence. Under the influence of Adolphe Prins, father of the Social Defense movement in Belgium, insane delinquents but also recidivists were subjected to a specific Social Defense Act of 1930 against abnormal criminals and habitual offenders. Complementary to the existing neo-classical criminal code of 1867, this dangerousness law was clearly the expression of criminological positivism. It proposed an internment regime based on security and/or care measures, targeting both categories of offenders enshrined in a same status of dangerousness : insane criminals were indeed considered to fuel recidivism, which explain that “abnormals” and “habitual offenders” in the broad sense of the term are targeted in a same text.

If Prins played a proeminent role in the implementation of the new security regime for the insane criminals, Cartuyvels shows that the new law was also an answer to the practical problems raised in Belgium by the judicial response to criminal insanity throughout the 19th

century. Under the French *Code pénal Napoléon* of 1810, applied in Belgium until 1967, only complete insanity, known as "dementia", was considered a reason for non imputability. This rapidly created two problems: first, those insane criminals who escaped punishment, if subjected to an administrative collocation measure, were rapidly released into society even if still dangerous; second, the French dual system "sane-insane", also adopted by the Belgian criminal Code of 1867, did not take into account the problem of intermittent of partial insanity. As a consequence, an important number of "half-insane" who did not escape criminal punishment could benefit from mitigating circumstances and reduced penalties on the ground of their diminished responsibility. Here again, many estimated that this group was reintegrating into society too quickly, exacerbating the risk of recidivism. Under Prins influence, a globally shared conviction emerged on the necessity to adopt a security measures system in place of punishment for a broader category of insane and abnormal criminals, in so far they constituted a danger fort society. As a result, the 1930 Social Defense Act foresaw an internment measure of relative indeterminate length, oscillating between care and security, *de facto* carried out in psychiatric annexes of prison. The discussions about the reform of the Act, considered as early as 1935, also show that, even though it may have been the subject of discussions between proponents of classical school and positivism, the internment regime also reflected tensions between lawyers and physicians regarding their respective places in the decision-making process about abnormals.

If the 1930 Social Defense Act was mainly devoted to abnormal and insane criminals, its chapter V considered the fate of recidivists and habitual offenders. For such dangerous offenders, the Act introduced an additional measure of placing at the government's disposal taking effect after the sentence. Considered as a "removal measure" or a "sentence of social elimination", mandatory or optional following the cases, such internment measure was in fact a punishment upon punishment, as recognised by the Cassation Court in a ruling of 11 december 1933. Even if contrary to the principle of proportionality of the sentence, such innovation encoutered little resistance: at the time, taking exceptional security measures derogatory to the main principles of penal law was considered as necessary in the war against the "rising tide of crime" and the priority of "maintaining the order" (Prins).

The criminal responsibility of insane offenders in **Germany** is studied by Karl Härter, from the Max Planck Institute for Legal History and Legal Theory (Frankfurt/M), with an article entitled "Insane Offenders, Dangerous Criminals, Criminal Responsibility and Security Measures: The Network of Positivist Criminology and the Reform of Criminal Law in Imperial Germany". More specifically, Härter studies the concept of the 'insane offender' from the angle of the positivist criminology network that formed around Franz von Liszt and the International Union of Criminal Law, and investigates its effect on the reform of criminal law in imperial Germany. With the concept of the 'insane offender', the author shows that positivist criminology established as a new threat to society that called for social defence through criminal punishment, security measures, medical treatment, and reform of criminal law. The major figure of German positivist criminology and the International Union of Criminal Law, Franz von Liszt, served as an intellectual focal point in the formation of the concepts of 'insane offenders' that was of particular relevance in promoting a reform of criminal law regarding the implementation of diminished criminal responsibility and a dual system of judicial punishments and security measures. However, the empirical criminological knowledge was rather limited, and the debates stuck to the juridical conceptualization of (diminished) criminal responsibility based on free will and the problem of impunity. In this context, insanity and mentally ill or deficient persons were merely considered from the angle of dangerousness, inferiority and habituality.

Diminished criminal responsibility and insane offenders were conceptualized in relation to the typology of criminals and the defining categories of dangerousness, habituality and inferiority.

