Zaffaroni
Selected works (1995 - 2008)

Edited by Matias Bailone
Eugenio Raúl Zaffaroni

Selected works (1995 - 2008)

Chapter I .................................................................................................................................................. 10

Seeking the Enemy: from Satan to Cool Criminal Law – Eugenio Raúl Zaffaroni ...................... 10
The different aspects of punitive power ................................................................................................. 10
The colonialist and neocolonialist stages ............................................................................................... 11
Penal authoritarianism in XX Century Europe: the mythical frontality .................................................... 13
The XX century at the periphery of global power .................................................................................... 15
The legitimating emergencies of the last decades of the century ............................................................ 15
The dawn of the XXI century: where is the enemy? .............................................................................. 16
The Latin American cool authoritarianism .............................................................................................. 18
Responses of the judicial discourse towards cool authoritarianism ........................................................ 21

Chapter II .................................................................................................................................................. 28

Criminology and Psychiatry: The Trauma of the First Meeting - Eugenio Raúl Zaffaroni ............ 28
Communicating the lack of communication ............................................................................................ 28
Prehistory ................................................................................................................................................... 28
The origins: modern psychiatry illuminates official criminology ............................................................ 29
Criminology follows its hand from the hand of Psychiatry .................................................................... 31
The trauma of genocide .......................................................................................................................... 32
Criminology becomes independent of psychiatry .................................................................................... 33
The perspective of a fruitful reencounter ............................................................................................... 34

Chapter III .................................................................................................................................................. 40

Criminal Law and Social Protest - Eugenio Raúl Zaffaroni ................................................................. 40
Delimiting the phenomenon .................................................................................................................... 40
Non-institutional protest .......................................................................................................................... 42
Institutional protest is always atypical ..................................................................................................... 43
The non-institutional protest is not always typical .................................................................................. 44
Protest that manifests itself in classified conduct and its justification .................................................... 47
Protest that manifests itself in illicit actions and culpability .................................................................... 48
Some political reflections ........................................................................................................................ 50

Chapter IV .................................................................................................................................................. 52

Organized Crime: A Frustrated Category - Eugenio Raúl Zaffaroni .................................................... 52
Introduction ............................................................................................................................................... 52
Plurality of agents and organized crime ................................................................................................. 52
An overview of conceptualizations ........................................................................................................ 53
Power imposes an impossible mission on criminology ................................................................. 54
The political functionality of the conspiracy version ................................................................. 55
The criminological inconsistency of the Mafioso paradigm ....................................................... 55
Organized or disorganized crime? .............................................................................................. 57
The extension of a frustrated category ....................................................................................... 59
An interventionist criminal discourse in a market economy ...................................................... 60
Criminalization by means of a frustrated category: authoritarian penal law .............................. 61
Conclusions ................................................................................................................................ 64

Chapter V ...................................................................................................................................... 68

Is a non-Authoritarian Enemy Criminal Law Possible? - Eugenio Raúl Zaffaroni ............... 68
The most recent proposal for a criminal law of the enemy ......................................................... 68
Polarization in current criminal law ............................................................................................ 68
An uncommon philosophical polarization .................................................................................. 69
The Hobbes/Locke confrontation ............................................................................................... 69
The Kant/Feuerbach confrontation ............................................................................................. 70
Hobbesianism in the past century: Carl Schmitt ....................................................................... 71
The penal reflex of the enemy during the last century: Edmund Mezger .................................. 73
The frustration of the aspiration for a non-authoritarian enemy criminal law ......................... 74
Consequences of the sacralization of the dynamics of punitive power ....................................... 76

Chapter VI ...................................................................................................................................... 79

Girardin: Abolitionism between the Second Empire and the Third French Republic
- Eugenio Raúl Zaffaroni ............................................................................................................... 79

Chapter VII ..................................................................................................................................... 93

Globalization and the Current Orientations in Criminal Policy - Eugenio Raúl Zaffaroni ........ 93
Introduction .................................................................................................................................... 93
Globalization as a fact of power and the Single thought as a legitimating discourse .................. 94
Characteristics of the new planetary power .................................................................................. 95
The general ideological disconcertment ....................................................................................... 96
The disconcertment of penal system ideologies ....................................................................... 96
Macroeconomic wrongdoing: planetary power .......................................................................... 98
The deterioration of political power: national power ................................................................. 99
The criminal spectacle of the political spectacle ........................................................................ 100
The center of the margin: the process of leveling ..................................................................... 102
The immediate perspectives of punitive power, from discourses of the penal system
    and human rights ..................................................................................................................... 102
Possible perspectives .................................................................................................................. 104
The meaning of action ............................................................................................................... 105
The penal knowledge of globalization ....................................................................................... 107

Chapter VIII .................................................................................................................................. 109
The “Dangerous Classes”: The Failure of a Pre-positivist Police Discourse
- Eugenio Raúl Zaffaroni

Chapter IX

The legitimation of penal control over the “strangers” - Eugenio Raúl Zaffaroni

Chapter X

The Path of Criminology - Eugenio Raúl Zaffaroni

I. Criminological knowledge as a path
II. The path of administering fears
III. Definition as an authoritarian tautology
IV. The wise criminologist and the naïve criminologist
V. Criminology has been accumulating discourses for five centuries
VI. The discourses as struggles between corporations
VII. The middle ages are not over
VIII. Confiscation from the victims
IX. The abduction of God
X. Violent interrogation as a scientific method
XI. The knowledge of the lords
XII. Knowledge subject to the lords
XIII. Is it possible to overcome knowledge through violent inquisition?
XIV. Discrimination as a structural product
XV. The first privatization of security
XVI. Inquisition: the state as administrator of death
XVII. The bureaucracies: the state that administers life
XVIII. The corporations divide up life
XIX. The corporations teach one not to see
XX. The corporate link with broad social power
XXI. Corporate hegemony and mercenarism
XXII. The corporate dispute for ownership
XXIII. The major stages of hegemony
XXIV. The current deficiency in discursive hegemony
The different aspects of punitive power

One cannot conceive of human beings as part from interactive relations (of cooperation or conflict), which proceed to create power structures that appear in small-scale societies (tribes, clans), extended to broader contexts (nations) and finally encompassed the globe. This process has advanced since the XV century in the form of colonialism, since the XVIII as neocolonialism and since the XX as globalization, with each moment preceded by an economic, political and social transformation known as a revolution (mercantile, XIV/XV centuries; industrial, XVIII century; and technological, XX century), all episodes in an expansive power process.

The exercise of planetary-level power has always required a certain form of internal power for the dominant nations, since one cannot dominate without first organizing in a dominant manner. Thus Europe, to begin the process of globalizing power, needed to first reorder its societies into a form of higher hierarchization, very similar to a military organization (corporatization of societies), through which it recovered an internal power that had been employed by the great conquering power (Rome) and had disappeared with its downfall: punitive power.

This formidable instrument for social verticalization proved indispensable for the success of colonialist genocide. Neither would Rome have been able to conquer America and Africa without the powerful internal verticalization derived from confiscation of the victims so as to neutralize dysfunctional elements. Furthermore, without such an instrument, it would not have been possible to control the colonized countries, where individual hierarchized forms were assumed to turn them into immense concentration camps.

The conquering armies are only the most visible expression of other much greater ones which are the colonizing societies or nations themselves, corporately structured, ordered into hierarchies and endowed with a unique ideology, which will not abide dissent. Those immense armies have armed themselves beginning with small controlling cells (families) commanded by a under-officer (pater). Submitting to him were the women, the elderly, the servants and slaves, the children and domestic animals, all of them biologically inferior to the pater, who according to traditional civil law answered for damages caused by this subordinates. From this comes the importance given to controlling sexuality, to misogyny and homophobia as disciplining elements for those who, since the Middle Ages have been obsessed with repressing all Dionysian expressions, which were considered diabolical.

But when one analyzes the phenomenon of expansion of planetary power from the perspective of its guiding instrument, which is punitive power, one nor mally confuses aspects that - although interacting – are not merely independent, but essentially different. One cannot understand an exercise of power that is constantly expanding if one confuses levels that correspond to the different
agencies in its heterogeneous composition. To apprehend its reality, one must distinguish, at a minimum, three levels or perspectives:

(a) One thing is the real exercise of repression, that is to say, secondary criminalization or individualization of persons on whom it falls, be this in the form of punishment, death or physical pain, legally or illegally imposed by executing agencies;

(b) Another is what is prescribed by laws, in other words, Primary criminalization or repressive or penal legislation, which configures what should be produced by agencies that issue laws (parliaments, autocrats, etc), and that never completely coincides with the is of repression

(c) And another, different from the first two, is what is theorized by authors of legitimating or critical discourses, that is to say, the judicial-penal or ideological discourse, which basically arises from ideology reproduction agencies (academies, universities, etc.).

(d) To this one may add the publicity or propaganda from the penal system, which presents itself to the so-called public opinion as a protector or custodian, in this or in another world, acting through different a gencies (ranging from sermons in churches, soapbox speeches in parks, ha ranges from village priests, etc., to sophisticated contemporary publicity, and involving the theater).

It is only from the perspective of a whole that encompasses the four levels noted above that one perceives the course of planetary power as a permanent search for the enemy, without becoming entangled in the constant changes in analytical level, which is a trap that keeps one from understanding the phenomenon in its totality. For it is from the perspective of this totality that one perceives that such corporatized societies have launched attacks on external and internal enemies; the external enemies were those destined to be dominated, while the internal ones were all those who weakened the hallucination of the moment, make up by the emergency of the moment.

The question of the enemy was studied and discursively rationalized in the XIX century with Garofalo and in the 20th with Carl Schmitt. The search for and identification of enemies has been the permanent task of punitive power throughout the last eight centuries. The relation be tween corporatized societies, some to dominate and others to be dominated, could only be one of war, and that presupposes the existence of enemies. The delinquent is defined as the internal enemy, while the alien soldier is the external enemy. The delinquent is a part of the fifth column that breaks down ideological homogeneity on the internal front. For those who define power as power to define the enemy, there is no possibility of using power to give validity to human rights, because they have no enemies, for they embrace all of humanity, and their use would be more than a pretense for excluding those who violate them from humanity. Long before Schmitt, it was correctly observed that one who seeks the legal foundation of the sentence should also seek, if he has not found it, the legal foundation for war.

The colonialist and neocolonialist stages

The theocratic discourse presented colonialist discourse as a pi ous undertaking, but it killed internal dissidents, colonized rebels and rebellious women. The enemy of that undertaking was the devil. Because Jesus is a victim of punitive power and not a warrior god, it invented a warrior enemy, the head of an army of demons, to legitimize its armies in the name of Christ. That invention was built on top of European prejudice, which from ancient times had believed in the maleficence of witches, admitted and ratified by academics of the period.

The power legitimated by those discourses was exercised in the form of genocide (elimination of the majority of the American population, African slave trade, destruction of pre-colonial cultures on both continents). Its exercise set in motion an extractive economy that provided raw materials and means of payment, which gave rise to modern capitalism, weakening the colonial powers and strengthening the neocolonialists.
Power passed from Spain and Portugal to middle and northern Europe, the capitalist class raised itself up against the colonial nobility, and global power began to favor economic relations and relativize political dominion, largely replacing it with economic control. Punitive power played a central role in the internal structural changes in neocolonialist societies: to begin with, the new productive classes struggled to weaken such power exercised over them (with the discourse of penal liberalism, founded on contractualism and rationalism); but later on, the same classes re-vitalized it in order to contain the populations concentrated in the cities because of the wealth accumulated in them and to submit them to the training that would convert them into salaried workers.

Prison became generalized, police services were invented for controlling the dangerous classes, and the penal spectacle was inverted: penalties ceased being public and judgments were shown on a previously determined stage, although inquisitorial activities were retained with the figure of the police instructor.

Insubordinates and dissidents became biological inferiors, the same as the colonized peoples, and total institutions were dedicated for them. Subhuman status was assigned to women and sexual minorities. Medical doctors provided an academic discourse for the police—a new institution lacking its own discourse and scientific dissemination in schools and the press operated as propaganda. Legislation invented security measures, in other words, sentences that were not sentences, to neutralize inferiors. Academics theorized that internal enemies were savages born by biological accident in the dominant societies.

In the neocolonialist countries the total institutions took on the form of prisons and the repressive power served in fact to expel a goodly number of the enemies or dangerous European classes: those who were aggressive found themselves relegated to distant colonies and those who were merely inconvenient were forced to emigrate.

The punitive power played a crucial role at this stage of world history. The Roman Church had lost its discursive hegemony; the Reformation had paved the way for capitalism accepting that the devil was the owner of this world and that only faith could save one in the next. The philosophers and jurists discursively legitimated the reduction of punitive power over the new rising class, finally, the police and doctors, based on notions of permanent progress and on biological absurdities, had provided a new hierarchizing discourse, that was clearly racist, paternalistic, organicist, misogynous, discriminatory, and whose final consequence was elimination of inferiors. Although one cannot blame the Nazi genocide on the discourse of danger—because no discourse in itself can produce genocide—it is also true that such a discourse made it possible to identify the enemies of the regime.

In summary, the seven centuries of uninterrupted punitive power prior to the XX century show us the main moments of its unlimited use: colonialism, with the discourse of inquisition (ecclesiastic or state) and neocolonialism, with its medical racism/police discourse. Between the two, there was a drop in the struggle between those who were losing power and those who intended to assume it: this was the dominant moment in the critical discourse for penal liberalism. Thus, on the academic level, there arose two discursive structures: authoritarian or inquisitorial and critical or liberal.

At a distance of five centuries, the legitimating texts conserve an identical authoritarian structure. On a real social plane, all evidence indicates that this alternation derives from a struggle among corporations to monopolize discourse on the criminal issue: the Dominicans held sway over the inquisition against the devil (XIV century), while the Jesuits reorganized it on a Spanish model against the heretics (Protestants) (XVI century) and, thus, needed to delegitimize the Dominican corporation. That is why they were beneficent with the first critical discourse (XVII century). Later on, the illuminists and liberals (corporation of philosophers and jurists) delegitimized the theocratic discourse with a new discourse, which responded to the critical structure that the Jesuits had inaugurated against the Dominicans. When the industrialist class reached power, the doctors and police provided it with a new authoritarian discourse that had the inquisitorial structure.
The penal discourse was degraded into direct police coercion (administrative) whenever it assumed an inquisitorial structure; it justified use of force to eliminate a supposed collective threat coming from very powerful enemies in a war that was to a large degree imaginary. When it wanted to contain power (liberalism) it turned to civil law, where there are no enemies but only parties in conflict; civil law seeks reparation and not elimination of the vanquished. This equipped the penal discourse with a particular avidity for assimilating elements from other discourses because it lacked elements of its own.

Penal authoritarianism in XX Century Europe: the mythical frontality

The First World War (1914-1918) was uncommonly cruel, ushered in the first genocide in the last century, made it plain that soldiers are only the visible advance of armies that encircle all wartime economies and changed the map of world power. Europe on the wane, an ascendant United States and the Soviet phenomenon marked important changes in planetary and also internal power.

In Europe heroism was praised and new authoritarianisms burst on the scene to assume various penal discourses of a biological nature: ranging from Marxism in Russia, to idealism in Italy and to raw and brutal genocidal racism in Germany. Discourses in those regimes not only had an inquisitorial structure, but also the same ideology derived from the XIX century: dangerousness followed its police/administrative destiny, legitimating crimes to the extent that each autocrat wanted to forward his genocidal purposes, actually going far beyond the formal laws and the rationalizations – even the most aberrant ones – of his judicial and criminological scribes.

In effect: the dangerous were parasites to the Soviets, subhuman to the Nazis and enemies of the state to the fascists, and all were submitted to a parallel penal system, to inquisitory/police courts. It is obvious that the Nazis were the cruelest of all, but this does not exclude other atrocities or erase the fact that at heart all those systems had a common ideological penal base, which was medical/police dangerousness (racism) inherited from the XIX century.

In reality, such authoritarian structures carried out their repressive power in a genocidal matter, creating subterranean penal systems, with disappearances, torture and police executions on individual and mass scales, with no legal basis whatsoever. The Holocaust had no legal basis even in Nazism, as had also been the case with the suffocating Führerprinzip. This was also true of the elimination of Polish prisoners by Stalinism. The infamous Night of the Long Knives was not hing more than the selective assassination of dissidents.

The criminal laws in such authoritarian systems showed merely the visible face of the formal penal system and something of the parallel penal system, while underneath them a subterranean system operated, without law and without limits. However, if there were no limits to the punitive power to whom should one show the law? To whom should one show the law with limited power when it was exercised without limits? Sociologically speaking, to whom should one show the law? Laws were drafted by jurists, and they could not be directed to the autocrats who commissioned them through amanuenses. If the laws addressed them, it was not to limit their all-encompassing power, but instead to please them. All of the laws for defense and protection of the Nazi state were directed to the Führer to please him, but also to the public, to extol the virtues of a regime that intended to defend and protect them with such laws. Basically, then, such authoritarian laws had two addressees: the autocrats, whom the scribes must please so as not to fall into disgrace, and the public, for whom they would serve as propaganda. Only secondarily did they provide bureaucratic tools for suppressing enemies, who were the aliens or hostiles.

The main characteristic of those laws was their frontality. This trait was described in courtly art by Julius Lange and Adolf Erman, who noted that the human figure or language or any manifestation, is directed towards an observer, whom one needs to please, in a respectful and servile manner. It is the
same frontality of courtly theatre, which never turns the its back on the observer, which always focuses on the fact that what is happening is a fiction directed at the observer and not to another. Frontality only disappeared with the rise of sophistic relativism and its pluralistic perspectives.

The frontality of a authoritarian criminal laws between the wars was part of a highly frontalist scene, which included monumental architecture with imposing neoclassical facades, colossal statues, immense parades and uniformed machines, s howy uniforms, medals, pa rticularly ostentatious ceremonies, generalized histrionics and so on. Frontality is characteristic of every manifestation of an autocratic regime and not only the autistic ones, which also means that its laws will be frontalist.

Although those laws were directed to the autocrat and also to the public, they were not bifrontal, but had a single face: the autocrat was pleased with what served as propaganda for him, especially at a time in which the formidable power of propaganda was beginning to be clearly perceived. That does not mean that these laws, because they were directed to the public, were democratic, since they responded to what from that time onward has been called völkisch, which should not be confused with democratic, nor with popular nor populist.

Strictly speaking, what was new was the name völkisch, but not the phenomenon itself, a technique that has been used in manufacturing an enemy for centuries; it consists of feeding and reinforcing the worst prejudices to publicly stimulate identification of the enemy of the moment. When one analyzes Nazism, this technique is particularly noteworthy, especially because it is intimately linked to the discourse that privileges the theory of the intended plebiscitary democracy, theorized by Carl Schmitt, associated with his concept of the political based on the friend/enemy distinction, which he detailed during that period. Schmitt was able, like no one else, to lay bare the nature of power, designating its essence as the capacity for identifying and excluding the enemy, the stranger, the hostile. Starting – as did Hobbes – with the assumption that he is the only entity that can guarantee peace, he deduced that for this it is necessary to identify and exclude the enemy, without admitting that a third party is able to decide the conflict. The Hobbesian connection of this reasoning is clear and, although it is somewhat more distant, one cannot ignore the reference to Hegel, who excluded from judicial relations – and thus from a sentence with retributive limits – those who had not reached the moment of having a subjective spirit or self-consciousness. To maintain that one may only attribute judicial relevancy to those who are part of the judicial community, in other words, those who share certain common values, means excluding the strangers and submitting them to police measures. From there to considering some or all of them as enemies is merely a step away.

At any rate, even though at this moment the discourse had reached its highest degree of sincerity, it was still a rationalization to justify a regime that exercised an unlimited repressive power, enabled by aberrant laws, or directly without any legal qualification, but, with or without a quote from Schmitt and with greater or lesser elaboration, fell back on the recourse that has always been used to legitimate unlimited punitive power in any emergency: appealing to the hallucination of a war.

Although all identification of the enemy is based on a myth, the frontality of between-the-war authoritarianism occurred in a coarse manner. The extreme Nazi brutality supplanted some of the more elaborate rationalizations, replacing them with cruder arguments; they preferred the fables of Rosenberg to elaborations by Schmitt or Heidegger. In fascism different discourses seemed to coexist, and this did not perturb its disparate levels of elaboration, and Stalinism directly eliminated those that might become a nuisance according to the autocrat’s paranoia. The most grotesque myths won out because there is always an inverse relation between the degree of irrationality and brutality of the repressive power and the level of elaboration in the discourse used to legitimate and also because myths are better suited to publicity demands.

Nevertheless, it is worth noting the presence of those myths, some of them very old – such as racial and blood myths, others more nationalistic, the product of idealist traditions and the need for reinforcing recently unified states. The ancient myths were partly combined with the old Spenserian
racism, and, truth be said, although they were aberrant, one cannot deny – as is also the case with the old racism – their colorful inventiness and depraved creativity, what one might call the brilliance of their perversion.

The XX century at the periphery of global power

Whereas the punitive or repressive power was the verticalizing instrument for colonialist and neocolonialist societies, it was employed in colonized societies to turn them into immense concentration camps for the natives (given that all were considered biological inferiors). The shameless Hitlerian slogan engraved above the gates of concentration camps was the synthesis of colonialist premises: the colonized were to work and submit themselves in order to learn to be free. Because the mestizos were less domesticable than the pure natives, miscegenation was discouraged (apartheid) and existing mestizos were considered unbalanced (moral degenerates). The penal discourse treated the natives as unimputable (assimilating, in Lombrosian fashion children and savages) and mestizos as potential moral madmen. In this way it rationalized its exclusion and turned the most rebellious into enemies (savages, enemies of civilization, of progress, etc.).

The exercise of repressive power in the colonized countries was prolonged for many decades, supported by the oligarchic republics that kept their majorities under conditions analogous to servitude. Justice exercised by landowners, private death penalties, murder of dissidents, massive repression, forced recruitment of mestizos for the armies, occupation police forces, arbitrariness and tortures, de capitations, imprisonment without trial, permanent states of exception and phenomena of incredible corruption, were all common in those immense concentration camps.

While the punitive power in Latin America was exercised in this way, from the second half of the XIX century on legislators in the local oligarchies – proconsular groups linked to central interests – approved constitutions and criminal codes that were first liberal and later on based on dangerousness, the former copied from the United States and the latter from continental Europe.

The legitimating emergencies of the last decades of the century

With the bloodiest civil war in the Latin American XX century – the Mexican Revolution – the downfall of the old oligarchic republics began and the punitive power was transformed to the beat of old-style dictatorships and political processes known as populisms that – in general – used it in a more prudent manner, although almost always under the aegis of police paternalism. The judicial-political discourses abandoned pure positivism and blended with German theories successively imported as techniques, with total disregard for their original political and social orientation. Legislation underwent the influence of second-generation European codes, such as the Codice Rocco.

Populisms were pro-tectionist and nationalistic, unsympathetic towards United States administrations, who, by means of coups d’états caused setbacks for the incipient welfare states, which in some countries had achieved interesting levels by the mid-century. Those regressions generated resistance and also some Marxist-inspired armed minority movements. With the pretext provided by the latter, the United States supported military regimes that practiced state terrorism with unusual cruelty, especially in the Southern Cone. To eliminate the last traces of populist policies, their definition of the enemy did not restrict itself to members of the armed minority groups, but in some cases physically extinguished a generation of current and potential leaders.

To this end they exercised a formidable and unlimited punitive power. They established a parallel penal system that perverted the exceptional measures provided in the constitutions, imposed thousands of sentences without trial and submitted civilians to military courts and commissions. But what set them apart was their setting up an underground penal system without precedents as to its
cruelty, complexity, and highly calculated planning and execution, whose analogy with the final solution is undeniable. Using this apparatus they committed thousands of homicides, forced disappearances, torture and other physical abuses, kidnappings, sexual crimes, house holds invasions, damages and fires, intimidation, robberies, extortions, changes in civil status, and so on, without any normative base, including within their own de facto order.

The legitimating discourse for such atrocities was the so-called national security doctrine, inspired by the French coup plotters in Algeria and disseminated among officers in the armed forces of the whole region through the School of the Americas, which the United States supported in Panama. Although somewhat more elaborate work was done, it was explained in simplistic manuals, which began with a premise held in common with Trotskyism: the hallucination of a permanent war, waged between the Soviet Union and the West, in which each blow in a foreign zone of influence would be a battle. The vision was of a dirty war, which did not respect the rules of conventional warfare, required the violation of human rights and humanitarian law. Despite this genuine atrocity, the criminal law discourse continued to be feed by the German theories, and no one theorized a national security criminal law, save for a few isolated exceptions.

The U.S. administration also pressured those dictatorships to declare the war on drugs, in a first version that was closely linked to national security: the drug dealer was an agent who wished to weaken Western society; the youth smoking marijuana was a subversive, and so on. As the fall of the Berlin Wall drew new, a new enemy was needed to justify the hallucination of a new war and to maintain high levels of repression. To achieve this, the war on drugs was reinforced. During the 1980s, very similar anti-drug laws were passed throughout the region, forming a criminal legislation for exceptional cases analogous to what had already been employed against terrorism and subversion. These laws violated the principle of legality, multiplied texts following the North American legislative technique, assimilated participation and a customary practice, attempted preparation and consummation, ignored the principle of offensiveness, violated the moral authority of the person, and so on. Special courts were created for proceedings, inquisitorial elements were introduced, such as rewards for informers, training for spies and for agents provocateurs, anonymous witnesses, a nonymous judges and inspectors, et cetera. An aberrant authoritarian penal legislation was created, which actually happened to judges, magistrates, inspectors and academicians.

While the prisons became overpopulated with drug consumers (whom one would suppose to be the victims) and with the women who carried them (mules), parallel economies were created. Corruption of penal systems was formidable – including in the armed forces incorporated for police functions – the volume of trade to the United States grew incredibly and the price for the internal distribution process in that country remained high, placing into circulation something like five hundred billion dollars annually, which gives an idea of the recession that would be caused by its sudden drop. But it is certain that drugs have not been able to occupy the vacuum left by the fall of the Berlin Wall.

The dawn of the XXI century: where is the enemy?

With the arrival of globalization, capital changed its nature. Its predominant speculative interests are guaranteed by a complex system of international agencies but are mainly supported by the Republican administration of the United States, a power that has been on the center stage since the First World War, after which a devastated Europe was left to its own devices by the Republicans who succeeded the idealistic president Wilson. During the 1920s the flow of capital to the United States also provoked an influx of immigrants, selected according to racist criteria and Prohibition gave rise to strong market criminality organizations. The terrible crisis of 1929 gave rise to the New Deal; later
occurrences highlighted the power of the United States in the world, not without a mythical component. The abrupt ending of the so-called cold war left it as the unquestioned hegemonic power.

Earlier on, the American penal system had been interesting in terms of some of its sentencing options that did not involve deprivation of freedom\textsuperscript{104}. The odious presence of the death penalty seemed to be ending when in 1972 the Supreme Court declared it unconstitutional\textsuperscript{105}, while imprisonment rates had been stable since the XIX century\textsuperscript{106}. That situation has been changing since the end of the 1970s, when the imprisonment rate began to rise exponentially and the penal system became oversized\textsuperscript{107}, keeping imprisoned and controlled (on parole and on probation) millions of persons and providing employment for other millions. As a hallmark of a service economy, the penal system has become a factor in reducing the unemployment rate.

The very high selectivity of repressive control in the United States is denied by the judges\textsuperscript{108}. The death penalty has been reestablished, re-legitimized by the Republican judges nominated to the Supreme Court by that party’s presidents, making it the only country in the Americas and Europe to apply it profusely\textsuperscript{109}, condemned by the OAS for executing minors. Furthermore, penal legislation has been established that imposes a life sentence on those who have committed three or more crimes, which reestablished the definitive relegation of the undesirables or enemies, which violates the principle of rationality. On the procedural plane, judgment has become extraordinary, so that jury guarantees have been suppressed for people with scarce resources. Bargaining is little less than extortion against minorities and all low income segments. In this may the accusatory criminal proceedings are a mere fiction, since the decision lies in the hands of the accusation itself (the district attorney).

In contrast to productive capital, globalized capital is not managed by business people, but by administrators of conglomerates, who are technocrats charged with obtaining the highest profit in the shortest time, to prevent their investors from seeking out another more efficient technocrat. That is how such persons overcome their scruples, so much that their activity frequently enters into a zone that is little different that economic delinquency. This phenomenon has spawned inquisitorial legislation, with elements derived from the Middle Ages (spies, informers, secret proceedings, etc.) applicable to a nebulous set of infractions designated as organized crime, which has encouraged the rise of an incredible number of international instruments\textsuperscript{110}. This is a pseudo-concept invented by the press, for which criminology has never achieved a legislatively adopted agreement to deal with heterogeneous hypotheses that cannot be confronted with the same measures. It is with infinitely is equivalent to market criminality, which is enough to show the enormity of the universe covered\textsuperscript{111}. The verification that the majority of such activities require complementary public corruption, has unleashed parallel with itch-hunting campaigns, which, not because of bad luck, never find those responsible for the asset stripping of entire countries\textsuperscript{112}, but motivate an enormous national and international bureaucracy and reached the heights of moral absurdity in the impeachment charges brought against a president of an extramarital sexual affair. Both organized crime and corruption\textsuperscript{113} serve to enable punitive power state interference into any economic activity that is disagreeable to the group in power at the moment or that is useful to eliminate or defame competitors, without the constitutional guarantees for such interventions.

The United States does not answer to international courts, since it has not ratified the treaties that would leave it accountable. The former nation of Wilsonian multilateralism is today a champion of unilaterism and its isolationist policy is similar to that of the authoritarianisms that led to the collapse of the League of Nations. In terms of penal systems, the country that disseminated procedural guarantees today practices the most heartless inquisitional methods.

That context follows the idea that the new role of strongest power on the planet has required a reinforcement of its internal verticalism. The Republican penal discourse since 1980 has been simplistic: the politicians promise more sentences so as to provide more security; it is affirmed that delinquents do not deserve guarantees; hallucinations of a war (also dirty) on crime arise; it is claimed that delinquents
违反人权；一些州长寻求连任，其竞选活动被处决的犯罪分子的照片包围着；一位成功的总统候选人，在竞选活动中展示了一名已故警官的海报；一位市长投资了大量的资金在改善公共服务上，清除了大部分的警察腐败，并在就业高峰期时管理国家。但他说他的成功基于零容忍，并提供简单直白的解释，以吸引拉丁美洲的商业领导人，他们向他支付了数百万美元。在2001年9月11日，这个惩教系统找到了一个组织。同时，它从合法化的惩教话语中借用了预防的预防，当它尝试去合法化对伊拉克的战争时。前所未有的军事和惩戒权力赤裸裸地联合起来，进行一场对敌人的绝望搜寻。

这种与美国传统背道而驰的威权主义标志着其社会的文化沉沦，并在政治中放弃了其民主的基石。它特点是绝望地寻找一个敌人来填补苏联解体留下的真空。候选人的多重性，毒品的不足和组织犯罪的过度抽象，使它们在街道上的犯罪分子上无法单独识别出可信的敌人。虽然缺乏一个预设立场来制造一个新敌人，但这个令人恐惧的事实，在2001年的袭击中是基础性的。虽然这个敌人是危险的，但这并不意味着对国内异议人士的镇压是正当的，它并不取代共同的罪犯——人们不能忽视，在众多候选人中，联邦机构在争夺天文数字的预算时，有竞争。弱点的国家，特别是全球化程度较低的社会，主要问题不是社会排斥，但无法通过直接镇压来控制，而是通过扩大内部矛盾来中和。复仇的信息是复制冲突的有用工具，因为被犯罪分子、受害者和受警察关注的群体招致，他们之间的暴力冲突的强度与冲突的激化程度和他们的能力之间存在反比关系。

在那些社会中，财富的两极分化，导致了全球化经济严重削弱了中产阶级，使他们处于困境。这就是为什么他们呼吁规范，但不知道什么是规范。他们是病态的无政府状态，呼吁规范，并在他们的困惑中结束对爱护自己国家的北美的威权主义话语的控制。这使政府能够更有效地控制那些阶级，否则这些阶级将成为异议人士。给定信息在这个全球化的形式中，很容易传遍海外，给社会沟通业务的领导人带来巨大的利益，能够控制被排除的人，甚至对衰败的中产阶级来说非常成功。因此，政客们可能会利用甚至竞争它。那些打算面对这种话语的政治家将被自己的政党边缘化，因为他们不使用它，因为出于选举计算，他们甚至会因为害怕而在这种情况下被边缘化。这样单一的威权主义新话语的独占就站起来了。

**The Latin American cool authoritarianism**

因为社会沟通是最全球化的形式，美国的威权主义话语是最广泛传播的。它的简洁被仿效到这个星球上的每一个角落，尽管在拉丁美洲地区获得了最大的成功，那里出现了该地区机构的脆弱性。它的世界范围扩散得益于它的简短和情感的冲击，这是为电视量身定造的，因为它的高成本和观众不思考的事实。

在全球化程度较差的社会中，主要问题在于社会排斥，不能通过直接镇压来控制，而是通过扩大内部矛盾来中和。复仇的信息是复制冲突的有用工具，因为被犯罪分子、受害者和受警察关注的群体招致，他们之间的暴力冲突的强度与冲突的激化程度和他们的能力之间存在反比关系。

在那些社会中，财富的两极分化，导致了全球化经济严重削弱了中产阶级，使他们处于困境。这就是为什么他们呼吁规范，但不知道什么是规范。他们是病态的无政府状态，呼吁规范，并在他们的困惑中结束对爱护自己国家的北美的威权主义话语的控制。这使政府能够更有效地控制那些阶级，否则这些阶级将成为异议人士。给定信息在这个全球化的形式中，很容易传遍海外，给社会沟通业务的领导人带来巨大的利益，能够控制被排除的人，甚至对衰败的中产阶级来说非常成功。因此，政客们可能会利用甚至竞争它。那些打算面对这种话语的政治家将被自己的政党边缘化，因为他们不使用它，因为出于选举计算，他们甚至会因为害怕而在这种情况下被边缘化。这样单一的威权主义新话语的独占就站起来了。
The poverty of means for lawsuit proceedings, means that the police who are dependent on the executive are the true authorities in finding of facts or indictments. Police deterioration and corruption encourage by politicians who enable growing opportunities for illicit raising of funds degrade the effectiveness of security services, which, in a social scenario in which unemployment and anomie that generates exclusion increase the frequency of violent errors of conduct, result in a truly lethal combination: both primary and secondary prevention are degraded.

The discourse of North American authoritarianism is like that which is installed in the rest of the Americas, but it's functionality is as different as the reality of repressive power. Whereas the United States turns it into an enterprise that employs millions of people, in other words that transfers resources social assistance to the penal systems and resolves an unemployment problem, the penal system in Latin America, far from providing jobs, serves to control those excluded from employment, becomes brutally violent and the police **autonomized and undergoing dissolution** lay siege to the political powers.

The cool discourse in sets itself in this region in inverted penal systems, with prisons overcrowded by inmates not yet convicted, where more than seventy percent of the penal population is in preventive custody in most cases serve out their sentences in that condition, if a conviction is finally handed down. An increase in penal scales does not mean more sentences but more preventive imprisonments (because they impede prisoner releases), penitentiary law is to a large degree a utopia and the true guilty verdict is the act of prosecution: the final judgment operates as a review.

Furthermore, Latin America is losing its police forces, and with them an elementary state support for civil society. Autonomization, bans on union membership, militarization and greater levels of arbitrariness simply destroy police institutions through corruption. Systems of illegal fund collection are formed that in the leadership of verticalized structures and whose preventive efficacy operates in an inverse relation to its unscrupulousness. The worst costs are fully paid by the lower ranks through degraded salaries, internal authoritarianism, very high risks, professional anomie, lack of information, lack of credibility among the public, social isolation and no conditions for a horizontal debate on their working conditions.

The Latin American authoritarian discourse participates in North American simplism and lacks any academic support, composed as it is of slogans or propaganda. Its irrationality is of such an order that it cannot even be legitimated through coarse myths – such as Rosenberg did for Nazism – but is reduced to a pure advertising campaign with predominant use of images. Its technique follows that of market research, which sells punitive power as merchandise. When it is confirmed that emotional promotion of vindictive impulses is commercially successful, techniques are perfected. News services and opinion makers are charged with disseminating them. The would-be specialists do not have serious empirical data available, but are simply opinionators who reiterate the single discourse. They sell the illusion that by approving laws that disproportionately focus on the few vulnerable and marginal persons who are individualized and by increasing police arbitrariness, they will directly or indirectly legitimate all manner of violence, including against those who object to the publicity discourse, they will achieve greater urban security against common crime.

In the final analysis, it is a question of sending messages that are taken as true only because they have advertising success. The conviction that a world in disarray can be organized through discipline imposed as repression is imposed as a prejudice. No one knows who the enemy is, because they succeed each other without combining; instead of being defined photographically they are projected cinematographically, as a series of constructs of the mass media, especially television. The state does not define them, but its authorities have found themselves besieged by successive impositions by the media, whose reproductive velocity is so dizzying that it impedes the holes that have provided space for critical discourses. There is no other corporation that intends to construct different enemies and that to
do so must disarm the previous myths, but the same corporation that produces enemies discards them and replaces them.

The succession of enemies increases the anguish and demands new enemies to remain calm, because if an appropriate scapegoat is not found, it will be empowered in a circular form. It is a case of a publicity apparatus that moves by itself, that has demanded autonomy and has returned autistic, which imposes a purely emotional propaganda that forbids denunciations and that signals among the young that which is superficial and is in fashion, and that is used as a distraction: it is cool\textsuperscript{121}. That is because it is not assumed as a profound conviction, but as a fashion, to which one must give in, only so as not to be thought old-fashioned or out of place.

Because the powerless state in those countries that are getting the worst part out of globalization cannot resolve serious social problems\textsuperscript{122}, its politicians choose to simulate that they are solving them and know how to do so, and become mannerists, affected\textsuperscript{123}; politics becomes a spectacle and the state itself becomes a spectacle\textsuperscript{124}. The politicians – caught up in the competitive nature of their activity – stop seeking the best so as to concern themselves merely with what can better transmit their image and increase their electoral clientele.

That cool advertising authoritarianism has a vulgar frontality, but as it lacks a fixed enemy and also a myth, it is faded, it lacks the color of the between war period and the inventiveness of racist biologism, its hi strionics are more pathetic, its c r eative pov er ty is formidable, it is or phaned of a ll perverse brilliance, but does have a horrid and depressing perverse opacity. There are no neoclassical monuments, rationalizing scientists, ostentatious parades, but it is poor, it functions because it i s not very intelligent, it is elemental, does not think and promotes a strike against thinking\textsuperscript{125}, because at the slightest whiff of a thought, it would implode.