Von Liszt did not develop a legally applicable distinction between insane and sane offenders regarding criminal responsibility, nor between insane offenders and dangerous mentally ill persons. Instead, he constructed a continuum of insane, inferior, habitual and dangerous offenders that was characterized by the overlap of mental and moral insanity and an alleged criminal inclination/disposition. Hence, von Liszt and the positivist criminology also created labels of criminalization and narratives of a security discourse, whereas, the psychological factors of the individual perpetrator and the medical dimension only played a role regarding the inclusion of mental therapy as an element of security measures. As a consequence, von Liszt and the positivist criminology network demanded a differentiated dual system of judicial punishment and security measures, both with the option of indeterminate sentences, and regarding custody, institutionalization, therapy and legal incapacitation also as preventive security measures that could be imposed against dangerous mentally ill persons, who were not guilty of a crime. In this debate, the International Union of Criminal Law functioned as an intertwined national and international arena to discuss a compromise between the approaches of juridical and medical experts as well as between the dogmatic-juridical differences of the classical and the modern school of German jurisprudence. However, concerning the punishment of insane offenders with diminished criminal responsibility and preventive security measures against mentally ill persons who had not committed a crime, the 'système allemand' was widely rejected and the compromise that was reached was rather insubstantial.

As a result, the direct impact on the revision of the German penal code was limited in the first instance. The abrogation of free will as the essential criterion for criminal responsibility, the implementation of obligatory punishment and indeterminate security measures against insane offenders, legal incapacitation and preventive custody were rejected. In Härter's view, this was not merely the result of the 'clash' of the 'modern school' with the 'classical school', since the implementation was also impaired by the preservation of the juridical idea of the rule of law and the attitude that a national codification should be protected from non-juridical, interdisciplinary and international influences. Härter's hypothesis is that German jurists sought to maintain their predominance against the claims of positivist criminology and medical experts, and that the relation between international positivist criminology and the national criminal law reform was characterized by contradictions which had a rather ambiguous effect on the reform of constitutional liberal criminal law. Only in the long run, some compromises were incorporated into the reform of criminal law in Germany: diminished criminal responsibility with a focus on insane offenders, mandatory mitigation of punishment, and a dual system of judicial punishment and hybrid security measures, which included medical treatment and institutionalization in mental asylums as well as indeterminate custody/preventive detention. The author's conclusion is that positivist criminology did contribute to the inclusion of measures of social control into criminal law for the purpose of social defence, and that positivist criminology in Germany was more a juridical-political (*kriminalpolitisches*) than a scientific movement in the sense of empirical criminology.

The discussions about the insane offender in the **Austrian** monarchy around 1900 took place on several levels, which are addressed in detail in the contribution of Martin P. Schennach from the University of Innsbruck, with an article entitled "The insane offender in Austrian penal legislation and legal science around 1900". He shows that, from the sixties of the 19th century until the First World War, several drafts for a new codification of Austrian criminal law were

presented, which were meant to replace the penal code of 1803, but never came into force. The provisions on the insane offender in these drafts reflect the discussions that took place in the scientific community. These debates were lively, show the close entanglement with German criminal science and were not limited to legal scholars. In fact, psychiatrists such as Richard von Krafft-Ebing and Julius Wagner-Jauregg also contributed intensively through lectures and articles. Unlike in other countries, differences did not arise over the demarcation of responsibilities between medical and legal experts.

The attitude of Austrian legal scholars like Heinrich Lammasch or Hugo Hoegel towards insane offenders was largely determined by their position in the "clash of schools" (*Schulenstreit*) between the "classical school" and the "positivist school". Most of the Austrian legal scholars tended to take a mediating position. All points of discussion, such as the question of the definition of insanity, the distinction from diminished sanity and the question of how to deal with insane offenders, are presented in detail in Schennach's article. The question of the definition of insanity was closely linked to the discussion about the existence of human free will (which was acknowledged by most Austrian legal scholars). Diminished sanity was almost unanimously perceived as a reason to mitigate the sentence, whereas the question of moral insanity was hardly addressed. There was also broad agreement on the consequences of insanity: placement should be in specialised psychiatric institutions, not in regular prisons. However, until the end of the Austrian monarchy, internment of insane offenders in conventional psychiatric hospitals remained the norm for financial reasons.

Schennach also describes separately the views and discussions of the extraordinary academic Julius Vargha, professor of criminal law at the university of Graz. Vargha firmly rejected the idea of the offender's free will and subsequently saw all criminals as ultimately insane and therefore not punishable, but in need of treatment.