As a whole, this cool authoritarian discourse of publicity communications operates with total autonomy from reality and its more serious conflictiveness. It is concerned with some acts of vengeance and ignores prevention and the most awful largeness. It manipulates and dramatizes only the ones that it wants to be considered unique. As it lacks a myth, it also has no fixed direction. It is a war without enemies; the only enemy that is recognized is the one that no a ut horitarianism can do without: these who confront its discourse\textsuperscript{126}. Because of that, few are encouraged to contradict it and its authoritarianism is incredible: it is not a case of an authoritarian state that controls and censors the communications media, but communication converted into publicity in search of ratings. It has become autistic and imposes a discourse that it is forbidden to contradict, even the state itself, because the only fixed enemy that it has is one who depreciates repression, which is its product. It imposes itself on the state because it demands the alignment of politicians who must choose between joining in the publicity of repression (become cool) or be replaced by internal competitors from their own parties, who take advantage of their weak side if they show themselves to be outdated and unpopular, in other words, not cool.

In this scenario the politicians opt to get on this autistic bandwagon and approve criminal laws and processes that a re a uthoritarian a nd of fend c onstitutional pr inciples a nd gu a rantees, call f or disproportionate sentences or those that cannot be fully served because they exceed a human lifespan, reiterate typifications and aggravating circumstances i n capricious m azes, punish preparatory acts, dismantle criminal codes, approve criminal laws due to foreign pressures, introduce i nquisitory institutions, regulate preventive prison as a sentence, and ultimately, confound the courts through cool modern penal legislation.

That legislation constitutes the saddest chapter in the current Latin American scenario, in which politicians intimidated by the threat of negative publicity provoke a major authoritarian legal chaos – incomprehensible and irrational – that has occurred in the history of penal legislation since independence. This period will be identified as the most degraded time in penal history; its decadence
cannot even be compared to the authoritarian legislation between the wars, which enacted frontalist laws for propaganda and the approval of their autocrats, because the current legislators do so only because they fear contrary publicity or because of opportunism. In other words, their conduct is not guided by ideological authoritarianism, but is simply cool, which seems more decadent from an institutional perspective. When the Latin American legislators – politicians – establish sentences lasting more than sixty years in their laws\textsuperscript{127}, they are more pathetic than the Weimar Social Democrats who suppressed Jewish candidates from their lists for fear of losing votes\textsuperscript{128}. The sign of cool authoritarian legislation in our days is its opacity, sadness, depression, mediocrity, lack of creativity, superficiality, disrespect for citizens: it is simply de cadence. I n i t here i s none o f t he brilliant frontality o f i deological authoritarianism, but only the frontal opacity of the lack of ideas; it is absolutely cool.

The judges, for their part, also find themselves submitted to the cool publicity authoritarianism of the mass media. Every sentence that runs up against the single discourse runs the risk of being stigmatized and the judge, according to the circumstances, can end up in serious difficulties and even wind up being prosecuted or condemned, as has happened in various countries in the region. It matters little what the constitutions and international human rights laws say, if the judges cannot apply their provisions, under penalty of being denounced and persecuted by pressure from the communications media and by colleagues and politicians who take advantage of the opportunity to eliminate a bothersome judge, to get publicity, or simply to further their own careers or because of palace intrigues. The judges’ vulnerability regarding the cool discourse is enormous.

Responses of the judicial discourse towards cool authoritarianism

In light of the advance of cool authoritarianism, it is natural for the judges – disconcerted and threatened – to direct their gaze to the universities, that is to say, to ask for help from judicial penal doctrine. One can affirm that here is a general attitude of Latin American penal doctrine favoring defense of constitutional and international guarantees, in other words, that criminal law – understood as judicial-penal knowledge – fortunately reacts positively. However, as it is known, our criminal law is fed by continental European doctrine mainly German, either to follow in its footsteps or to debate with it\textsuperscript{129}, and what is certain is that some discourses in that doctrine are worrisome\textsuperscript{130}, especially because of their effects at this moment of cool penal in Latin America.

A detailed analysis of these theories and a discussion of their foundations would be the subject for another work, but we cannot neglect to mention here the only one that achieves a high degree of sincerity, by openly postulating the existence of an enemy and legitimating its identification\textsuperscript{131}. From that perspective one directly assumes the need for distinguishing between enemies and citizens, to separate the treatment directed towards each. Hegelian roots are undeniable in this aspect, although Hobbesian roots are even more not able. The starting point seems to be diametrically opposed to the original liberal German conception, represented in the XIX century by Feuerbach\textsuperscript{132}, who focused his criticism precisely on Hobbes\textsuperscript{133}. Of all of the European theses of the last few centuries, this is the one that expresses itself with the greatest sincerity, but also with the greatest risks to our regional reality, in which historically, the definition of enemies has been brutal and the consequences genocidal. Furthermore, its Hegelian roots – as we have noted – involve a classification of citizens, presupposing that there are the included and the excluded, which is certainly no less alarming, taking into account the difficult situation through which our societies are passing.

In general, the responses that come from Europe seem to resign themselves – in a different measure – to accepting and assuming the search for the enemy and intend to save the guarantees of criminal law, at least for a part of it. We believe that such initiatives are particularly risky, given the brutal violence of our penal systems and the terrible role they are assuming in the region. It would be
very negative for our judges to assume these positions, which would accomplish little in our context without the prudent limitation their authors see applied in the European context.

We do not believe that, in this hour, there is a nother solution than to maintain with greater firmness the principles of liberal criminal law, to oppose the cool criminal law of our margins. The path must be through strengthening judicial independence, respect for judges and their decisions, demanding institutional responsibility from our politicians and – free from any censorship – expanding freedom of expression so as to be able to confront the single discourse of cool authoritarianism using the same means. It is a time for struggle – which should not be confused with war – and one must not forget that law always seeks for peace by means of fighting against injustice: the struggle is the means; peace is the end.34.

AUTHOR’S NOTES


3 Cf. Immanuel Wallerstein, Utopística o las opciones históricas del siglo XXI, México, 1998. Each one of those moments generated an understanding of the world and a legitimating and delegitimating discourse, with integrated and apocaliptics (Umberto Eco, Apocalittici e i integrati, Comunicazioni di V mossa e teorie della cultura di mossa, Bompiani, 1995), and equipped violent phenomena to an increasing extent, according to the increase of technological potential for control and destruction, until reaching the present, where it places the life of the whole planet at risk (Cf. Nicolas Skrotzky, Guerres: crimes écologiques, Paris, 1991).

4 See Ferdinand Tönnies, Comunidad and sociedad, Buenos Aires, 1947.


6 “What do those who rise to power need today besides a good army, aguardiente and sausages? They need the text.” (André Glucksman, Los maestros pensadores, Barcelona, 1978, p. 43).

7 See the detailed investigation by James A. Brundage, La ley, el sexo y la sociedad cristiana en la Europa Medieval, México, 2000.


10 See the care taken with regulating it: on this, Valentino Rivalta, Storia e sistema del diritto dei teatri secondo l’etica e i principi delle leggi canoniche e civili, Bologna, 1886.

11 Thah happens when an observation on “a” is answered with an argument extracted from “c” or from “b” and vice-versa, in the thirty-two possible and disconcerting combinations.


14 “In the eyes of the people, the codes, the procedures and even judicial power seem to have reached an agreement to protect the criminal from society, more than society from the criminal” (p. 15); “Through killing on the field of battle the nation defends itself from its foreign foes; through capital execution, from its domestic foes” (p.133) (R. Garofalo, La criminología, Trans. by Pedro Dorado Montero, Madrid, s.d.; pp. XXIII and 59 de la 2ª. Ed. Italiana, Torino, 1891).


16 Tobias Barreto, Obras Completas, V Direito, Menores e loucos, 1926, Sergipe, p. 151.

18 They were also occupied with diabolical acts in the colony. See Fray Andrés de Olmos, *Tratado de hechicerías and sortilegios*, 1553, Edición de Georges Baudot, UNAM, México, 1990, p. 47.


25 See e.g., Walter Rodney, *De cómo Europa subdesarrolló a África*, México, 1982.


29 In France they were established by the Bourbons, but were greatly resisted in Great Britain. See the difficult English process in Sir Basil Thomson, *La historia de Scotland Yard*, Madrid, 1937.

30 A classic and masterful analysis of that transformation is found in Michel Foucault, *Surveiller et punir, Naissance de la prison*, Paris, 1975.

31 That was the ideology of all criminal positivism, but it reached its peak with Fructuoso Carpena (*Antropología Criminal*, Madrid, 1909, p. 15), who maintained that criminology was a branch of zoology.

32 Lombroso noted the similarity of the born criminal with the Mongoloid and Negroid (*L'uomo de lincuente in rapporto all'antropologia, giurisprudenza e alle discipline carcerarie. Delincuente nato e pazzo morale*, 3ª Ed., Torino, 1884, pp. 248 and 295). From ancient types human characteristics had been assigned to animals, and then humans were classified according to them. That was the task begun by physiognomists, starting with Giovanni Battista della Porta, *Della fisionomia dell'uomo. Con i'illustrazioni dell'edizione del 1610*, Parma, 1988. In the XVIII century, Johann Caspar Lavater / Georg Christoph Lichtenberg, *Lo specchio dell'anima. Pro contro la fisiognomica. Un dibattito settecentesco*, a cura di Giovanni Guriassi, Padova, 1991; also Lucia Rodler, *Il corpo specchio dell'anima. Teoria e storia della fisiognomica*, Bruno Mondadori, 2000.


34 On positivism and sexual minorities, Jorge S. aléis, * Médicos, m aleantes and m aricas, Hi giene, c riminología a nd homosexualidad en la construcción de la Nación Argentina* (Buenos Aires: 1871-1914), Bs.As., 1995. The adult man, white, “Aryan,” strong and muscular was superior (Cf. George L. Mosse, *L'imagine dell'uomo. Lo stereotipo maschile nell'epoca moderna*, Torino, 1997), all the rest were considered inferior, weak, decadent, pathological or criminal: women, Jews, the colonized, Gypsies, the ill, the physical or mentally incapacitated, old people, children, political dissidents, sexual and religious minorities, etc.

35 Since the XVI century the doctors had tried to make use of the penal discourse: see Jean Wier, *Cinq Livres de l'imposture et de la tromperie des diables: des enchantements et sorcelleries*, Paris, 1569.

36 The most important book written by a Paris policeman showed the weakness of the discourse: H. A. Fréjigier, *Des classes dangereuses de la population dans les grandes villes*, Bruxelles, 1840.

37 Although that was the Lombrosian idea, such were also the political dissidents: Cesare Lombroso, *Gli anarchici*, Torino, 1894; Lombroso/Laschi, *Le crime politique et les r évolutions*, P aris, 1892; and those considered s upranormal w ere a lso suspicious (Lombroso, *L'uomo di genio in rapporto alla psichiatria, alla storia ed all'estetica*, Torino, 1894). Max Nordau followed him closely considering as degenerate all dangerously creative artists (*Degeneración*, Madrid, 1902). On this Daniel Dic, *Voli della degenerazione, una sindrome europea 1848-1918*, Firenze, 1999.


40 It is also maintained that his preparation derives from Saint Augustine: L éon R ozitchner, *La C osa and l a C ruz. Cristianismo and capitalism*, Bs. As., 1997.

One should not identify all inquisitory activities with the Roman or ecclesiastical inquisition, since witch-hunting was also broadly practiced by lay justice; for that matter, one should also not identify the Roman inquisition with the Spanish version. On this: a synthesis in P aolo Orano, *L’Inquisizione Santa*, Colognola ai Co lli, 1999; M artín Walter, *Historia d e l a Inquisición Española*, Madrid, 2001; Henry Kamen, *La inquisición española*, Madrid, 1973.


Cf. Giovanni Romeo, op. cit.


See Arthur Herman, *La idea de decadencia en la historia occidental*, Barcelona, 1998;

It was also interpreted as a result of genetic decadence: Lothrop Stoddard, *The Revolt against Civilization. The Menace of the Under-man*, London, 1923.

There were ample precedents in the cult of the hero, e.g., Thomas Carlyle, *On heroes, hero-worship and the heroic in history*, N. Cork, 1931; French translation: *Les héros le culte des héros et l’héroïque dans l’histoire*, París, 1914.

The dogmatic affirmation of Lamarck’s thesis by Lyssenko as official biologist in Stalinism, implied that a new society would produce acquired characters that would be transmitted and generate different and better humans. On this dogma: Jean Rostand, *La herencia humana*, Bs. As., 1961, pp. 52-53.


Although Fascist racism was much less intense than the Nazi version, it certainly existed. Proof of this are publications such as: Paolo Orano, *Inchiesta sulla razza*, Roma, 1939; Julius Evola, *Il mito del sangue*, Cali, 1985, pp. 301 and ss.

On this concept, L ola Aniad y Ca stro, *Derechos h umanos, modelo integral de la ciencia penal, and sistema p enal su bterrâneo*, in “Rev. del Colegio de Abogados Penalistas del Valle”, Cali, 1985, pp. 301 and ss.


One cannot deny that in the final analysis they served for dividing up the internal functions of power, to avoid in some measure the chaos caused in every authoritarian regime by competitive struggles between agency leaders and agencies.

On the sinister meaning of “foreigners” (Fremde) in Nazi legislation, Francisco Muñoz Conde, op. cit., pp. 170 and ss.; also Buleigh/Wippermann, especially chapter VI.


Ibid, p. 129. It has been argued, with reason, that frontality, clearly manifested in ancient Egyptian art, is characteristic of autocracies, together with repudiation of nudity, which is only tolerated as a demonstration of the healthy and superior man in the muscular colossal marble statues common to all of them, suitable for sublimating homophilous tendencies that one wishes to control (Cf. Heinz-Dieter Schilling (herausg.). *Schwule und Faschismus*, Berlin, 1983). Hiding of nudity and death is hiding of equality (Arnold Hauser, op. cit., p. 101, con cita de Julius Lange), although clearly not only there.

See the impressive illustrations of: *Deutschland erwacht. Werden, Kampf and Sieg der NSDAP*, with texts by Wilfrid Bade and selection of photos by Heinrich Hoffmann, Berlin, 1933.
Miguel Angel Asturias or organización and atribuciones model was followed so closely that its commentators were translated: José Story, wars, religious de Thomas Hobbes xercise of punitive power was in fact nothing more than the Prussian and Napoleonic model. However, the academic, political and publicity contradictions mattered little, because 1996; Louis Favoreu, entrusted all power to the state bureaucratic apparatus (Michel Fromont, 1994). Those sources were quite incompatible, because the constitutions prescribed judicial perspectives, Sergio Romano, La filosofia al potere, Milano, 1990; Ugo Spirito, Giovanni Gentile, Firenze, 1999. Near to this, Georg Lukacs, El asalto a la razón. La trayectoria del irracionalismo desde Schelling hasta Hitler, México, 1983, p. 7. 

That verificación throws the concept of religious war into a crisis, because it would lead to considering that all wars are religious. We do not believe that such a conclusion is correct, but it would demonstrate well that there are no true religious wars, but that all wars are mythic, or better still, that all wars are idolatrous. Alfred Rosenberg, El mito del XX century. Una valoración de las luchas animico-espírituales de las formas de nuestro tiempo, B uenos Aires, 1976. This did nothing more than recycle Houston Stewart Chamberlain (Die Grundlagen de s neunzehnten Jahrhunderts, Manchen, 1906) and Arthur de Gobineau (Essai sur l’inégalité des races humaines, Paris, 1967 ; Italian trans. : Saggio sulla disuguaglianza delle razze umane, Rizzoli, 1997).  


That was the general meaning of the Latin American oligarchic order. The investigation by Leopoldo Zea is illustrative in that respect, El positivismo en México: nacimiento, apogeo and decadencia, México, 1984. 


Thus, for example, Carlos Octavio Bunge, Nuestra América. Ensayo de psicología social, B s. As., 1903. 


E.g., Raimundo Nina Rodrigues, Os africanos n o Bra sil, Re visao e p refácio d e Homer o Pi res, S ao Paulo, 1932; s u inspiración era Dr. A. Corre, Le crime en pays créoles (Esquisse d’ethnographie criminelle), Paris, 1889. 

See David Viñas, Indios, ejército y frontera, México, 1982. 

See e.g., José C. Valadés, El Porfirismo, Historia de un régimen, UNAM, México, 1987. 

On this, in the work Política and dogmática jurídico penal, in “Directo e democracia”, Universidade Luterana do Brasil, Canoas (RS), vol. 3 n° 2, 2002. 

On this, in the work, Introduction a la codificación penal latinoamericana, in Universidad de Salamanca, “Los Criminal codes Iberoamericanos”, Bogotá, 1994. Those sources were quite incompatible, because the constitutions prescribed judicial control by Anglo Saxon constitutionality, whereas the codes were derived from the continental administrative tradition that entrusted all power to the state bureaucratic apparatus (Michel Fromont, La justice constitutionnelle dans le monde, Paris, 1996 ; Louis Favoreu, Los tribunales constitucionales, Barcelona, 1994), which completely ignored that control, according to the Prussian and Napoleonic model. However, the academic, political and publicity contradictions mattered little, because the exercise of punitive power was in fact nothing more than the instrument for internal disciplining of a concentration camp, with limits only to the degree that it might affect some administrators and their families or aides. 

See Alan Knight, La Revolución Mexicana, México, 1996. 

Perfectly depicted by the literary works such as Tirano Banderas by Ramón del Valle Inclán, El Señor Presidente by Miguel Angel Asturias or El otoño del patriarca de Gabriel García Márquez. 

On this, in the work Políticas and dogmática jurídico penal, in “Directo e democracia”, Universidade Luterana do Brasil, Canoas (RS), vol. 3 n° 2, 2002. 

See in the work, Introduction, cit. 


Classics i nclude: Golbery d o Co uto e S ilva, Planejamento e estratégico, Br asilia, 1 981; Augusto P inochet Ugarte, Geopolítica, Sgo. de Chile, 1984.
It was clear that this was nothing more than a discourse: the Argentine dictatorship did not hide its commercial ties with the Soviet Union, its main grain buyer during those years and a power that blocked denunciations in international forums.


There were few judicial discourses: Mário Pessoa, O direito da Segurança Nacional, Rio de Janeiro, 1971; Carlos Horacio Domínguez, La nueva guerra and el nuevo de recho, Ensayo para una estrategia jurídica antisubversiva, B.s. As, 1980; Fernando Bayardo Bengoa, Los Derechos del Hombre and la defensa de la Nación, Montevideo, 1979.


These criteria merited enthusiastic admiration from Adolf Hitler, Mi lucha, Sgo. De Ch il e, 1939, p. 126. There was an attempt to renew them in the last decade of the XX century: on that, John Sedgwinck, Inside the Pioneer Fund; Adam Millar, Professors of H ate, ambos in “The Bell Curve Debate”, edited by Russell Jocoby and Noemí Glauberman, Times Books, 1995, pp. 144 and 162.


They have always aroused interest from comparativists: e.g., La Probatios (Régime de la mise á l’épreuve) et les lemusres analogues, Imprenta A dministrativa, M elón, 1953. H i s influence on late r E uropean penology is c lear: H EUNI, Norman Bishop, Non-custodial alternatives in Europe, Helsinki, 1988; A nton M. van Kalmthout/Peter J. P. T ak, Sanctions-Systems in the member-States of the Council of Europe, 1988.


Ibid.

McCleskey v. Kemp, en The death penalty in America, cit., p. 254.


S ee for example, the works in José Octavio López Presa (Coord.), C orrupción and cambio, M éxico, 1998.

It is unquestionable that corruption must be fought, but it is certain that it is absurd to intend to do this with the penal system, which is one of the areas most vulnerable to it, when everyone knows that corruption arises in a context of arbitrary power, and the only effective way of preventing it is by closing those spaces, by means of improved and constantly renewed institutional engineering.


A t that moment, belief in witches was founded on the prejudice of widespread European beliefs regarding them. Norman Cohn, Los demonios f amil iares de Europa, cit. As present there are numerous prejudices, but one is not allowed to build enemies on them. Undeniably, many social sectors maintain prejudices against women, Jews, blacks, Latinos, etc., but they are not allowed to use them to create enemies.

B oth in the sense intended by Emile Durkheim (Le suicide, Paris, 1897), because the previous norms for access to wealth are no longer useful, and that of Robert Merton (Teoría and estructura sociales, México, 1984), because they socially lacked legitimate routes for that same access.

This corruption i s c ombined with that o f l ocal p arty ch iefs and p rovides f inancing for their i nternal e lections, t aints judicial powers and weakens political democracy at its base.

Cf. Carranza/Mora/Houed/Zaffaroni, El preso sin condena in Latin America and el Caribe, San José, 1983.

The regional situation in this aspect is no different from what Concepción Arenal described in Spain well over a century ago: Estudios Penitenciarios, Madrid, 1877.
It is interesting to note the similarity between publicity for the penal system as a product and advertising for toothpaste and pain-killers: in both it is common to present persons who act in the role of specialists. In other cases, it is the victims or their relatives who assume that role in the media, as if the justice of a claim for a solution were to spring miraculously from technical knowledge to decide solutions.


In some cases be cause t heir pride impedes t hem; in others because the urgencies of publicity demand production of sensational acts (what the politicians like to call “the time for politics,” as opposed to “the times for technique”) and in others, because budgetary limitations that are imposed internationally or transnationally on debtor countries prohibit.


It is interesting how this phenomenon was perceived early on by Roger-Gérard Schwartzenberg, O Estado espetáculo, Rio de Janeiro, 1978.

“The last century saw the first systematic strikes in the factories. The next century will not end without the threat of a strike from the Noosphere” (Pierre Teilhard de Chardin, El fenómeno humano, Madrid, 1965, p. 277).

The First Question of the Malleus Maleficarum, in other words, the first one it deals with, is to consider as heretics and condemn those who deny or cast doubt upon the power of the devil and of witches, including those who do so because of ignorance this is intentional (trad. italiana, p. 40).


See our work Política and dogmática jurídico penal, cit.

A solution is sought through a “right to intervention” that is different from criminal law, Winfrid Hassemer, Crisis and características del m oderno c riminal l aw, in “ Actualidad Penal”, nº 43, Madrid, 1993; also Hassemer-Muñoz Condé, Introduction a la criminología, Valencia, 2001; much more problematic is the proposal of a criminal law “at two speeds” of Jesús-Maria Silva Sánchez, La expansión de la política criminal en las sociedades postindustriales, Madrid, 1999; on the so-called “symbolic criminal law” one may see the two works published in nº 1 of “Pena y Estado”, Barcelona, 1991.


Anti-Hobbes o d e r ü b e r d ie G r e n z e n d er h ö c h s t e n G e w a lt u n s d a s Z w a n g s re c h t d e r B ü r g e r g e g e n d e n O b e rh e rn, Ital. trans. a cura di Mario A. Cattaneo, Anti-Hobbes overo i limiti del potere supremo e il diritto coattivo dei cittadini contro il sovrano, Milano, 1972.

R. von Ihering, La lucha por el derecho, Trans. by Adolfo Posada and Biesca, Madrid, 1881, p. 3. On that concept see the works compiled by Agustín Squella, Ihering and la lucha por el derecho, “Revista de Ciencias Sociales”, Universidad de Chile, Valparaíso, 1977.
Chapter II

Criminology and Psychiatry: The Trauma of the First Meeting

Eugenio Raul Zaffaroni

Communicating the lack of communication

These reflections have the objecting of making it clear that criminology suffers from an original birth trauma and a trauma of the first meeting, which leads it to reject – or at least to mistrust – further and profitable contacts with psychiatry.

As a result, if one intends to establish a fruitful interdisciplinary base, one must first analyze this trauma, remember it with a certain precision, make clear its magnitude and its terrible consequences, meaning, remove it, and then, with the reservations derived from a painful experience, confront a new dialogue between both forms of knowledge. This continues to be indispensable, because it would be absurd to limit knowledge because of an old trauma, which it is clear that the link needs to be reestablished on very different bases, about which we can do more than to indicate their major lines with the mere objective of indicating the need for them.

We should note that the trauma of the first meeting is not small, and thus, the difficulty in removing it is also considerable. From such an original relation arose a racist, reactionary criminology, used to legitimate the destruction of all guarantees and limits in modern criminology, which provided arguments for serious de-articulating the rule of law. It is significant that one of its branches ended up legitimating genocide for the different and the dissidents in the Nazi concentration camps. Distrust and the resulting rejection, for their part, are not gratuitous or much less.

Nonetheless, it is clear that since that distressing experience, both criminology and the mental health sciences have traveled along paths that are radically different and diametrically opposed to the previous ones, that they have reached radical positions such as radical criminology and anti-psychiatry.

If criminology now intends to contribute useful knowledge to reduce the arbitrary exercise of punitive power, to diminish the pain that crime and punitive power produce, and, to definitively construct a world that is less violent, less unjust and more respectful of Human Rights, we believe that the moment has also arrived for demanding recognition of the importance of constructive and closer contacts.

We will be gin, then, by looking at the course of relations between our knowledge and remembering the trauma of the first encounter.

Prehistory

Contrary to what theoreticians of etiological or traditional criminology usually affirm, it did not begin with authors at the end of the XIX century (Lombroso, Lacassagne, etc.), nor with the thinkers of penal illuminism (Beccaria, Feurbach, Carmignani, etc.), as maintained by criminologists of the social reaction paradigm. Criminology, with another name, but as knowledge regarding criminalized and criminalizable evil, as born with punitive power itself, that is, with the demonologists who were the first criminologists¹. The power struggles over the discursive hegemony on the criminal question among
criminologists and doctors are also very much prior to the delimitation of our disciplines as knowledge and especially their academic enshrinement.

The prehistory of the dispute goes back to the publication of a book by Jean Wier, in Basle in 1568, in which he maintained that witches should not be punished by inquisitors, but turned over to the doctors, who disputed punitive power not only with the inquisitors but also with the courts and lay jailers. Wier thus rose up against the demonologist discourse.

One should also note that the institution for total psychiatric control, the asylum or bedlam, is much older than the prison as a penal sentence. Juan de Dios, founder of the Fate-Bene-Fratelli order, had an asylum built in 1540 in Granada and during the next century went over to France, to specialize in treatment of the mentally ill. Contemporaneous with the appearance and spread of prison as a penalty, the asylum became laicized, going from a charitable entity to a tutelary entity, to contain those cases in which the threat of laws and counsel of the religious were considered insufficient.

The origins: modern psychiatry illuminates official criminology

With industrialism, the urban concentration became obliged to gather the mentally infirm and violators of property into total state institutions, the insane asylums and prisons. The police were a new institution, charged with urban oversight and discipline, who lacked a discourse to encompass such duties. Through the work of psychiatrists dedicated to forensic medicine, the doctors offered their discourse to the jurists and philosophers and officializing etiological criminology, usually known as positivism.

This explains how criminology acquired its category of academic knowledge from the hands of the psychiatrists. The relative isolation of European countries determined parallel, though somewhat different courses.

The French case is highly illustrative of this process, because it is practically lineal. The lay transformation of the insane asylum occurs with the work of Philippe Pinel (1745-1826), even though much of his legend comes from the famous call for freeing the mentally ill from the prisons. Strictly speaking, psychiatric regulations began with his teachings, although they were more concretely defined years after his death, through the work of his disciple, Jean-Étienne Dominique Esquirol (1772-1840). The French police lacked a discourse of their own. The most important essay in the police discourse was produced in 1838 by H. A. Frégier, an illustrious Parisian commissioner, responding to a contest called for by the College de France. In it he made the first reference to the dangerous classes, ten years before the famous Communist manifesto, but his inconsistency was clear, and he did not go beyond a series of observations, moral maxims and commonplace.

For their part, the psychiatrists had to deal daily with delinquents, with murderers, who provided occasions for public solemnities by trials that ended with the guillotine, and, even more frequently, with urban marginalization of those who made up the dangerous classes in the terminology of the College de France. The idea soon arose that would encompass and explain both: degeneration. Degeneration was enunciated and enshrined by Bénédict Augustin Morel (1809-1873) in his famous Traité des dégénérescences in 1857. For Morel, degeneration was the result of inheritance, in which inherited characters were combined with those incorporated from the environment, with Lamarck’s thesis of transmission of characters being admitted. Morel linked degenerative symptoms and signs and accentuated his interest in epilepsy, coining the expression larval epilepsy.

Morel’s theses were followed by Valentin Magnan (1835-1916), who attributed degeneration to an imbalance between the higher and lower centers of the brain. His substantial difference with Morel lay in his refusal to admit a perfect type in the past, since for Magnan perfection was worked out through evolution and was in the future, which de generation consisted in a reduction of the will, understood as being the capacity for struggling to survive and adapt. For Magnan degeneration was not
the cause of crime, but crime was a political definition of what was socially harmful, and degeneration would provoke a difficulty in adapting to the issues of prohibition, so that in crime there would always be a component of social responsibility. In this sense, there seems to be a prudent parallel with the thesis of Pedro Dorado Montero. The contrary position, which attributed criminality to degeneration and excluded all social responsibility in etiology, was set forth by Charles-Samson Féré (1852-1907), working from radical Darwinism. He maintained a theory of social hierarchization based on the capacity of adaptation, which determined the social sedimentation of the degenerates, in other words, that society tended to be socially just for biological reasons. Social responsibility failed to operate for Féré in that the state had not sufficiently protected the non-degenerates, and because of that, should indemnify them.

These discourses fit in with selective police demands and soon, due to the forensic doctors, they jointly began to question the hegemonic power of the discourse on the criminal question with the jurists, reaching the ridiculous point of disputing over the heads of guillotined criminals.

The most famous of the pioneers in officializing criminal anthropology (the first name for modern criminology) was Alexandre Lacassagne (1843-1924). From Morel he took the combination of inherited characters and those acquired and transmitted by inheritance and combined the phrenological theses of the German Gall with social stratification, maintaining that criminal etiology depended on modifications of the brain that could affect the occipital, frontal or parietal region, of alienated delinquents from upper classes. Bertillon applied physical anthropology measurements for identification and Topinard maintained that criminal anthropology is not a pure but an applied and practical science, while Manouvrier discussed the method that intended to distinguish the criminals from the non-criminals.

Those French psychiatrists on the whole rejected Italian criminal anthropology, especially the thesis of the Lombrosian born criminal, but in their own way, with their psychiatric discourse, they legitimated police selection. Let us not forget that Morel, based on evolutionism, installed the theory of apartheid, postulating that it was inconvenient to have human interbreeding because it produced degeneration, meaning unbalanced human hybrids, a highly functional position at the time that he intended to confirm with the works of Corre.

For its part, English psychiatry recognizes as its pioneer criminologist and anthropologist James-Cowles Prichard (1786-1848), who advanced important concepts for future developments: he was the first to precisely describe moral insanity, which soon became known as psychopathy; he published a book entitled On the different forms of mind and its relations with justice; and maintained that primitive man (Adam) was as black. As was the case with French psychiatry, Italian criminal anthropology was rejected in Great Britain and the United States. Nonetheless, the so-called social darwinism was underivable, above all because of the work of Spencer (1820-1903) and the Lamarckian tradition, which had repercussions both in Lombroso and in the English school of eugenics of Francis Galton (1822-1911) and K. Pearson (1857-1936). The racist consequences of this thinking are clear, and moved from psychiatry to criminology and politics.

Henry Maudsley (1835-1918), a prison doctor, a propos of the critique of English rules on imputability (M’Naghten Rules) discussed the absurd judicial concepts of his time and with that, claimed that crime should be treated as a medical question. Charles Goring (1870-1919) in his 1913 work was the one who faced Lombrosian theory with the greatest emphasis, conducting a study of 4,000 convicts to conclude that they did not present the characteristics defined by Lombroso, but – following the eugenetic line – he affirmed that the majority suffered from intellectual and physical deficiencies that he attributed to inheritance. Undoubtedly Goring clearly influenced the work of Henry Goddard (1866-1957) in the United States, famous for the Kallikak family case, when he applied intelligence tests and concluded that there was a high incidence of hereditary mental weakness in juvenile criminality, and promoted preventive measures.
In the German language, Franz-Josef Gall (1758-1828), born in Baden but whose activity was carried out first in Vienna and then in Paris, is undoubtedly the pioneer in studies of physical anthropology in criminal issues, although his field of action was much broader, encompassing the entire nervous system and its localizations. At any rate, by the middle of the XIX century, his phrenology had been all but forgotten in Europe and a few decades later, German psychiatrists denied the Lombrosian concept of a born criminal, but insisted on looking for the constant variable and discovering the different forms of mental alienation that they presumed were determinants of criminal conduct.

This emphasis was followed by the line developed by Austrian psychiatrist Moritz Benedikt (1835-1920), who as a student of craniology w as not able to establish physical differences among delinquents, but who was inclined to seek determinants in the so-called step toward the act. His idea of secret life or second life seems to have influenced Freud, but in criminology, beginning with the affirmation that a high percentage of the imprisoned were genuinely mentally ill and among the rest those on the borderline were predominant, the German-language psychiatrists pathologized practically every area of crime.

A very significant work was that of Gustav A chaffenburg (1866-1944) – Crime and its repression – which is practically a psychiatry for jurists and operators of the penal system, preceded by the work of Richard von K rafft-Ebbing (1840-1902), who quickly pathologized all non-conventional sexual activity, considering it perversion in his Psychopathia sexualis of 1866, and was criticized for this by the Englishman Henry Havelock Ellis (1859-1839).

It is curious to note that due to the work of scholars in judicial psychology, the etiological paradigm was partially broken, although without consequences later on, since it was not limited to the conduct of those being tried, but encompassed all protagonists in the process, including limitations of knowledge for judges, lawyers and witnesses. A classic work in this regard is that of the Austrian Hans Gross (1847-1914). Another interesting curiosity was the thesis presented by Albrecht at the Rome congress in 1885; he affirmed that the normal person was a delinquent and the honest man an abnormality.

Criminology followed its course from the hand of the psychiatrists

Criminology, officialized in this manner, with a letter of presentation valid worldwide through the extraordinary dissemination of the theories of Cesare Lombroso, followed its course. It offered the world a discourse that allowed it to consider colonized peoples as inferiors, since the European criminals resembled them, pathologized political dissidents, reinforced the aesthetic prejudices of the criminal stereotype; provided the basis for dangerousness without crime, which made it possible to impose sentences on inconvenient people, in other words, on marginalized urban populations, known as bad lives, rationalized elimination of so-called social enemies, condemned innovators, calling them geniuses and noting the need for distrusting them, promoted sterilization as a form of preventing crime through de generation of the species, encouraged reclusion of mentally weak e ak in gigantic establishments; etc.

In summary, if it is true that European sociologists were advancing in their work, psychiatry was converted into the dominant discourse on the criminal issue, neutralizing all of the established by criminal law in terms of illustration and modernity, while defending the most absolute social immobility and hiding social injustice while enshrining class hierarchization as a natural results of different biologically conditioned capacities. There were many variations to soften the blow, but they were not enough to undo the major premises.

North American criminological sociology was born during the period between the wars, but the psychiatrists continued to dominate criminology in Europe, where sociology had suffered a sharp major
decline, following a slightly less obstinate course, with a biological reductionism that was less accentuated, but followed an identical line.

The concept of constitution was initiated beginning with Dupré (1862-1921), with his theory of *perverse constitution*, combined later with contributions from endocrinology. A similar line guided the work of Nicola Pende (1880-1970) in Italy, developed more broadly by his disciple Benigno Di Tullio with his classification of delinquents and especially with the definition of *constitutional delinquency*, but even more widely disseminated were the works of Ernst Kretschmer (1888-1964), with their classification of body structures as leptosomatic, ponicic and athletic, inclined respectively towards schizophrenia, manic-depressive psychosis and epilepsy. Normal persons presented characteristics of abnormal ones; there was no dividing line, but degrees for classifying people as *schizomotics*, *cyclotimics* and so on. In the United States there was an attempt at making a new classification along the same lines, to a greater or lesser degree, endocrinology contributed by reaffirming the pathologization of non-conventional sexuality; from the *moral madman* the emphasis shifted to the concept of *psychopath*, which, if arbitrarily handled could lead to very dangerous results as an obstacle to any penitentiary benefit or as the foundation for imposing a life or indeterminate sentence, and to which were added no less nebulous terms such as sociopath and asocial.

It is altogether undeniable that the work of the Swiss Eugen Bleuler (1857-1940), through an article published in A schaffenburg’s *Treatise*, consecrated the nototaxia of precocious dementia later called schizophrenia. And, with the systematization introduced by Emil Kraepelin (1857-1926), order was brought to the classificatory chaos of psychiatric nototaxy, at the same time as the idea of degeneration was definitively abandoned.

**The trauma of genocide**

Even though the period between wars was not very luminous for psychiatry or for the European criminology that continued under its tutelage, the first contacts with psychoanalysis produced a new enormous initial bibliography dedicated to the theme. Although of unequal quality and hastily prepared, as well as lacking a solid theoretical base, and with the growing distrust of biological and racist ideologies, psychiatry with considerable penetration began to appear, which culminated, many years later, in therapeutic prudence and an open criticism of institutionalization.

Nonetheless, that tendency began almost as an alternative, not very well defined and frequently contaminated by the dominant ideas, while the strong inertia of previous decades followed its inexorably directed course towards genocide, because with the forms of totalitarianism during the period between the wars, it became shamelessly politicized and led to its ultimate and most inhuman consequences.

Lamarck’s thesis on the transmission of acquired characters applied to humanity led to an ineludible consequence: it was necessary to suppress inferiors or prevent them from reproducing in order to save humanity from irrevocable genetic decadence. There were multiple political uses of this ideological instrument: for some, the inferiors had caused the Russian revolution, for others, it was necessary to neutralize them by means of the dictatorship of the proletariat in order to create the new man; for some, the unilateral theories about the surrounding world were the product of materialist Marxism, for others they were a product of the North American School.

What is certain is that the inferiors needed to be neutralized, or, failing that, eliminated, to defend society and save humanity from irrevocable genetic decadence. The horrendous coronation of the first encounter was the imprisonment and annihilation of millions of people in the Nazi concentration camps, rationalized by jurists and doctors. Recent historical research has revealed the magnitude of the theoretical aberration and the degree of personal commitment achieved by criminologists who had been highly recognized and profusely cited in postwar years, such as Franz Exner and Edmund Mezger, the...
first a doctor and the second a jurist, who designed legislation destined to lead to the disappearance of the marginal and undesirables in the concentration camps.

The contradictions of the time led to many thinkers and scientists considered to be progressives in the political field not perceiving the aberrations fleshed out by the theses they defended in the criminological, psychiatric and penal. Biological positivism presented itself as a scientific response to medieval obscurantism, when in fact it allowed a renewal of the inquisition, by eliminating the limits imposed by modernity. The attempts to harmonize the incompatible were no more than rationalizations developed by those who were dumbfounded by the horror of the monsters they had helped to create.