Urs Germann, from the University of Bern, touches upon **Switzerland** with an article entitled "The Hybridization of Punishment and Welfare: The legal treatment of insane offenders in Switzerland 1890–1970". The author deals with the treatment of insane offenders in Switzerland between the late 19th century and the 1960s, and how it became part of the legal policy agenda. The implementation of the Swiss criminal code after it came into force in 1942 is also examined. Two lines of arguments are developed. On the one hand, Germann shows that the new system for dealing with insane offenders was a hybrid in several respects. On the other hand, the author argues that the changing modes of dealing with insane offenders are not only significative for the integration of social defence approaches into Swiss legislation, but in a more general sense also for Switzerland's path toward modernity. The problem of insane offenders shows how the assertiveness of legal positivism, with its Janus-faced aspects of 'scientification' and 'juridicalisation', largely depended on political decision-making and implementation processes, both of which were strongly influenced by Switzerland's federalist system.

From the onset, Swiss psychiatrists were important players in drafting the first Swiss criminal code. Together with other progressives, they developed a set of security and treatment measures based on earlier forms of administrative detention, while simultaneously advocating important demands of legal positivism aimed at protecting society. This hybrid broke through the traditional demarcation between repression and prevention, at legal, institutional and individual levels. The new Swiss criminal code of 1942, similarly, was a hybrid between repression and welfare provisions in its security and treatment measures. Psychiatry thereby became part of the correctional system, while the majority of mentally ill offenders ended up,

de facto, in penal institutions. This led offenders to often be stigmatised as abnormal in criminal proceedings; they were imprisoned for indeterminate periods of time and had little or limited access to psychiatric care.

Germann shows that legal experts, doctors and social politicians alike welcomed the dual-track system as an important innovation. In fact, criminal law thereby became more open to prevention and protection considerations, and hence to public welfare concerns. In retrospect, however, the development is part of an unfinished and inherently ambivalent modernisation process, marked by disagreements among psychiatrists about the creation of special facilities for the execution of measures, conflicts between federal and cantonal authorities and growing financial constraints. It can be interpreted as an example of the "muddling through" typical of how marginalized groups are dealt with in liberal and federalist Switzerland.

The criminal responsibility of insane offenders in **Spain** is covered in two articles, one dealing with legislation and case law, the other with doctrinal sources and scholarly discussions and controversies between lawyers and medical experts. José Franco-Chasán, from the University Rey Juan Carlos (Madrid), in his article entitled "Legislating for deviancy in the shadows: treatment for *dementes* and *locos* from 1870 to 1928", carries out an extensive analysis on the Spanish legislation regarding the treatment of insane offenders. This normative study comprehends various legal sources such as criminal codes, decrees, royal decrees, royal orders, ministerial orders, the War Navy Code, and the Code of Military Justice. Most of the evolution of the legislation is due to doctrine and case-law.

There were many legal provisions directly affecting and shaping the treatment given to insane offenders. However, those happened to be very small, progressive changes. They tended to leave behind an excessive legal formalism, and to increase the flexibility of conditions to make the treatments more suitable the insane offenders. However, that process went extremely slow. One would find the opposition of the judges who wanted to preserve individual freedom of the citizens and to stress out the individual responsibility, as to not blame it on other rather biological, more deterministic postulates.

The most relevant moment in which one can observe this was the passing of the Decree of 1931 on the Assistance of the Mentally Ill. Even if it entailed a major change, it met most of the revindications of the experts. Nevertheless, it was far from being the sole attempt. Thanks to it, the patient could be assisted without absurd obstacles of any kind. Then, the Spanish Civil War would take place and with the Dictatorship most of the process would be reverted.

Spanish judges assumed a wide discretionality. To this respect, doctrine had boosted the legislative change. In a similar way, the excessive guarantorism of judges had acted as an obstacle to the treatment of the insane. Thus, in most of the cases the work of the judiciary acted as a hand brake to the Social Defence theories in Spain. The judiciary never supported their ideas. Most of the judges did not support the idea that responsibility for the own acts rested upon an illness or that it had a biological origin, but it was rather a moral decision, which stressed out the belief on the existence of freewill. Thus, a model in which the judge is completely detached from the creative capacity of law is not plausible, at least in practice.

Finally, the elements of this analysis are highly interrelated complementary laws forced by the doctrine (which forced the changing legislation) and the decisions of the judges slowed and stopped the changing legislation.

Aniceto Masferrer, from the University of Valencia, analyses the doctrinal sources in an article entitled "The rise of dangerousness in the Spanish criminal law (1870-1931). The case of insane offenders: Medical experts vs. judges and criminal lawyers?". The authors shows that not all early twentieth-century criminal lawyers endorsed Saldaña and Jiménez de Asúa's proposal of replacing the principle of responsibility by that of dangerousness. In fact, after Dorado Montero's death, they were both the most representative figures who fervently embraced the new theories of criminal law, sometimes even misreading and exaggerating the theories of the most relevant authors who preached the need for a shift from imputability to dangerousness (particularly, Von Liszt and Prins).

Most of the Spanish criminal lawyers knew all these new theories, and praised them to some extent, but were not in favor of fully replacing the classical principle of responsibility. Some of them knew very well the new doctrine of the criminal's dangerousness potential, admired the most relevant Spanish representatives (Dorado Montero, Saldaña and Jiménez de Asúa), but did not endorse the full replacement of imputability with dangerousness. Enrique de Benito and Mariano Ruiz-Funes were two of them. They both realized that the main criterion in determining the penalty should be the delinquent (rather than just the nature of the crime), but were not open to the possibility of imposing a punishment even before a crime had been committed, as Dorado Montero, Saldaña and Jiménez de Asúa seemed to be.

Masferrer shows that most of criminal lawyers admitted the need for reports by medical experts, although they understood that the declaration of criminal responsibility corresponded to judges. As Ruiz-Funes pointed out, "[t]he medical expert is not the interpreter of the law to which a judgment of responsibility is requested." Vicente Orts y Esquerdo consistently explained the origins of the mutual mistrust between judges and some medical doctors (as the author gives clear evidence when describing and analyzing the works by José Esquerdo, José María Esquerdo and Ángel Pulido Fernández), particularly those who maintained radical or ultra-radical theories, to the extent of arguing that anyone who commits a crime is to be considered insane.

Masferrer argues that none of the studied authors – both lawyers and medical doctors – agreed with the Spanish Supreme Court's doctrine, whereby insanity could not be used as a defense resorting to the mitigating – or attenuating – circumstance (art. 9.1 SCC 1870). The Supreme Court defended such interpretation to be consistent with the classic idea of responsibility, but those authors who were more concerned with the idea of dangerousness, with the defense of society against those who might be repeat offenders – or even commit a crime for the first time – in a society in which criminal offences did not cease to increase, were understandably not prepared to accept that. Others – like Alejandro Groizard y Gómez de la Serna –, those who did not suggest such a relevant role for dangerousness in criminal law, understood it better, although some of them also did not fully agree with that controversial doctrine of the Supreme Court.

Maria João Antunes and Pedro Caeiro, from the University of Coïmbra, deal with **Portugal** in an article entitled "Positivism, insane offenders and social defense in Portugal at the end of the 19th century". More specifically, this contribution analyses the influence of positivism over Portuguese law in relation to the treatment of dangerous offenders, especially insane offenders, between 1852 and 1936. In the second half of the 19th century, the writings of Portuguese legal scholars and alienists were already influenced by the positivist doctrine, especially in what concerned the State's response to the association of madness and crime, as well as criminal dangerousness. Consistently with the positivist view that the ascertainment of

insanity should not mark the end of public intervention (as had been upheld by the classical paradigm), the Penal Code of 1886 provided that the offenders acquitted for insanity could be hospitalised if their mania was criminal or their state so required for greater security, which would be determined by the courts upon hearing medical experts. Later, some kinds of insane offenders (the 'alienated criminals') were committed in criminal asylums for an indefinite term. Over time, the grounds for applying this therapeutical measure have changed, until the coercive internment of unaccountable dangerous offenders acquired the nature of a true (criminal) security measure in 1936.

The authors show that positivist concerns with the need to look more at the offender than at the offence also reflected on the way the approach to the association between crime and insanity evolved in that period. Offenders who became insane after the perpetration of the offence, namely during the enforcement of the sentence, were committed in special facilities (in the prison or in a psychiatric hospital, or, after 1911, if they belonged to the designated classes, in criminal asylums), and, if they were deemed dangerous, their internment could last beyond the expiry of the prison term. The classification of offenders according to a special prevention criterion also led the legislator to establish a special regime for abnormal criminals (1936), i.e., accountable offenders who suffered from a mental anomaly. They were placed either in criminal asylums or asylum prisons depending on whether they were able to understand the meaning of the sentence.