To culminate, another line of biological inquiry ended up in experiments that were no less aberrant, leading to the practice of surgical interventions intended to modify behavior, such as the famous lobotomy, which enjoyed considerable prestige in the postwar years.

The idea that criminology was a dangerous science began to take shape among the criminalists, who took refuge in an aseptic neokantism, although they were as contaminated as criminology itself, even to the point of sharing authors, since their greatest mentor during the period was Edmund Mezger himself, who published his terrible work of criminology during those years. After the Second World War, everyone rejected the baneful consequences of the thesis that in some measure they had helped to support and diffuse, denied that their ideas had been necessary consequences of such a thesis, pointed to them as pure political deformations, and could not assume the responsibility for their own conceptual errors. Psychiatric criminology weakened and entered into open death throes. Psychiatry, which had enabled the first and traumatic encounter, also began a retreat, albeit more slowly. Its marked ideological character could not have been more evident and its excesses such as the killing of patients in Nazism and the grotesque Soviet manipulation caused enormous horror.

The first encounter had been horrendous and was closed out with incoherent explanations and dissimulation. Even today it is necessary to delve into writings from that period to extract the original ideas, which are generally omitted or considered secondary and of lesser importance. One idea that was the product of this first encounter continues in laws, in jurisprudence and in periodicals: dangerousness. This is the most arbitrary ideological resource which still encumbers criminal law in our days, as a sad memento of the first encounter.

Criminology becomes independent of psychiatry

The first and prolonged traumatic contact with criminology, with consequences as disastrous as those noted, and because of the fright it caused, led to a displacement of interest from criminology to North American sociology, in abandonment of the dying European psychiatric criminology.

In the 1960s criminology moved from the etiological paradigm to that of social reaction. It is incorrect to interpret the move away from the etiological paradigm as a abandonment of the study of relations of connectivity and contemporaneity regarding violent and conflictive behaviors. Understood correctly, the change of paradigm meant expansion of the fields in those phenomena (encompassing those of punitive power) and, furthermore, denunciation of a false analysis of those relations, as was done by the so-called traditional or positivist (or neokantian) etiological paradigm, which distorted the perception by doing without of violence and the reproductive effect of the punitive power itself and of the penal system.

Although it is necessary to abandon or redefine quite radically the word etiology, separate it from every medical connotation, from any mechanical causality (or so replace it) and deprive it of any pretension of having the correct prognosis in individual cases, the truth is that the social reduction paradigm correctly understood does not refuse to ask itself about the why of certain conducts (especially violent and lethal ones). Rather, in the first place, it expands the horizon of the included conduct, incorporating those of the operators of the penal system and, as a consequence, rectifies the
explanations of the positivist or neokantian etiology. This proved to be false precisely because of the narrowness of the universe included and the dogmatic presupposition that the penal system and the exercise of punitive power operate legitimately, a conclusion reached through the simple expedient of omitting its analysis, passing over its character as a very important confluent factor that in many cases is determinant and replicable, as well as the criminal actions of its own operators.

Stated another way, the paradigm of social reaction does not renounce etiology, but, taking the word with due reservations, can affirm that by expanding the universe of conducts covered and including in it those of the ones themselves the operators and responsible for punitive power (penal system), denounces and rectifies the false etiologies that omitted them and, as a result, did not take into account their highly determinant and reproducing confluent character.

As a result of the special attention that punitive social control has merited since the Sixties, at least for the most important criminological sector, it became a central component of criminological knowledge, and of the patent falsity of the etiology arbitrarily selected beforehand; the so-called clinical criminology has fallen out of favor. It has apparently remained anchored in the old paradigm of the false etiology, without a precise place within the criminology of social reaction.

At times one has the impression that it is antiquated and reactionary to refer to the individual aspects of violent behavior in the field of criminology, or, in the best case scenario, it is considered an area that should be left to other specialists, but is no longer in the realm of criminological knowledge.

It is not possible to forget that this is also a result of the fact that criminological discourse has ceased to belong to health professionals and moved into the realm of sociologists. That transference of hegemonic discourse, which had been produced in the United States as the result of the primordial importance that country had acquired in sociological studies after the First World War, was produced in Europe later on and as a consequence of the traumatic shock of the first encounter with psychiatry, which exposed the false positivist etiology and laid bare its profoundly conservative and racist ideology.

The perspective of a fruitful reencounter

The labeling approach, symbolic interactionism, phenomenology, ethnography, and others, cast light upon the falsity of the premises on which sentencing and all penal theorization is supposed to be founded; criminal and radical criminology incurred excesses but left a track that keeps later expositions from being ingenuous or simplistic; antipsychiatry in some ways was its equivalent in the psychiatric field, but made the repressive nature of the insane asylum irreversibly clear; the thinking of Foucault contributed towards clarifying the nature of psychiatric power. In this manner, much water has gone under the bridge since the first and traumatic encounter, since neither criminology nor psychiatry are the same today; there are highly plural views in both camps.

It is true that a biological criminology survives, and it is also certain that there is no lack of an administrative and pragmatic criminology for a sort of Reaganesque criminology that rediscovers the importance of studying identical twins and other similar novelties, that there is no lack of pseudoscientific reappearances of racism, that some hasty consequences of genetic research intend to invigorate a sociobiology that smacks suspiciously of reductionism, similar to a psychiatrist excessively enamored of drugs and the chemical lifejacket on occasion leads people to forget the prudent lessons left by the horrors of the past. One cannot deny that in both fields, there are dangerous regressions.

Nonetheless, the progressive and prudent tendencies that one finds in both camps cannot mutually ignore or mistrust each other to the point of rejecting all contact, when they have important spheres of applied knowledge that they cannot elude and that they can only successfully confront by working together. It would be unpardonable to waste the river of knowledge of human health, whose importance is undeniable for clarifying conflictive and violent human behavior, which we now know for certain is not reduced to something easily controlled.
The trauma of the first encounter must be overcome because it demands the need for providing treatment for the imprisoned population, for reversing or neutralizing the regressive consequences of jail, for stimulating positive self-perception and avoiding the consequences of fixing roles. There is also the need for assisting the victims not only of the crime, but also of multiple violence by the penal system itself, of compensating and a voiding deterioration of its agents, meaning the police personnel, the judges, the lawyers, the judicial personnel, the family conflicts and the institutions that generate violence. Criminology needs to eliminate its prejudices towards psychiatry in order to analyze the role played by pathology in all of this violent conflict, for if it is quite certain that it would be absurd to pathologize all violence, one may also not ignore that on many occasions psychic pathology has a determinant or predisposing incidence.

Furthermore, if a contribution is unquestionably needed for the criminology of social reaction, it lies in the irreversible admission of the criminalizing and victimizing selectivity of the punitive power. In analyzing that selectivity, one must not be allowed to ignore the individual and especially pathological factors that contribute towards configuring vulnerability nor the mechanisms that lead to assuming negative stereotypes, which are both criminalizing and bureaucratizing as well as policizing and victimizing.

The dramatic situation of Latin American penal systems and the repressive, authoritarian and imprisoning systems that one observes in the world, impede criminology from wanting to exhaust itself with theoretical usings, passing over its concrete applications to the suppositions of violence, including the responsibility it has in the training function of agents and operators of the penal system, who must not be left ignorant of the disciplines of mental health as they seek to find effective solutions for facing the conflictive situations in which they must intervene.

AUTHOR’S NOTES

2 Jean Wier, Cinq livres de l’imposture et de la tromperie des diables: des enchantements et sorcelleries, Paris, 1569
3 The power of the courts and inquisitors was strongly defended by Jean Bodin, in De la demonomanie de sorciers, Paris, 1587, in which he dedicated an extensive refutation of the work of Wier (pages 238 to 276). It is interesting to remember that Freud was impressed when he noted that the practices attributed to demons by their worshippers were identical to childhood accounts by his patients. About this: Am and Danet, L’inquisiteur e s es sorciéres, in Henry Institoris (Kraemer)/Jacques Sprenger, Le Marteau des Sorciérres. Malleus Maleficarum, Paris, 1990, p.53.
4 He may be cited as Vier or Weyer lo que se atribuyó a que Wier significaría reservoir en francés and piscinarius en latín (asi, Victor Moliner, La vie et les travaux de Jean Bodin sur sa Démonomanie des sociers et sur les procés pour sorcellerie au seiziéme et au dix-septiéme siècle, Montpellier, 1867, p. 21 nota2). Strictly speaking, la explicación no es muy clara, porque haría referencia a estanques o piscinas, although la palabra Wier no aparece en los modernos diccionarios alemanes.
5 Mario Calzigna La malattia morale. Alle origini della psichiatria moderna, Venecia, 1988, p.31; enunciates the hypothesis that asylum for the mentally ill derives from Arab culture
6 Ibid, p. 30
7 Sobre Pinel, Klaus Dörner, Ciudadanos and locos, Historia social de la Psiquiatría, Madrid, 1974, p. 185.
8 See Jacques Postel and Claude Quétel, Nueva historia de la psiquiatría, México, 2000, p. 608.
The compilations of “great trials” enjoyed large success throughout Europe: Causes célèbres étrangers, published in a series by P. Ackouecke, Paris, 1827, translated from several languages by an anonymous society of jurists and people of letters; José Vicente and Caravantes, Anales dramáticos del crimen, Causas célebres, españolas and extranjeras, extractadas de los originales and traducidas, bajo la dirección de ..., Madrid, 1858; the tradition continued in the XX century: Henri-Robert, Les grands procés de l’histoire, Paris, 1924.


Also his Traité des maladies mentales, Paris, 1860.

See Magnan et M. Legrain, Les dégénéres (état mental et syndromes épisodiques), Paris, 1895.

Pedro Dorado, El derecho protector de los criminales, Madrid, 1916.

Fére’s work was published in 1888, see Ch. Fére, Degeneración and d criminalidad, traducción de Anselmo González, Madrid, 1903.

Proceedings of the various congresses of criminal anthropology. His admiration for Gallat the Rome congress of 1885.


At the 2nd congress of criminal anthropology, 1889.


Corre, A., L’Ethnographie criminelle, Paris, s.d.; Le crime en pays créoles (Esquisse d’ethnographie criminelle), Lyon-Paris, 1889.


Perhaps it would be more correct to speak of a biological Spencerianism, given Spencer’s well-known influence on Darwin, and furthermore, because Charles Darwin never intended to mechanically transfer his concepts to society. On this, see Marvin Harris, op. cit., pp. 91 and following.

Sobre Galton and Pearson, Martindale, op. et loc. cit.


Goddard’s work is entitled Human Efficiency and Levels of Intelligence, New York, 1920. The genealogical investigation of the Kallikak does not seem to have been serious; obfuscated for having shown the antidemocratic political consequences of its thesis, it maintained that it would be terrifying if the masses had power in their hands, but that in practice, it was always a few million who made use of power. More about this, more broadly, Stephen: Chorover, Del Génesis al genocidio, Madrid, 1986, p. 70.

These assume openly racist characteristics that were approvingly accepted by known Nazi authors, such as Exner, who affirmed that adaptation to North American civilization was a task for which the Negroes “did not have the capacity” (Franz Exner, Biología criminal en sus rasgos fundamentales, Barcelona, 1957, p. 80), reproducing North American theses that resurrected instead the apartheid of Morel during the time of struggles for civil rights, especially Henry E. Garret, General Psychology, New York, 1955, p. 65, cit. by Chorover, op. cit., p. 70.


It is fair to note, nonetheless, that he seriously criticized his punishment.

See the much broader perspective of Havecoek Ellis en la introduction a Calverton/Schmalhausen, El sexo en la civilización, Madrid, 1930.

Gross’ work is from 1898 and the first English translation from 1910 (cfr. Debuyst/Digneffe/Pires, op. cit., p. 497), but it is curious that there is a Spanish translation in two volumes that is much earlier: Manual del Juez para uso de los jueces de instrucción and municipales, jefes políticos, alcaldes, escribanos, oficiales, agentes de policía, etc., por el Dr. Hanns (sic.) Gross, de Graz. Traducción del alemán por Máximo de Arredondo, Juez de primera instancia and secretario auxiliar del tribunal, México, 1901.

The informant at that congress synthesizes his thoughts in the “Archives”: “Extracting his arguments from anatomical and pathological anomalies, such as harelips, supernumerary incisors, bifid canine roots, enormous apophysis of the mandible in...
men, and the major development of the orbital angle, Albrecht, by means of ingenious reasoning, concluded that man does not descend from monkey, for the excellent reason that he himself is a monkey, and an inferior monkey. Coming to the question of criminal anthropology, he concluded that the criminal man is normal, and the honest man, who controls his passions is a phenomenon, an inferior being among the most inferior monkeys. As these theories were presented calmly and with a serious tone, I believe that the members of the congress began to look at each other, soon reacted and began to warmly applaud, without taking the very spirited professor very seriously” (“Archives de l’Anthropologie criminelle et des sciences pénales”, 1, 1886, p. 286). We are unaware of works a long time, as has been pointed out by Christian Debuyst in Debuyst-Digne-Pires, Histoire des savoirs sur le crime et la peine, Montreal, 1998, II, p. 467, note 66.


38 “In general, the majority among the born delinquents have wings, a bundant hair, s parse beard, marked forehead, enormous mandibles, square and emergent jaw, frequent gesticulation, to sum up, a similar type to the negroid and sometimes to the mongoloid” (Lombroso, Cesare, L’uomo delinquente, Torino, 1884, p. 248).


40 M. L. Patrizi, Preliminiari d’un indirizzo antropológico (bio-psicologico) nella critica e storia dell’arte figurativa, in Dopo Lombroso, Milano, 1916; Alfredo Nicéforo, Criminali e degenerati dell’Inferno Dantesco, Torino, 1898; Enrico Ferri, Les criminels dans l’art et la littérature, Paris, 1902; I delinquenti nell’arte e altre conferenze e saggi di scienza e d’arte, Torino, 1926.

41 Mariano Ruiz-Funes, La peligrosidad y sus experiencias legales, La Habana, 1948.


43 R. Garofalo, La Criminología, trans. by Pedro Dorado Montero, Madrid, s.d., p. 7, 11, 14 and 15; Franz von Liszt, La idea de fin en criminal law, Valparaíso, 1984, p. 120.

44 Lombroso, L’uomo di genio in rapporto alla psichiatria, alla storia ed all’estetica, Torino, 1894; Max Nordau followed him closely and considered all dangerously creative artists as degenerates (Degeneración, Madrid, 1902).

45 Cfr. The information from Mariano Ruiz-Funes on sterilization laws in the United States, Switzerland, Denmark, Canada, Sweden, Norway, Finland, Estonia, Latvia and Germany (La peligrosidad, cit., pp. 510 and sgts.).

46 Degeneration could be prevented with campaigns against social illnesses. For example, L oui R énon, Les m aladies populaires. M aladies v enériennes, al coolisme, t uberculose, M adrid, 1907; I ater o n i A rgentina: F rancisco D e V eyga, M ario L incesi, Dopo Freud, Buenos Aires, 1938; regarding this period and its ideology: Ruth Harris, Assassinato e loucura. Medicina, leis e sociedade no “fin de siècle”, Rio de Janeiro, 1993, pp. 81 and following.

47 Without a doubt North American sociology, and later the resulting sociological criminality received and continued lines that had been drawn by European sociology, which had faded with the Great War (1914-1918), especially that of Durkheim (1858-1917), M a x W eber (1864-1920) a nd G eorg C . Alexander, Teoría s ociológica contemporánea, México, 1998; Patrick Baert, La teoría social en el XX century, Madrid, 2001; Jeffrey C. Alexander, Las teorías sociológicas desde la Segunda Guerra Mundial, Barcelona, 1990.


49 Nicola Pende, Trabajos recientes sobre endocrinología y psicología criminal, Madrid, 1932; also, La ciencia moderna de la persona humana, Buenos Aires, 1949; ¿A dónde vas, hombre? Problemas humanos de nuestro tiempo, Buenos Aires, 1958; hi s S panish t ranslator, M ariano R uiz-Funes, ha d published Endocrinología y criminalidad, M a drid, 1929. T he discussion on imputations of racism and antisemitism, is in Giorgio Israel/Pietro Nastasi, Scienza e razza nell’Italia fascista, Bologna, 1998.


51 Ernst K retschmer, K örpera u bau und C harakter, Untersuchungen z um K onstitutionsproblem und z ur L ehre v on den Temperamenten, Berlin, 1925; Manuel théorique et pratique de Psychologie Médicale, Paris, 1927.

53 Gregorio Marañón, La evolución de la sexualidad and los estados intersexuales, Madrid, 1930; Luis Jiménez de Asúa, Libertad de amar and derecho a morir. Ensayos de un criminalista sobre eugenesia, eutanasia, endocrinología, Santander, 1929.

54 Kurt Schinder, Las personalidades psicopáticas, Madrid, 1962.


56 Eugen Bleuler, Demencia precoz, El grupo de las esquizofrenias, Bs. As., 1960.


58 A broad bibliography from the period in: Quintiliano Saldaña, Nueva Criminología, Madrid, 1936, pp. 248 and following. The most disseminated works from this period are: Franz Alexander-Hugo Staub, Der Verbrecher und seiner Richter, Wien, 1929 (spanish translation, El delinuente and sus jueces desde el punto de vista psicoanalítico, Madrid, 1935); Theodor Reik, Der unbekannte Mörder, Von der Tat zum Täter, 1932 (Psicoanálisis del crimen, El asesino desconocido, Buenos Aires, 1965). In Spanish, for example, Cesar Camargo Marín, El psicoanálisis en la doctrina and en la práctica judicial, Madrid, 1931; Luis Jiménez de Asúa, Psicoanálisis criminal, Madrid, 1935.

59 As seen, for example, in the singular importance assigned to investigation into the criminal behavior of identical twins univitelinos: Lange, Verbrechen als Schicksal: Studien an kriminellen Zwillingen, 1929; F. Sturnfl, Die Ursprünge des Verbrechens, 1936; Carlo Ferrio, Gemelli, en Eugenio Florian-Alfredo Nicéforo-Nicola Pende, Dizionario di Criminologia, Milano, 1943, I, p. 400.

60 From a broader perspective, Arthur Herman, La idea de decadencia en la historia occidental, Barcelona, 1998.


62 Such were the biological ideas of Lyssenko, with the so-called “Mitchurin school”, which led to the loss of several harvests for Stalinism. See in Jean Rostand, La herencia de la criminología crítica, Madrid, 1992.

63 Vierstein, quoted by Edmundo Mezger, K riminalpolitik a us k riminologischer Gr undlagen (1933), translated as Criminalinologie, Madrid, 1942, p. 158.

64 For this, see the prologue to Exner, Franz, op. cit., p. 6.

65 New light on this project has been shed by the painstaking investigation of Francisco Muñoz Conde, Edmund Mezger y derecho criminal de su tiempo. Estudios sobre criminal law en el nacionalsocialismo, Valencia, 2003; this project and the concrete proposal by Mezger are also dealt with by Michael Burleigh/Wolfgang Wippermann, Lo Stato razziale, Germania 1933-1945, Rizzoli, 1992, p. 158.

66 Perhaps the greatest effort in this regard is the quoted but not highly esteemed work of the exiled Spanish Republican professor, Mariano Ruiz-Funes, La peligrosidad and sus experiencias legales, La Habana, 1948, where the author strives to make dangerousness compatible with the principles of a state of law.