Under the influence of French law, the Portuguese legislator provided for security measures (first the relegation to overseas territories, then the work in agricultural colonies) applicable to multi-recidivists after the enforcement of the penalty. Those measures were then extended to vagrants, beggars and pimps. Such dualistic model, aiming at countering criminal dangerousness, was reinforced in 1936, when the internment in a psychiatric institution could be applied to abnormal (accountable) offenders if dangerousness persisted after the enforcement of the sentence. However, the situation of beggars, vagrants and the like was no longer punishable as a criminal offence: such deviant groups were deemed to be in a "state of dangerous a-sociality" and therefore were subject only to (*ante-delictum*) security measures, which was also in line with positivist lineaments.

Paulina Kamberov, from the University of Gdańsk, is the author of the article entitled "The issue of the insane offender at the beginning of 20th century in **Poland**". She argues that the position of the insane offender in criminal proceedings was a very complex problem. In her view, it is a platform where basic rules of law and human rights are to be exercised. It is a search for the balance between the obligations and freedom of an individual, between human rights and public order, between an individualism and the interest of a society. Kamberov describes the foundation of criminal legislation on the matter of insane offender and concept of criminal responsibility in Polish Penal Code of 1932. The paper also examines the inspirations for adopted rules and the parallels between the way of handling the insane offender cases and roots of a criminal responsibility.

The article covers vastly the ideological and axiological background for legal provisions regarding insanity, criminal responsibility and adjudication of a punishment. The examination is based on the circulation of thoughts in a debate in nationally recognised legal journals and writings of contemporary leading legal scholars and practitioners. Aside of that, the author also analyses protocols of Codification Commission proceedings, and somehow examines legal provisions themselves. The case of Poland and addressing the insane offender problem is an

illustration of how law was merging with other sciences, like medicine, which relation lasts to present day.

The author maintains that the issue of the insane offender at the beginning of 20th century in Poland was framed into a broader topic of the development of a criminal law in Europe and in the world, so foreign influences on insane offender matter and sources reveal a clash between the classical and positivist criminal law schools. Eventually, the paper shows the role of deep comparative work undertook by contemporary scholars in the law-making process. Since the work on insane offender happened to be a part of a national criminal law codification process, Kamberov also shows how the local perspective fits in a global legal culture.

The case of **Russia** is studied by Maria Filatova, Tatiana Alekseeva, from the Lomonosov Moscow State University, in an article entitled "Social Defense Measures and Insanity in the USSR: Problems and Solutions". The authors start by stating that, in Russia, insanity is strictly a legal term and not a medical one. It is not a synonym of a term "mental illness", as medical criteria are only a component of an insanity formula. The latter was developed by N.S. Tagantsev and imperial psychiatrists. Both lawyers and psychiatrists were interested in solutions which could help to achieve a compromise between legal and medical terms in relation to mentally ill offenders. For instance, psychiatrists V.P. Serbsky and V.Kh. Kandinsky concentrated on this issue along with lawyers. In the view of Professor Tagantsev, insanity could be established on the basis of two criteria – the medical and the psychological (it is now called the legal one, but its essence remains the same). There are two alternative elements in the legal criterium – a person's inability to realise what he or she is doing or to control his or her actions (cognitive and volitional elements, respectively).

During the first years of the Soviet government, positivism was presented by the sociological criminal law theory and was at a peak of its influence on criminal law. Positivist ideas were modified on a basis of the class theory in order to meet needs of the new government. In some sense, insane offenders were less of a threat to Soviet power than class enemies (the so-called "haves", in comparison with the "have-nots"). However, lawmakers aimed at rejection of all traditional criminal law terms and categories (e.g., "guilt", "punishments"), and previous elements of the traditional formula of insanity were inaccurately replaced with incomplete ones. For example, until 1926 the legal criterium lacked its second part – control of actions. All legislative modifications of the traditional insanity formula can be considered a step backwards in its development.

As for theories of insanity in doctrine of criminal law, in 1920s and early 1930s they focused on the idea of rationality. Scholars began to assume the absence of free will. If there was no free will, a person could be neither guilty nor innocent. If the person was not guilty of a crime, but the crime had been committed because of different factors, then the only fact that mattered was that this person was dangerous to society so the social order should be protected from him. So, insane offenders were treated as *criminals*. Some commentators insisted that, instead of analysis of the offender's mental state during the commission of a crime, the judge had to choose what measures to apply on the basis of *rationality*. However, some scholars made it synonymous with class nature of Soviet criminal law, while others put emphasis on crime prevention as its purpose. The third interpretation suggested to apply different kinds of measures in regard to offenders' abilities to perceive measures imposed on them.

So, such a lack of clarity both in theory and in practice broadened powers of psychiatrists. The traditional formula was developed by them in parallel, but in 1920s the

balance was lost. It became easier to fully rely on medical criteria rather than establish what rationality was, even though judges did not lose their powers to disagree with medical reports on mentally ill people. Psychiatrists, who became experts for the purposes of criminal law and procedure, adopted lawyers' terms, categories and interpretations and even turned to the idea of rationality instead of evaluation of mental states (it can be exemplified with their argument in one of the reports – long stay at hospitals, which had not led to any positive results, meant that further medical treatment was not rational). Psychopaths were regarded as people with boundary mental states and often received specific treatment from experts in the 1920s, and experimental psychiatry was developed. All these tendencies soon ended in their rejection. The traditional formula was reestablished, and powers of experts were limited, but in Russia courts even today become dependent on experts, while the concept of diminished sanity was restored in the Russian legislation in 1990s and unavoidably requires analysis from a historical perspective.

The legal regime of insane offenders in **Brazil** is analysed by Ricardo Sontag, from the Federal University of Minas Geiras, in his article entitled "'Houses Destined for Them' [*casas para elles destinadas*]: Insane Offenders, the Article 12 of the 1830 Brazilian Criminal Code and the Question of the Predecessors of Security Measures". How not to get lost when looking for the threads of the predecessors of security measures? Ricardo Sontag's article takes this methodological reflection forward when analyzing the peculiar article 12 of the 1830 Brazilian criminal code. Few criminal codes of the 19th century explicitly established a legal consequence for when an insane offender was acquitted. This is why article 12 of the Brazilian code was peculiar: it established that acquitted insane offenders should be interned in "houses destined for them".

Sontag's analysis, thus, contextualizing this article in the international scenario, identified a type of regulation on insane offenders that was not widespread, which also includes the Spanish criminal code of 1848-1850 and the Argentinian provincial criminal codes that adopted the wording of Carlos Tejedor's 1866 criminal code draft (in this aspect, by the way, not adopted by the first unified Argentinian criminal code of 1886). Despite predicting a fate for insane offenders, Sontag argues that this is not enough to consider article 12 of the 1830 code a security measure. More cartography and less genealogy; more context and less origins. Paying attention to the moment when security measures become a problem for legal science is the alternative proposed by Sontag for a more cartographic and contextual approach. In this way, provisions that look like ones from the chapters of current criminal codes on security measures are not valued isolated, but rather inserted into a legal culture. Not by chance, the jurists' comments on article 12 of the 1830 code were very short and treated it as the frontier of criminal law: from the acquittal of the insane offender, we entered another territory (of medicine, of common hospitals, of charity, etc.).

Only at the end of the 19th century the "houses destined for them" came to be interpreted as criminal asylums specifically. This overlap between criminal law and medicine, however, did not yet configure the displacement of frontiers that the problem of security measures would produce a few years later. What are the foundations of security measures? Should they be applied by administrative or judicial bodies? These are some of the questions that Brazilian jurists in the first decades of the 20th century will address: now we can say that the problem of security measures already existed. Based on the Brazilian case, this is Sontag's proposal for an analysis of the history of security measures that does not get lost in isolated threads, but that is able to address the fabric in which they are inserted, in Paolo Grossi's metaphor.

Two articles cover **Argentine**. The first one, entitled "Between Impunity and Treatment Orders: Mental Illness and its Legal Consequences on Argentine Criminal Codification and its Legal Culture (1877–1921)", is authored by José Daniel Cesano (Institute of Legal History and Political Ideas), Jorge Núñez (Consejo Nacional de Investigaciones Científicas y Técnicas, Universidad de Buenos Aires), and E. González (Universidad Nacional del Litoral). Its main contribution is the reconstruction – in a historiographical way – of the legal responses of the Argentine penal codification in cases of crimes committed by the mentally ill. The article develops the Argentinian legal culture through a wide range of sources between 1877 – the province of Buenos Aires adopted the draft Criminal Code elaborated by Carlos Tejedor – and 1921 – when the current Criminal Code came into force –: norms, legal doctrine analysis, doctoral theses, Criminal Code reform projects, readings of foreign authors by the actors of that time.