67 See Egas Moniz, Confidencias d e u m investigador científico, Lisboa, 1949. At the end of the book one may see the enormous number of lobotomized patients, accordng to information from the Lisbon congress of 1948.

68 Edmund M ezger, Criminologia, translated by Arturo R. Martínez M uñoz, Madrid, 1 942 (t he original t itle i s: Kriminalpolitik auf kriminologischer Grundlagen), his prologue begins with the following words: “The mighty political and spiritual revolution of the liberating movement in Germany has placed state life in this country on a new cultural basis. The new totalitarian State has risen by building on the basic principles of people and race.”

69 On this, see Elizabeth Antébi, I fabbricanti di pazzia, Milano, 1979.

70 Among others, Alessandro Baratta, Criminologia critica and critica del diritto penale, Bologna, 1982, p. 83.

71 Strictly speaking one may s peak of a “positivist-neokantian” paradigms, s ince wh eres positivism co rresponds t o a n integrated m ode of f penal s ciences, the s econd s plits t h e c riminal law a s a s c ience f rom t he cu lture o f criminology as a natural science, exactly in order to save the positivist etiological paradigm (regarding integrated and split up systems, Baratta, Alessandro, op.cit., pp. 41-42).


75 See R. Angelerghues and others, La Antipsiquiatría, Siglo XXI, México, 1975;Thomas S. SAS, Legge, libertà e psichiatria, Milano, 1984; from the same author, Ideología e doenca mental, Ensaio sobre a desumanizacao psiquiátrica do homem,


77 Michel Foucault, *El poder psiquiátrico, Curso en el Collège de France*, Bs. As., 2005.


Chapter III

Criminal Law and Social Protest

Eugenio Raul Zaffaroni

Delimiting the phenomenon

In recent decades and as a consequence of a crisis in the social state model (the Welfare State), which is suffering a round the world because of the impositions of growing planetary economic authoritarianism built around globalization (and sometimes confused with it), there have been public protests and demands for rights that generate conflicting situations of varying intensity. In our midst protests and public manifestations expressed through creating obstacles to vehicle traffic have been especially noteworthy.

Although some might consider this a new phenomenon, the demand for rights through non-institutional means and at the fringes of legality is far from being something new.

On the one hand, one may affirm that it is an aspiration to every state of law to achieve institutions that are so perfect that it is not necessary for anyone to resort to non-institutional means to obtain satisfaction for their complaints; on the other hand, the same aspiration seems to be held by all citizens who demand rights that are really or supposedly not satisfied. But both in historical reality and the present, the states of law are not perfect and have not achieved the level of the ideal model that guides them, so that neither the state nor the citizens are able to see realized the aspiration to have all demands channeled via institutional routes.

On the other hand, in general, the citizens also do not intend to opt for non-institutional routes to obtain the rights they are demanding, but they choose them only to enable institutional functioning. That is, they definitely demand that the institutions operate according to their expressed purposes.

In Argentina especially, the constitutionalists and the non-governmental organizations that are working in this area, have used the term right to social protest for activities exercised for that purpose of making demands, while they call the phenomenon of repressing it criminalization of social protest. These terms are quite appropriate; moreover, although recent, they are already consecrated in use and individualize the issue quite well.

A different denomination may also be justified, since although certainly at certain points it overlaps with other forms of demand known in the country and around the world, it is quite distinct from them and it is also necessary to differentiate them in order to appropriately delimit the field of analysis.

In principle, one must clearly distinguish the right to resist the usurper, explicitly recognized by the National Constitution for all citizens, because the protest is carried out in the framework of a state of law with legitimately elected authorities.

Nor is it a case of the right to resist the sovereign, which would take us back to the contractual debate between Hobbes and Locke, since it is exercised to remove the oppressor – as it is understood – one who has ceased to be sovereign through betraying his or her mandate and has become an oppressor, meaning that resistance to the sovereign is definitely a right to revolution. The social protest current in our midst does not seek to overthrow any government. Not even in some very exceptional case –
which has led to federal intervention – does it propose to ignore the state of law, but to provoke functioning of its federal institutions so that they are the ones that replace the local government. Even for those who profoundly sympathize with Hobbes it would not be appropriate to invoke him to criminalize social protest, since one may not argue he intends in any manner to reintroduce the *bellum omnium contra omnes*.

Even though on occasions such a right may overlap with some manifestations of the so-called *civil disobedience*, whose most notable representatives would be Thoreau, Gandhi and Luther King⁸, the fact is that it does not identify – or does not yet identify – with it altogether.

In *civil disobedience*, the protagonists confront the state by disobeying and generally accepting the consequences, because those become the banner and publicity for the injustices that they suffer. Not always – nor much less – do social protests seek to face the consequences so as to make injustices clear, but instead they pursue solutions to conflicts by means of intervention by the same authorities. Protest itself is the form of calling attention of the public and the authorities regarding the conflict or the needs for which satisfaction is being demanded.

*Civil disobedience* involves strongly disciplined tactics of non-violence. Among its principles it is essential not only not to use violence, but to exercise extreme care so that *nothing may be maliciously interpreted or projected publicly as the use of violence*, and to quickly and carefully exclude any uncontrolled person or someone who is a *provocateur* or infiltrated in the ranks. When that rule is not observed rigorously, *non-violence* combines with some sporadic more or less violent act, or one appearing to be so, giving rise to *civil resistance*, which may have occasional success, but is not the appropriate form for movements with a greater reach over time.

Regarding the way in which social protest is developed in our midst, one may say that it is moving from *resistance* to *disobedience*, even though its progressive movement - and on occasions its identification with disobedience – keeps one from bringing in the assumption and introjections of all of its techniques and rules on the part of all of the protagonists.

It is natural that, in a country whose official history has always glorified violent actions and that, for many years has not experienced the needs produced by the violation of basic social rights, because the welfare state has achieved a respectable degree of development (certainly inferior to that of industrialized countries, but coming close to it at certain periods), there is no profound conviction of the power of *non-violence* and much less, certainly, of a practice of internalized non-violence, with the degree of organization and discipline that it would demand⁹.

A any rate, it is certain that Argentine social protest, outside of isolated acts, generally does not assume violent forms, and, even more, one might say that there is an inverse relation between violence and organization (less violence the more organized the protest is), which is explicable, since otherwise the organizers would be employing a tactic that strategically would end up being suicidal.

It is natural that, where the *culture of non-violence* has not been sufficiently extended, the first expressions of social protest are inorganic, and may later on suffer intervention by overly emotional people, not to mention that, when it is expressed massively and with poor organization, they can also notoriously suffer from *tactical infiltration* by provocateurs oriented towards justifying repression. As the protest assumes more organic forms, it is also known that it progressively refines its tactics and carefully distances itself from other occasional manifestations that use violence and expresses lament for inorganic breakdowns that are alien to it and run the risk of contaminating its own struggle.

But it is certain that for the time being the more or less organized social protest is not completely familiar with the tactics of *non-violence* and, as a result, incurs episodes in which errors conspire against its own purposes, since they neutralize the publicity that is being sought. At any rate, it is necessary to specify that those few contradictions – such as frequently happen with demands for social rights – are often extremely magnified by those who which to delegitimize those demands and
argue for indiscriminate repression of any social protest. This in spite of the fact that the magnitude of such violence practiced by the demonstrators is not even remotely comparable to the degree of violence that historically has been inflicted on those who protest, which, as is publicly and widely known, has translated into multiple homicides and all manner of arbitrariness and ill-treatment.

However, unfortunately, all movements must build their own experience, which is not always susceptible to being replaced by the advice or experience of others — or of the protagonists of other demands — so that, almost inevitably, their own survival is conditional on their assuming the tactics that around the world have been common in civil disobedience or they will end up dissolving due to their own errors. Given that the needs do not disappear as rapidly as desirable, the space for protest will continue to be open, and certainly the organizations that do not assume a progressive identification with civil disobedience will dissolve, while those who advance until they achieve such identification will go forward.

However, the legal problems for which the protests demand solutions continue to be open and it will be necessary to go more in depth in analyzing the legal area, where there are no simplistic solutions, due to the multiple situations that occur, especially during the time when the transition in question is taking place.

Although within the constitutional law area several voices have been raised calling for recognition of the right to protest, there have been almost no answers so far from dogmatic criminal law. There is a considerable complexity of hypotheses and case and we cannot cover them all in this brief work, but we believe it is necessary to remember the categories of the theory of crime and position them in relation to the problem, in order to orient the focus on particular cases, without falling into casuistry and only to highlight the need for more particularized investigation. We will simply limit ourselves to pointing out those themes that require reflection according to the traditional categories of the theory of crime.

We do not doubt the existence of a right to protest and in that sense we are in harmony with work by the constitutionalists. Nonetheless, with this elementary recognition we advance very little, especially when immediately the shopworn argument is invoked that there are no absolute rights and with this everything falls into a nebulous terrain that opens up a huge space for arbitrariness. It is clear that no one who suffers an injustice can stop traffic on a street or highway, and even less that someone can damage another’s property or commit even greater infractions. If this obvious truth is going to be expressed as the so-called non-existence of absolute rights, this seems to us to be a technically deficient expression: the correct course of action would be to say that although every person who suffers an injustice has the right to protest, that does not enable that person to always exercise it in the same way and same manner. For an obvious truth does not satisfy any elementary legal rigor for solving particular cases, when what one is asking exactly about exactly the extent and for to which it is legally admissible to exercise the right of protest, according to the particularities of the case.

Non-institutional protest

The recognition of the right to social protest will depend upon the answer one gives to the question as to whether a state of law should accept demands for change through non-institutional routes.

It must be understood that one must answer in the negative in the case of a perfect state of law: when there are institutional routes for demanding rights, it is not admissible to opt for non-institutional ones. But it is certain that there are no perfect states of law, and that none of the historical or real states of law make available to their inhabitants, in equal measure, all of the institutional and effective means to achieve effective use of all rights.

www.matiasbailone.com
The third consideration of the Universal Declaration of Human Rights states that it is essential that human rights be protected by a regime of Law, in order for man not to be compelled to take the supreme recourse of rebellion against tyranny and oppression. If there is a regime of Law, as called for by the Declaration, there is no appropriate rebellion against tyranny and oppression, but one also supposes that such state will be as perfect as possible in terms of effective functioning of its institutions as providers of fundamental rights, so that men and women will not feel themselves compelled to rebel, given the presupposition of a framework for a state of law, but that they will be able to make use of non-institutional protests.

The right to protest not only exists, but is expressly recognized by the National Constitution and by international and regional Human Rights treaties, since it is necessarily implicit in the right to freedom of thought, of conscience and of religion (article 18 of the Universal Declaration of Human Rights), of opinion and expression (article 19) and freedom of meeting and peaceful association (article 20). These provisions impose on all states the duty of respecting the right to dissent and publicly demand rights, and, obviously, not only to reserve them inwardly, but to publicly express their dissent and demands. No one can argue judicially that freedom for meetings is only recognized for expressing consent. Furthermore, there is recognition not only of the right to protest, but to the right to demand rights before the courts (article 8).

The problem comes when rights are demanded that are enshrined in the so-called article “14bis” of the National Constitution and in the International Pact for Economic, Social and Cultural Rights, which a re part of the so-called second generation rights or those founded on social constitutionalism that originated in the Mexican Constitution of 1917 and in the Weimar Constitution of 1919. These do not consist of omissions on the part of the state, but in positive actions and obligations for action, and when institutional routes consisting of public manifestation, the call for large-scale measures, petitions to authorities and court cases themselves end up ineffective in facing the reiterated and continuous omission of the state, in other words, which are not able to obtain effective measures, or at least to obtain them in timely fashion, impeding irreversible effects or interrupting their progression. These situations in which the right to protest raises questions for criminal law, because as long as it remains within institutional routes the questions it can raise are not real but merely apparent, given that a constitutional and international right regularly exercise can never constitute a crime.

Institutional protest is always atypical

Public order begins with recognition of human beings and freedom of conscience inherent to it. It would be of little use to recognize that humans had dignity as beings endowed with conscience, if they were not allowed to express their freedom of conscience. There is thus a general basis for freedom from which one subtracts merely a few types of conduct previously identified in criminal laws through legal types, which, in the case of not being supported by any special permission (cause of justification), constitute unjust or criminal acts. The protest that is maintained within institutional boundaries is nothing more than the regular exercise of constitutional and international rights, and as a result, can never be a subject for criminal classification, meaning that legally prohibiting it is inconceivable. These suppositions are excluded from the first specifically penal category of the stratified crime theory, meaning the same type of conduct.

It makes no sense for someone to ask in these cases if one is talking of conduct justified by the regular exercise of a right provided for in the general formula for justification found in article 34 of the Penal Code, because such actions cannot be covered by penal types. Both the National Constitution and international treaties prohibit states from banning such conduct, so that, even though some penal types,
merely at the level of exegetical analysis, can cover such conduct; an elementary dogmatic analysis will discard typicity.

As a result, the exercise of the right to petition authorities, the public manifestation to do so, the public that gathers to do so, regardless of how much inconvenience their numbers cause, how their march interrupts circulation of vehicles or pedestrians, how they create disturbing noises, drop pamphlets that dirty the sidewalk and so on, is a legitimate right within the strict institutional framework. It is clear that such supposed inconvenience, noise, dirtiness or interruption of circulation is produced as a necessary consequence (a number of persons gathered or moving causes interruptions) or usual consequence (using drums, setting of small fireworks, throwing pamphlets, etc) of the number of participants and the need to exteriorize the demand and during the time reasonably necessary or exteriorizing it (walk down streets, stop and listen to speeches, sing, etc.).

It is lamentable that some intend to comb through criminal and contravention codes in order to look for types and how to flexibilize them with the object of holding back such conduct, which belongs to the sphere of exercising citizen liberty. The square, the square belongs to the people, as the sky belongs to the condor, wrote Castro Alves, the antislavery poet of romanticism in Brazil.

The non-institutional protest is not always typical

The circumstances in which the limits of institutional protest are exceeded do not be come automatically into characteristic conduct. When the protest goes beyond institutional limits, meaning that it exceeds a reasonably necessary time for expression (camping or deciding to spend the night in a square), they do not interrupt street activity due to the mere effect of number of people but because of actions intended to disrupt; small groups prolong their shouting after the protest has finished, they reiterate the shouts on transportation used to return home, etc. In such cases one penetrates a field that can be anti-judicial or illicit, but that is not necessarily criminal, because only a small part of anti-judicial conduct is classified as criminal. In effect: staying and spending the night on a square is not anti-judicial conduct. But bothersome unnecessary noise on ce the protest has concluded can be anti-judicial, but are not criminally classified, although they may constitute a misdemeanor.

This is the field in which the greatest emphasis is dedicated with the intent of flexibilizing criminal classifications or limiting oneself to pure exegetical analysis in order for those who wish to criminalize them to classify occurrences of transgressions in non-institutional protest. This is certainly the area in which criminal law should react with the greatest care. Penal classification is a purely legal exercise, restrictively interpreted, that does not agree to mere proof of elements of the objective legal classification. No one doubts that the end of a sporting event (football match) may be accompanied by bothersome shouts by spectators as they return home, but one is not fishing for classifications of transgressions in order to incriminate them, because such is the usual consequence of an act encouraged by the state. Although it is true that protest is not an activity encouraged by the state, it is an elemental constitutional and international right, whose consequences cannot even be classified as contraventions in those cases.

However, there may be other situations in which a contravention classification may be more or less unquestionable, such as when a street is interrupted by an action that is not the necessary result of a march by protesters or of their meeting because of their number, even though it does not correspond to that without intending a criminal classification. With regard to protest, whenever codes are combed through in search of criminal classifications and these are then flexibilized, of necessity there is a trampling of the principles by which criminal law seeks to contain punitive power through a strict interpretation of the dogmatic principles that must be applied in interpreting any criminal classification.
Leaving aside the fact that it is not possible to omit application of the principles of strict legality and restrictive interpretation, which are the result of the discontinuous nature of criminal legislation or classification, one may also not pass over or deny the principles of offensiveness, insignificance or proportionality.

The case of traffic interruption or disturbance is the issue that has appeared most frequently in judicial practice, considering that interrupting of any street or impeding the departure of any form of collective transportation are actions classified in article 194 of the penal code. It is a case of extensive interpretation of a criminal classification, for if article 194 had exclusion of creating a common danger, it is not correct to consider this identical to exclusion of any danger. Article 194 is for a type of danger and not a mere type of infringement of the right to circulate without disturbance. If that had been the meaning of the classification, the text would have excluded all danger and not only common danger.

Disturbances to circulation are the subjects of national, provincial or municipal regulation, depending on the nature of the route, and finally, punishments will be the subject of legislation on infractions at the various levels (if railroads or national highways they can be a case of federal violations, which do not exist; if they are provincial, provincial contraventions apply; if streets, there are municipal ordinances). The only possibility of interpreting article 194 in a constitutional manner is to understand that it is a conduct that through impediment, nuisance or disturbance place in danger judicial assets outside of the hypothesis of common danger.

The classification is not exhausted with the mere proof of the extremes demanded by the type of legal objective, but it is also necessary to assess if this objective classification results in something offensive (through lesion or through danger) to a judicial asset (and is also imputable as the author’s own act, which is not in question in the case). Forgetting that premise (not requiring danger) or presuming danger (meaning to say, consider it as certain when it has not been produced) violates the principle of offensiveness enshrined together with the principle of reservation in article 19 of the National Constitution, or is an invasion of federal contraventional jurisdiction or of provincial and municipal rules.

Another principle that must not be forgotten is the Roman maxim minima non curat Praetor, translated today as the principle of insignificance: insignificant or trivial affectations are not sufficient to complement the principle of offensiveness, as it is understood that that the transgressions should affect the judicial assets with a certain relevance, and issues that are more or less trivial or that do not have an elemental proportion with the magnitude of the threatening sentence cannot be applied. In other words: the judicial consequence of the transgression, meaning the sentence, indicates by its magnitude that it requires a respectable degree of affecting the judicial asset, which does not complement the harm or represent an insignificant danger.

That is a question that not only should be dismissed when it is a case of interruptions or hindrances to communication routes, but also included in other penal classifications. For example, extortion constitutes a multi-offensive classification that affects both property and liberty, but the magnitude of the harm to liberty must present a certain gravity in the content of the evil that threatens. It is not the same thing to threaten with a public protest as to place an explosive or cause a fire and less with a death threat, and one must admit that the protest does not correspond to institutional requirements in all of its characteristics. The magnitude of the intimidation required by the type of extortion does not occur with any harm or eventual loss of assets. On the other hand, in the current law the analyses of the types of extortion that might be valid in the original text of the Penal Code do not apply, as the sentence currently applied to simple extortion (which is not less than imprisonment or reclusion for five to ten years) reveals that intimidation demands a considerable degree of seriousness.
In the classic example from the manual, one cannot consider as deprivation of liberty the act of the person responsible for public transportation that does not stop the vehicle at a stop requested by the passenger and allows the passenger to get off at the next stop, even though some national sentence has found otherwise. In the cases of protest fustigation can constitute a contravention, but in no way could it be classified as one of the actions found in Article 141 of the Penal Code.