The authors develop their article in three parts, analyzing different periods and aspects of this process. Firstly, the situation that goes from the provincial adoptions of the national projects until the sanction of the Criminal Code of 1886. In this period, there was a deviation from the previous approach to the consequences of a crime committed by a mentally ill person. The Tejedor draft (which drew inspiration from the Spanish Criminal Code of 1848 as amended in 1850) expressly provided for confinement in houses for the mentally ill or the delivery under the care of the family in these cases, but the Code omitted any consideration on this matter. Something similar is observed in the draft by Villegas, Ugarriza, and García (1881). The solution adopted by Tejedor was not aimed at punishing the mentally-ill person who committed a crime, but at preventing such person from causing any damage to the society. The author argued that those consequences were not strictly criminal in nature: he stated that this protective power should appear "when the criminal courts declare their lack of jurisdiction". Despite this "legal silence" of the 1886 Criminal Code, some courts ordered the internment of certain defendants suffering from some mental pathology as a civil rather than criminal response; a situation that led to a large number of criticisms from medical experts and jurists.

In the second part, the article explores these criticisms that arose as soon as the Criminal Code of 1886 came into force. Mainly related to this normative silence, the criticisms came from two doctrinal positions. On the one hand, the adherents of the *Scuola positiva* proposed the creation of criminal asylums in which to intern these individuals. On the other hand, following the representatives of the *International Union of Penal Law* and specific pragmatic concretions reflected in foreign codification processes (in particular, the Swiss projects of 1893 and 1915), the notion of security measures began to take shape as a second way of criminal law, alongside punishment.

Finally, the article argues that in Argentina, since the Criminal Code of 1921, punishment and its formal assumptions, which had monopolized the system and legal regulation that European and Latin American societies of the 19th century established as a consequence of crime, began to lose that exclusivity. The Argentine Code provides for a security measure of a legal nature; not only because it placed (and places) in the Judge of that jurisdiction the issuance of the internment of the alienated, but also because a comprehensive analysis of the legislative document that contains it allows us to appreciate a true two-way system, where, together with the punishment, the security measures appeared as penal legal consequences against the realization of the crime or, as happens with the mentally ill, of a typical and unlawful act.

The second article covering Argentine is authored by Enrique Roldán Cañizares (University of Sevilla), Matías Rosso (UNC-US21). With the title "Insane offenders in

Argentinian laws and jurisprudence: a history of resistance", the authors studied the regulation of insane offenders in one of the most controversial draft criminal codes in Argentinean legal history. It was a project which, by decree of 19 September 1936, was entrusted to Professors Jorge Eduardo Coll and Eusebio Gómez, who submitted their work to the Ministry of Justice and Public Instruction on 8 July 1937. The draft consisted of 393 articles. It prescribed rules on the cause and error in the person, as well as on participation in the offence. In the chapter on the offender it dealt separately with the circumstances of greater and lesser dangerousness and in its Article 20 it established a classification of the offender "... the Court shall establish, in a well-founded manner, the relationship between the offence committed and the personal conditions of the perpetrator in order to determine: a) whether he committed the crime by yielding, exclusively, to a special and transitory occasion; b) whether he committed the crime in the impetus of a social passion or in a state of violent emotion which the circumstances made excusable; c) whether he committed the crime in a state of mental alienation, serious psychic anomaly, complete inconsistency or chronic intoxication of alcohol, drugs or narcotics...". The bill was referred to the Chamber of Deputies on 27 August 1937, but never discussed.

In this article, Roldán and Rosso try to retrace the little-known paths of the 1937 Criminal Code Project, with a special focus on Insane Offenders. This draft, which has been somewhat forgotten by Argentine historiography, contained a series of novel solutions that they attempt to recover here and had a clear dangerous tendency. However, the entire draft penal code was inspired by positivist ideas, especially in its general part, and it is possible to see the inevitable contradictions to which this doctrine led. The authors' efforts are particularly valuable for anyone who wants to have a deeper knowledge of the criminal ideas that circulated in Argentina during the late 1930s.

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