There are a number of other difficulties with other penal classifications that one can appeal to in the combing for classifications that some carry out on those occasions. In every manifestation of public protest the people are invoked. There is practically no protestor who has not petitioned in the name of the people. Nonetheless, not every manifestation can be considered as sedition, according to subsection 1 of article 230 of the Penal Code\footnote{17}, because it is not enough to petition in the name of the people, but also, according to the conjunction demanded by the Constitution and Code, it is necessary to attribute to oneself their rights, which no manifestation, protest or demand does, however much it intends to express itself in the people’s name, something that is nothing more than a universally employed rhetorical resource. A different interpretation would criminalize not only social protest, but also any meeting that is called, and demand greater repression that in fact – judging by its disastrous results in penal legislation – intends to intimidate the true and authentic representatives of the people.

No lesser problems are brought with the classification of article 239\footnote{18} of the Penal Code in the variable of disobedience – not so much of resistance – to a public employee in the legitimate exercise of his functions, whose classification must be meticulously reduced to avoid falling directly into unconstitutionality. Disobedience to a public employee may bring about administrative and perhaps contraventional sanctions and one might think this appropriate, but only in cases where it causes harm to other judicial, but sets a certain magnitude and very specific and serious cases, but not any. Disobedience to a non employee in the exercise of his functions, as legitimate as they may be, may constitute a transgression. That is because to extend to the exercise of his classification would achieve an unprecedented level that is incompatible with the state of law: it would be a transgression to refuse to show a driver's license to a traffic agent, to hand over documentation to police who were requiring it, to pay a tax or fee upon official demand, to disobey an order not to place posters or to stop smoking in a public place, etc. Obviously, each one of those actions has legal consequences, but they could not be classified under article 239 of the Penal Code.

Something similar happens regarding defense of a crime in article 213 of the Penal Code\footnote{19}. In certain forms of civil resistance, including those carried out by those who follow the line begun in the XIX by the famous Thoreau\footnote{20} in the United States, legal and penal consequences of such acts are accepted exactly as a form of protest and social criticism. Any expression of admiration or support for the attitude of those persons would be incriminated, when in fact it is nothing more than manifestation of social criticism. It would be a different case if one were providing an apologia for crimes of another nature, such as sex crimes, family violence, multiple and serial murders, genocide and so on. The classification of article 123 is another that needs to be interpreted restrictively in order to make it compatible with the Constitution and the international treaties on Human Rights.

The risk is no less that, as social protest becomes more organized and perfected, it will seek to include participants in those organizations in the classification of illicit association, which is another figure raising serious constitutional problems that are not sufficiently resolved\footnote{21}.

The classification of illicit association was profusely employed against labor demands when strikes were considered crimes in the struggles of European governments against the Social Democrats. Through inertia this has remained in modern legislation with relatively low sentences. Due to specific reforms during moments of political and social violence, the sentences have been increased to the current extreme levels, even though the circumstances were overcome decades ago. This is a classification that extends to acts that are clearly preparatory, that is,
quite previous to the attempt and do not even consider desistance: someone who agrees with other persons to commit simple thefts (proposes the organization of petty criminals or robbers of small articles in stores), is punished with the equivalent to the sum of the minimum sentences for thirty thefts, even if after the meeting none of the participants do anything in the future. The Republican principle indicates that this classification – and with the due reservations – could only be harmonized with the Constitution in the case of associations proposing to commit very serious crimes, such as the massive and indiscriminate destruction of judicial assets, not to mention that it is debatable whether a crime could be configured merely with an agreement and no later activity.

These examples serve to demonstrate that it is necessary for criminal law, in its function of judicial contention against the pressures of a police state, to keep a watchful eye on attempts for force criminal classifications not only in the cases where social protest is maintained within institutional channels, but also when it overflows such boundaries, and penetrates environments of illegality that can emerge from infraction against the administrative or contraventional order.

**Protest that manifests itself in classified conduct and its justification**

So far we have occupied our selves with protest that does not incur a penal classification (prohibition), even though it exceeds the institutional framework and may incur other illegal acts. Nonetheless, protest can involve classifications, such as crimes with not insignificant damages, harm, resistance to authority, etc.

Naturally, we will discard from this analysis those cases in which the protest is only a pretense for committing more serious crimes. Although that does not seem to be the characteristic of the dominant social protest, it would not present any problem to have a penal solution for someone who merely takes advantage of the protest to commit a homicide, a violation or a robbery. We will thus limit ourselves to the crimes that may be committed during the course and due to the protest itself, of which those previously mentioned (damages, harm and resistance) seem to be the most frequent.

In these suppositions one must analyze if the characteristic conduct is supported by a cause that justifies it. To do this one may not appeal to the formula of a legitimate exercise of a right more than as a general definition of all of the justifying causes, because the legal formula of article 34 is nothing more than a remission to all the judicial order, in order to determine if anything in a particular provision allows the performance of the characteristic action. The constitutional right to protest does not enter into that formula in the Penal Code, as it is what directly guarantees the atypical nature to which we have referred beforehand. The cases that need to be investigated regarding justification are exactly those that had fallen within the typical characterization. In those suppositions, as a general rule, one should ask in each case if it can fit within the framework of legitimate defense of in the state of justifying necessity.

It is not possible to consider here all of the hypothetical cases or to reiterate the development of the theory of justification, without only insisting on necessity, in each case, of analyzing if the characteristic conduct is not supported by some of those justifications.

As for participants in social protests who do not fit into the needs or conduct justified by legitimate defense, one should observe that those justifications also cover them when they really operate according to the circumstances of the case, for one who cooperates with someone who acts with justification, is also supported by the cause of justification being dealt with, and in the case of legitimate defense, the legitimate defense of third parties is especially regulated.

This last case presents the particularity that, in case the person attacked had sufficiently provoked the aggressor, the third party could equally defend him or her legitimately, subject to the condition of not having participated in the provocation. This is important in the cases of violent
repression of public protests or meetings: someone who defends one of the protesters who is physically attacked after insulting or provoking in another manner is acting legitimately, even if the protester was not supported by that cause of justification by virtue of the previous provocation.

The state of necessity also presents interesting and complicated problems in connection to particular cases. First of all, the evil caused must be less than the one desired to be avoided, so that it must be a case of a protest calling for a fundamental right. No one has the right to any characteristic conduct when demanding vacation, for example, but the right to food and health, according to the circumstances, may provide such a right, in other words, according to the seriousness and nearness of the evil one wishes to avoid. It cannot be a case of remote or hypothetical ills, but only those that are relatively close and urgent.

Secondly, there must not be another appropriate route, that is, one that is reasonably usable, to neutralize the threatened harm. The appropriateness of the alternative route for demands cannot be merely formal or hypothetical, but it must be a case of a real and effective appropriateness. No one may commit harmful conduct to obtain foods, if it is possible to call on the authority for to provide them within a reasonable timeframe.

Furthermore, the characteristic conduct must be conducive to that result, either because it is less harmful and more appropriate for attracting public attention, because there are no means of doing it by another means, because the communications media have not paid attention to the demand, because the authorities do not wish to repair the need, etc. If in a community elementary needs for food and sanitation are not met, if human lives are in danger, if contamination of drinking water is not prevented or detained or malnutrition is on the verge of causing irreversible damages, if the community is isolated and the authorities do not respond to petitions, it would not be permissible to destroy the city hall, but it would be justifiable to call the attention of the public and authorities by cutting off traffic on a road, even if this lasts for a considerable time and causes some danger to property and business. It is a case of the least offensive measure that falls into people’s hands in order to call attention to their needs in an extreme situation.

The question has been raised many times on the state of necessity created by privation that is general. As a rule, needs found to have been generalized do not enable a state of necessity, but in a country with considerable necessities, it will always be necessary to establish what is the average standard for satisfying social necessities, and thus to meet that standard to establish the nature of the needs. It is almost inevitable that immediately after an earthquake there will be needs and nothing will give people the right to carry out characteristic conduct while attempts are being made in a reasonable time and with urgency in the case, given that this question of suffering being borne by all inhabitants in the region or place.

Notwithstanding, in the framework of general neediness situations of particular necessities may arise. If, in the example of the earthquake, no one, because of the fact of being left homeless, has the right to occupy a hospital, one cannot deny that if a child is at the point of dying of thirst or hunger, it may take possession of liquids or foods that it finds in the ruins of a store.

It is thus not possible to exhaust herein all the hypotheses that may at some point justify social protest that leads to characteristic conduct; however, the considerations presented above are enough to illustrate the difficulty of the question.

Protest that manifests itself in illicit actions and culpability

When the conduct is characteristic and anti-judicial, in other words, when it constitutes an illicit or criminal act, there still remain the problems where social protest presents culpability. When that is
understood in the normative traditional sense of judgment of reproach or reproachability, this presents problems that lead to the need for understanding illegality and excusable necessity.

In principle, when the protest adopts the form of an unjust act because the justification of need is excluded since really a appropriate institutional routes for satisfying needs, a mistaken prohibition may operate, if those routes were really unknown by the protagonists of the protest or if they believed they did not have within their reach the means for forwarding their demands or did not believe they would be effective for reasons grounded in previous experiences.

Given that such protests may be massive, such a lack of knowledge does not have to be general, but there may be an error of invincible prohibition with respect to some or the majority of the people that participate in it, while others may fall into a vincible error, because they know the available and effective institutional means. That means that it is not possible to equally criminalize all of those who participate in the protest, only that culpability must be evaluated for each person to the extent that such a person can individually understand the illicit nature of their behavior and its penal relevance. Let us remember that the law (article 34 of the Penal Code) demands that the agent shall have had the possibility of understanding the criminality of his or her act and not its mere illegality or antijuridical nature: for Argentine law it is no t enough for the agent to believe he or she is committing a contravention or fault when in reality she or he is committing a criminal offence.

As to excusable necessity, the hypotheses are more remote, and do not seem to have characteristics with the cases of social protest known in our midst, even though one may not discard the possibility on a situation that will fit with exculpation. Those who in the face of the total inaction of authorities and absolute public indifference, with the looming loss of harvests due to the lack of water, with irrigation water supplies interrupted by arbitrary acts or lack of attention, channel water that is not theirs to save what is the only means of livelihood for them and their families, threatened by misery and hunger, in that case are affecting another’s property rights to save their own. It is a case of judicial assets of a similar entity, and thus, no justification is measured, but there is an excusable necessity, without prejudice to the need to make restitution to the affected property owner.

Everything said about culpability needs to be complemented, including in the case where the crime is completed, with an appropriate quantification, not only based on traditional culpability, but on culpability due to vulnerability, in other words, that it will be necessary to measure the effort that the person has made to reach the concrete situation of vulnerability that, in the case of social protests is usually minimal, given the special attention of the authorities in some of these cases.

In others, to contrary, the attention by the authorities favors the errors of invincible prohibition. This is because the social demands are, at heart, political or government problems, which means that with a certain frequency they are met by the political authorities themselves, who resolve them on occasions in situ. It is conceivable that when an executive or legislative authority helps a place and resolves the conflict (a meeting is held, a protest is called off, etc.), the participants do not have the capacity to understand the antijudiciality of their conduct, because the state itself is contributing to resolving the conflict. Moreover, in the case of interrupted routes or concentrations of people, the state is usually present to guarantee the physical integrity of the participants. Thus, it would seem to give the impression that the police are taking care of the intended delinquents. To a lay opinion, it is incomprehensible that the state will on the one hand try and resolve the conflict and take care of the complainants, and on the other hand intend to criminalize them. In such circumstances, it is very difficult to pretend that there is a demandable possibility of understanding the criminality.
Some political reflections

What was pointed out in the previous paragraph indicates that the substance of the matter being confronted in criminal law at this point is a question of an eminently political nature. No one can deny that realizing Human Rights for a second generation is of that nature. Leaving the problem in that environment to deal with it in criminal law is the most radical and definitive means of leaving it without a solution. Whenever one extracts a question from its natural environment and assigns it an artificial nature (such as penal) one guarantees that the problem will not be resolved. This indicates that the best contribution towards solving conflicts of a social nature that criminal law can make is to maximize its means of reducing and containing punitive power, reserving it solely for very extreme situations of intolerable violence and for those who take advantage of protests solely to commit wrongdoing. In that way, criminal law preserves itself, returns the problem to its nature and assigns responsibility for the solution to state agencies that are not only have constitutional standing to do so, but that also have the judicial duty to provide the solutions that we have known from the beginning cannot be provided by punitive power.

In terms of distributing legal authority and powers, it is obvious that to want to criminalize social protest in order to solve the complaints that it forwards, is to demand from judicial powers a solution that is the responsibility of strictly political state powers, and thus, any omission in the effort by criminal law for containment will be not only inconvenient, but also unconstitutional from the perspective of separation and independence of the powers of the state.

AUTHOR’S NOTES

1 Since the European antiglobalization manifestations there have been much more specific and articulated organizations, such as in Brazil. On this: Bernardo Mancano Fernández, MST formacao e territorializacao em Sao Paulo, Sao Paulo, 1999; José Carlos Garcia, De sem.rosto a cidadao, Rio de Janeiro, 1999; Roseli Salete Caldart, Pedagogia do Movimento Sem Terra, Petrópolis, 2000.


3 See for instance, A AVV, Sob la r esistencia a l as v iolaciones de h uman r ights, Trabajos de batidos e n l a r eunió n de expertos celebrada en Freetown, Sierra Leona, del 3 al 7 de marzo de 1981, Serbal/UNESCO, Barcelona, 1984.

4 It is not possible to forget the marked tendency of the XIX century to criminalize the leaders of mass movements, considered as a generation: Cesare Lombroso, Gl i a narchici, Torino, 1894; Lombroso/Laschi, Le c rime p olitique e t l e s r évolutions, Paris, 1892; Benito Mario Andrade, Estudio de antropologia criminal espiritualista, Madrid, 1899, pp. 203 and ss.; Gustavo Le Bo n, La p sicología p olítica a nd l a d efensa s ocial, Madrid, 1912; from the same author, Psicología d as multitudes, Ri o d e J aneiro, 1954; S cipio S ighele, 1 d elitti d ella f olla, Torino, 1910; J .M. Ramos Mejia, L as m ultitudes argentinas, B uenos Aires, 1912. In general, on c riminalization o f m ultitudes a nd leaders, J aap van G inneken, F olla, psicologia e politica, Roma 1989.


6 Article 36, 4th paragraph, of the Argentine National Constitution: All citizens have the right to resist those who carry out the acts of force listed in this article.

7 In that perspective, Feuerbach, P. J. A., Anti-Hobbes oder über die Grenzen der höchsten Gewalt und das Zwangsrecht der B ürger gegen den Oberherrn, Giessen, 1797.

8 See María José Falcón and Tella, La desobediencia civil, Madrid, 2000.
9 On non-violence in general, Michael N. Nagler, *Per un futuro nonviolento*, Milano, 2005; nevertheless, there are clear examples of non-violence in Argentina, such as the Madres and la Abuelas de Plaza de Mayo.


11 That seems to be the route taken by some court decisions.


15 Anyone who, without creating a situation of common danger, impedes, bothers or complicates the normal function of land, water or air transportation and the public services for providing water, energy and energetic substances, shall be repressed by imprisonment of from three months to two years. In the sense of classification, Sala 1, C.N.Cas.Penal, JA, 2002-IV, p. 375 and our note, in the same, p. 384.

16 The private actions of men that in no way offend the public order and morality, nor harm a third party, are solely reserved to God and exempt from the authority of judges. No inhabitant of the Nation shall be obliged to do what the law does not command, nor deprived of what it does not prohibit.

17 Repression by imprisonment of from one to four years shall apply to: 1) The individuals of an armed service or gathering of persons who attribute to themselves the rights of the people and petition in their name (Article 22 of the National Constitution). Article 22 of the National Constitution states: The people do not deliberate or govern, except for through their representatives and authorities created by this Constitution. Every armed service or gathering of persons who attribute to themselves the rights of the people and petition in their name, commit the crime of sedition.

18 Repression by imprisonment from fifteen days to one year shall apply to one who resists or disobeys a public employee in the legitimate exercise of his functions or to the person who provides assistance for a request made by that person by virtue of a legal obligation.

19 Repression by imprisonment of from one month to one year shall apply to one who publicly and by any means defends a crime or someone convicted of a crime.


21 Repression by imprisonment or reclusion of from one to ten years shall apply to one who takes part in an association or band of three or more persons destined to commit crimes for the sole fact of being a member of the association. For the leaders or organizers the minimum sentence shall be five years of prison or reclusion.
Chapter IV

Organized Crime: A Frustrated Category

Eugenio Raul Zaffaroni

Introduction

Organized crime is a denomination applied to an uncertain number of criminal phenomena by various specialists, by the mass media, by novelists, by politicians and by the operators of the penal system (specifically police, but also judges and penitentiary administrators, each one with his or her own objectives.

To facilitate understanding of the problem a basic understanding is required: it is necessary to point out that this is not the same thing as explaining the intention of pointing out certain phenomena that have the name of organized crime, that is, the explanation of categorization and the explanation of the phenomena that one intends to categorize.

We shall concern ourselves here with the first, since, as we have explained beginning with the title, we believe it is a failed enterprise, not requiring a false categorization, which, because it does not achieve its objectives, hinders understanding of the phenomena in the scientific field.

Plurality of agents and organized crime

The plurality of agents has drawn the attention of penalists and criminologists in every epoch and in different ways. Thus, in XIX century Europe, particularly after the Paris Commune, a considerable literature was produced regarding crime by the multitudes, which led to various assessments of the multitudes' and of the criminal liability of their leaders or conductors.

On issues that are closer to the ones that now occupy us, and certainly linked to prohibition of unionizing for workers, the judicial-penal concept of illicit association or association of wrongdoers or association for delinquency became generalized. Today it is a conventional classification in penal codes in the continental European tradition, whose constitutionality can be questioned, but have little to do with the category of organized crime as is the intention today, among other things, because the latter is a product of the North American tradition. Nor do the traditional qualifiers of some penal types when committed in bands, gangs or by three or more agents link to this concept. In the case of assaults by bands in unpopulated places and banditry in general, there is also an ancient criminological literature, as there is for political wrongdoing committed by organizations, some of which we would consider terrorists today, such as the concern of the positivists with anarchism, but a superficial analysis will suffice to show that all of this area is alien to what today we seek to understand as organized crime.

Organized crime as an attempt at categorization is a phenomenon of our century and it does little good for authors to lose themselves in discovering is supposed historical precedents, including remote ones, as they will contradict their own categorical premises. It is absolutely useless to seek organized crime in antiquity, in the Middle Ages, in Asia or in China, in piracy, etc., because this does do more
than to indicate that one has forgotten one or more of the characters on which one intends to found the category, such as the business structure and, particularly, the illegal market.

If we restrict ourselves to those characteristics, it is clear that when one speaks of organized crime, one is not referring to any plurality of agents nor to any illicit organization, but to a distinct phenomenon, which is un conceivable in the pre-capitalist world, where there were neither companies nor markets in the form we know today. To return to those ancient delinquent organizations would be to do no more than to mention previous forms of plurality of criminal agents or associations that are not useful to focus on the intended concept one is seeking.

Accepting that all attempts at characterization start with the phenomenon of plural agents, but that this, because of its broadness does not serve for this purpose, we shall mention the different paths that have been attempted.

An overview of conceptualizations

There are many authors who sincerely admit the lack of definition, and attribute this to the dominance of a “popular” conception, warning that criminologists are not in agreement and that the boundary between organized crime and white collar crime is not clear because of the lack of definition of the former. In the field of politics there is also no definition; the advisory committee to the United States government concluded in 1976 that “we do not believe that there is a sufficiently broad definition, which will satisfy the needs of very different individuals and groups that can use it as a means for developing an effort to control organized crime.”

On the legal level the situation is not much different, as the Racketeer and Corrupt Organizations act, known as “RICO,” and which constitutes chapter 96 of the Federal Criminal Code and Rules, as the specific legal instrument for fighting organized crime in the United States, contains a very extensive list of illegal activities, but no categorization. In Germany the situation is not much different, because they sincerely not their enormous deficit in theoretical concepts and empirical basis. Brazil legally incorporated the concept that goes back to the traditional illicit association, which is not oriously insufficient, but that does no more than to reveal the lack of a more adequate definition.

Within an environment that is strange, criminology has received the task of categorizing organized crime, marked by a reference to the illegal market, because since prohibition of alcohol and even before, the North American public has associated it with the illegal market, in other words, with “the prohibition of prohibited goods and services.” This pre-scientific limit to the supposed concept is actually useful, because it at least leaves outside of its scope activities which, would otherwise lead to an even greater confusion, as would be the case of including terrorism, bands of robbers, urban vandals and so on.

Nonetheless, that pre-scientific limit opens up a debate about the reach of attempts at categorization, as to whether the focus should be on type of organization or type of criminal activity, with some maintaining that the correct attitude is to correlate both types.

Over the last decade there have been many authors occupied with those difficulties. Among them we shall cite two, who have performed a balance of the conceptual attempts at a theoretical level. HAGAN reviewed definitions of organized crime by comparing thirteen authors and finding a consensus among them on the following points: a) it involves a permanent enterprise that operates rationally to obtain benefits by means of illicit activities; b) it sustains its action through real or fictitious violence; c) it implies corruption of public employees. As to the other characteristics, such as service monopoly, secret codes and closed status of the ground, he found very little doctrinal consensus.

MALTZ, for his part, did not go much farther, because his comparison led only to broadening the scope of multiple enterprises, but he denies the necessity of involvement in illicit business, organization on a
Mafia paradigm and the sophistication of that paradigm. Bynum considers that those contributions clarify the question, although he also recognizes the ambiguity and lack of consensus surrounding the theme.

Power imposes an impossible mission on criminology

The criminologist’s discomfort is not unwarranted, but derives from the fact that they are seeking a category that will satisfy politicians, police forces and, above all, the news media, and to a point, fiction authors.

Organized crime is not a criminological concept, but a task that power has imposed on criminologists. There are authors who expressively recognize that there are four conceptual sources for organized crime: police, criminological, the “penitents” and the economists (to those we would add that of the politicians, based on various ad hoc committees). However, the criminologists and the economists (and the politicians) work with data provided by the police and the penitents, so that “this monopoly of data has given the police a preeminent power in developing policies and strategies regarding organized crime.” The police agencies do not allow the scientists to access their data.

“Apart from sex and domestic struggles, there is not theme that provides greater entertainment than organized crime,” as proved by the success of the Untouchables and the Godfather as well as the ad hoc hearings in the United States Congress. This is linked to the conspiratorial sense in which the phenomenon has been interpreted within the Mafia paradigm. With the generalizing of the idea of a grand Mafia conspiracy at the national level in the United States, with a secret and highly sophisticated organization, it began to exert the fascination characteristic of all conspiracies. The at traction of conspiratorial versions is partly explained in that it always produces a discharge of anxiety when one knows whom to attribute the root of the evil, while one also admires those who can retain a secret without weaknesses, as they seem to acquire an enormous power of domination. The sadly famous “Protocols” are a deplorable proof of this public fascination, which in literature is dealt with masterfully in “The Pendulum of Foucault”.

As is natural, everything that attracts the public eye moves politicians to use it for clientelist purposes and the police to devote preferential attention to it. In that way, the police end up handing over sources for policy preparations and the politicians provide documents for the police to work with. Various commissions and committees of the U.S. congress fit into this feedback system, such as the one presided over by Senator Kefauver in 1951, the McCLELLAN Committee in 1962 and the 1967 Commission. The political revenue from such undertakings has been no less significant. Thomas Dewey, twice nominated as the Republican presidential candidate in the United States, gained his fame by prosecuting Lucky Luciano, while Estes Kefauver achieved recognition with his committee that almost won him the Democratic presidential nomination in 1952.

As is clear, criminology had very little to do with this attempt at conceptualization, other than receiving a task from those in power. Regrettably, it was unable to fulfill it, although not lacking in good will, because “organized crime and the illegal markets have been largely a source of myths and the truth is less entertaining.”

Criminologists did not occupy themselves much with this theme until the XX century. As one would logically expect, the first important works appeared from the “Chicago School” and Sunderland considered that it grew in unity and in opposition to society as a result of the state’s weakness. Much later it would be Cressey who took on the task of preparing the official version of organized crime. Even though criminology was born closely linked to power and so greatly permeated by it that one would could say it was a “suspicious” science, in this case, it did not reach the point of founding the official conspiracy thesis, because it was too much informed by sociology to tolerate such
as degree of servility and partiality. Thus, operating side by side were the non-systematic use of the police, the politicians, the media and fiction, and on the other hand criminological disconcertment: one could hardly construct a category based on a conspiratorial idea with little credibility.

**The political functionality of the conspiracy version**

The idea that organized crime is a conspiracy at the national level in the United States, aside from exercising the usual popular attraction of all conspiracy theories and of being readily believable by the lay audience, was also driven by the criminals themselves and in that way appeared as more powerful and worthy of admiration (especially if in moments of crisis they adopt Robin Hood attributes of appear as social defenders or benefactors). This fulfilled a dual purpose in the years of its growing postwar recognition: a) on the one hand, its political recognition in that period (KEFAUVER Committee in 1951), in the midst of the cold war, it served to compare or ganized crime with an authoritarian and totalitarian regimes; b) on the other hand, it attributed an anti-national conspiracy to foreign ethnic groups with foreign connections, in other words, to blame the evil on a foreign conspiracy. Although the first function disappeared with the circumstance that gave rise to it, the second has remained until the present, with some variants in terms of the ethnic groups involved.

The idea of conspiracy with a totalitarian structure, analogous to Communism or Nazism is expressed in reports from KEFAUVER and is continued in the OYSTER BAY conferences, called by the governor of New York, Nelson ROCKEFELLER, during the 1960s, which noted the great power and centralization, a small directing group and even a paramilitary structure in organized crime. As CRESSEY affirmed, this was ideal for the MCCARTHY era. Thus, belief in the centralized control of markets is the heart of the official policy doctrine in this area.

That version has lost political importance in our days, but during its time it accompanied and was complemented by the idea of a foreign conspiracy: both communism and crime were foreign conspiracies that were an attack on democracy and the American way of life. That function had the political advantage of citing the evil outside of American society. It is true that it is almost as grotesque in scientific terms as it is useful in political terms, for there were several authors who from the beginning pointed out that organized crime should be considered an American product and not a foreign conspiracy. It was BELL, for example, who in 1953 through a route close to Mertonian functionalism, noted that it should be understood as an innovative route for ethnic minorities to gain access to power.

In some way, in that explanation one may see a parallel with the self-realized prophecy of Jews in Europe: their social space was first reduced and they were next criticized for doing the only thing that their reduced social space allowed them to do, which at the same time reinforced the arguments for reducing their space.

Although the official version – which some criminologists call “orthodox” – has no serious factual support, since to the present all researchers note the insufficiency of empirical research, it has been the object of a criminological version by CRESSY, which was considered the most coherent along its line, although admittedly it did not present any supporting data.

We cannot forget to observe, incidentally, that attributing organized crime to the ethnic groups that immigrated to the United States fit very well with the entire racist immigration policy in effect in the period between the wars, which was praised by HITLER himself in *Mein Kampf* and that is experiencing a resurgence in our days, financially supported to a certain extent by the same foundations that upheld racism in those years.

**The criminological inconsistency of the Mafioso paradigm**
No one in criminology doubted the existence of the Mafia or Mafias in the United States, but instead what one could legitimately call the Mafioso paradigm as an approach to organized crime, meaning: a) the affirmation that these organizations had a structure that was so sophisticated, centralized, hierarchical, national and so on, meaning so strongly conspiratorial, that it could be compared with Bolshevism or National Socialism; b) that it responded to phenomena from outside of American society, and fundamentally, to cultural or biological determinants from immigrant groups; and c) that the Mafia model with those characteristics could be transported to all criminality linked with the illegal market for goods or services.

In reality, that paradigm lacked serious supporting empirical data, notwithstanding all of the documents and authors speaking of the “capos” and “capo de tutti capo” and that had been adopted and disseminated by the KEFAUVER committee (1951), by the O YSTER BAY conferences, by the committee on Law Enforcement and Administration of Justice of 1967, by J. EDGAR HOOVER, by the 1976 commission, etc. This is the description of organized crime which, formed during the postwar period, has since then influenced public attitudes in that country and is introduced as an ideological substrate in the criminology manuals.

The principal source for feeding that paradigm are the testimonies of the “penitents,” one of which, that of J OSEPH V ALACHI before the MCLELLANN Senate Committee in 1963 had major repercussions, since the contributions of data from the KEFAUVER Committee were minimal. However, many authors seriously criticized him, especially because very few criminal prosecutions were initiated because of the da ta provided, while others observed that his testimony was almost concurrent with other versions appearing in the press and from police. In 1969 efforts were made to strengthen this testimony with some magnetophonic recordings taken clandestinely at the offices of a famous Mafioso (DE CAVALCANTE).

Such unt rustworthy data cannot seriously inform a paradigm intended to conceptually cover organized crime in its entirety, if by that one understands all criminality linked to the illicit market. Later empirical research has shown that the FBI has not been able to provide any evidence for its usual affirmation that illegal gambling is the major source of political and economic support for the Mafia, that in both gambling and usury (typical activities in the intended category) in very few circumstances is it possible to use violence to suppress competitions and that, in general, the Mafia is less centrally coordinated than legend and popular ideology would have us believe.

In this regard, one must note the extremely important conclusions by R EUTER, for whom the press and the police provide each other with feedback in a way that sustains the Mafia’s reputation. “Because organized crime is broadly treated in the daily newspapers as entertainment, they provide information on the delinquent bands known to the readers, which raises the Mafia. The penal agencies, understandable desirous of calling the attention of the press to their activities, are driven to prefer the Mafia to other less known bands. In this way, the Mafia’s preeminence increases.” To that author, the mafia is the “visible hand” in the illegal market, but also considered that there was an “invisible hand” operating, which were the personal interests and technology that shape the markets for legal goods and services and there is often a tension between the two hands in the illegal markets. He concludes that in these markets investigated in his work (racetrack betting, lotteries and loan sharking) it is not true that they are a monopolized or centrally controlled, with the “invisible hand” emerging victorious, considering that there are theoretical arguments that allow one to suppose that this is typical of all of the criminality in the illegal market. “To summarize” he adds, “the orthodoxy has a weak foundation. Affirmations about the Mafia dominating the markets and the importance of the Mafia’s power are not based upon any effort at systematic academic or official verification. The academic literature has provided some isolated ex-post support, but the theory has never been well-
developed or submitted to rigorous verification. The best available documents cast serious doubts upon the entire orthodoxy. In addition to everything that has been pointed out, the inescapable political functionality of the aforementioned paradigm is much more than significant; all authors agree that organized crime existed in the United States previous to the Volstead Act of 1920, and the allied 18th Amendment to the Constitution, or the “dry law,” “prohibition” or the “noble experiment,” but did not have the characteristics and the volume it acquired from that point onward. One must not forget that the Mafia paradigm arose with this experience and only became officially consolidated during the second postwar period (during the so-called “cold war”). This paradigm has continued without important changes up to the present, and, additionally, until very recent times there has not been a change in the Italian or Italian-American stereotype, enriched with detailed stories of the Mafia and its families and homicides. The focus was on the Sicilian mafia, the Neapolitan Camorra and the Calabrian “onorata societa,” meaning all immigration from Southern Italy (which is the predominant Italian immigration to the United States), in other words, one of the most numerous Latin or non-Puritan minorities, a part of the tavern culture, against whom the anti-alcohol propaganda of the first postwar period was directed, the same as would later happen with the war on drugs in the United States, always publicly linked with some particular immigrant group.

Organized or disorganized crime?

The activities that criminologists generally consider to be manifestations of organized crime are things such as extortion and other attacks on freedom of work by unions, all forms of illegal gambling, usury, drug traffic, political corruption, white slave and foreign human traffic, and, most recently, electronic crimes.

We have seen that, with varying field methodologies (participant observer, interviews, opinion polls), it has become clear in the United States that these activities are usually organized in a subcultural and local manner, and that they do not have the rigid or bureaucratic organization widely depicted by the politicians, the police and fiction authors. Nonetheless, the United States Chamber of Commerce seems to be taking the exact opposite position, when it affirms that organized crime is a national power, operating with impunity and free of all constitutional limits, and asking if is not the fifth Estate.

Between these two antagonistic positions, there seems to be nothing in common, in principle, but when one looks deeper there is actually something linking them below the surface: by going deeper on the first, one may find the reason for the second. In effect, the second complains against what seems to be unfair or advantageous competition and is not much different in tone from complaints by formal against formal commerce in many Latin American cities.

The class of activities that many attempt to categorize as organized crime are linked to the market in that sense, the approximations of economists and criminologists who point out the economic aspect are clearer than those that move away from this position or underestimate it. One should not think that such approximations fit into Marxist theorizing regarding such phenomena, since, although it is true that Marxist have indeed thought to the issue and from their perspective consider organized crime as an ally of the establishment and a contributor to maintaining proletarian subordination, the great majority of economic approaches tend or gainized crime do not fit into that theoretical framework.

A sizable number of those who focus on this question by favoring the economic perspective consider that it is a case of activities that imply a continuation of illegal commercial practices from the XIX century (the so-called “robber barons”), who infiltrated and flourished in industries with excessive
competition, penetrating small sectors of the economy, where disorder and instability rule. Organized crime goes about neutralizing or destroying competition through threats and political corruption, and with that brings economic stability through a monopoly or oligopoly that disciplines the market, that is even territorially distributed.

In that manner, organized crime would be the set of illicit activities that operate in the market, disciplining it when legal or state activities do not do so. In more precise terms, its economic function would be to cover the areas of savage capitalism that remain in a disciplined market.

Along a similar line and in a certain manner complementary to that explanation moves what we could call the business paradigm, close to sociological functionalism. Starting from the supposition that any business organizes itself to obtain benefits, SMITH maintains the theory of a business spectrum at whose opposite extremes would be found legal and illegal activities, but the differences would preferentially be issues of degree and not of quality. He concludes that any explanation such as conspiracy or ethnicity, if it has any relevance to the interpretation of organized crime, will always be subordinated to the theory of the enterprise. BYNUM is entirely correct in observing that this focus can be traced to MERTON, who maintains that it is not possible to distinguish economically between organized crime and political corruption in legal businesses.

It is certain, whether because undisciplined areas exist in the market, or because they are created on the grounds that prohibition interferes with raising income disproportionately, spaces are opened by businesses, in an activity that appears in the form of a spectrum – as SMITH has well described – at whose extremes are legal and illegal activities. However, they appear so confused and dispersed that it is very difficult to distinguish the shades or degrees that incline to one or the other extreme. This leaves thousands of questions without answers. At what point of the capital flow is the money black or at what point does it begin being white? Does a lawful business that occasionally laundered money practice organized crime? Is the activity of a lawful business that massively employs immigrants so as to pay lower salaries organized crime? Is a gang of kidnappers organized crime? Does a bank that occasionally takes money with no concern for its origin fit in this category?

In summary, one has the feeling that, at least from the economic angle, that organized crime is a phenomenon of a disorganized and undisciplined market, which is open to the disciplining that a lawful, or unlawful or more or less lawful business produces. It is obvious that such openings or gaps in disciplining the market are very different, and are furthermore quite unstable and variable, for because every market is dynamic, there are spaces that close and others that open. Hence, it is impossible to conceptualize and the attempts are frustrated; moreover, the spaces themselves cannot be suppressed, as that would mean halting the market dynamics, in short, making it disappear.

Undoubtedly there are Mafias and gangs, which perform legal and illegal activities, but there is no concept that can encompass the entire set of unlawful activities that are able to take advantage of indiscipline in the market, and which, in general, appear as indissolubly mixed or blended with lawful activities.

Thus, the attempts being made at categorization cannot be completed, because they are a pretension of fitting market dynamics into a criminological concept. The enterprise becomes even more unreachable when one seeks to find a category that can be transferred to criminal law.

Consequently, there is a set of economic activities and phenomena, among which some are very clearly criminal, but there is no category capable of covering all of them in the criminological and much less the legal field.

It is natural for the question to have been raised in the United States in a priority manner and that it appeared during the period between the wars and that the political tendencies have tried to categorize it during the second postwar period. This is because the war of 1914-1918 had consequences that the
European politicians had never imagined. They believed they were going to carry out a relatively brief war, but did not imagine that technology would lead them into a conflict in which the winner would be the one who could consume its industrial potential for the longest time. That is why in Europe, the victors, in practice, gained very little, having been left almost as destroyed as the vanquished, and the United States as left in a privileged position, attracting a enormous mass of capital and of immigration from those who did not see achievable and secure conditions in a Europe destroyed by a war whose consequences they had not even imagined. That was the environment that allowed the United States to implement a racist immigration policy in the midst of a genuine festival of concentrating capital and speculation that ended with the Great Depression in 1929.

The disorder in this market and its interference with the 18th Amendment (“Dry Law”) provided the ideal conditions for penetration by illegal activities mixed with legal ones and, as usual in that country, politicians arose who saw an open route to clientelism and gained fame with their famous “wars” through the penal system, as well as police agencies and, as with their famous “wars” through the penal system, as well as police agencies and discourses, and criminologists who adopted their mottoes and discourses, and who allowed themselves to be swept along by public opinion that was infused by the Mafia stereotype, and also, with a certain narcissism that comes to those who feel that they own the key to solving all of the problems that are caused by indifference in the world’s largest market.

After the Depression and the New Deal, with the United States finding itself after the Second World War as the most powerful country in the world, unlawful activities in the market had acquired different characteristics and volumes appropriate to the new economic situation, while the politicians continued gaining their clientele with the same methods, and as a result, the phenomenon allowed the rise of some in the same way that the Cold War gave MACCARTHY the opportunity to place in check the TRUMAN administration and EISENHOWER’s first term.

The extension of a frustrated category

The frustrated category of organized crime, associated to the Mafia stereotype, extended itself around the world long before the present. Any more or less serious manifestation of criminal organization, especially if it involved foreigners, brought forth the frustrated category in the most unusual places. The penal reform approved by the Argentine senate in 1933 responded to it, to the point of implanting the death penalty through electrocution.

Nonetheless, one cannot deny that the massive exportation of that category from the United States has occurred in much more recent times and as a result of the so-called market globalization. Whatever opinion one may have regarding the nature, scope and perspectives of this phenomenon, one cannot deny that the circulation of goods and services across borders has acquired a hitherto unknown flexibility, that the fall of so-called “real socialism” and advances in technology, the regional markets, the rise of newly industrialized nations in the Far East and the indisputable presence of Japan as a world power, have extraordinarily favored it.

It is natural that as the world market globalizes in this fashion, it has not been limited in exporting its undisciplined environments, but enables new and previously unsuspected spaces for indiscipline, quickly taken advantage of by business activities, lawful or unlawful. It is clear that this has generated new complementary economies that have partly unlawful, and in general, one may affirm that, given the volume of illegal activity blended with legal activities, we find before us a new, hitherto unknown form for accumulating capital: dirty money derived from illegal business and tax evasion, traffic in forbidden goods and services, financial speculation and so on. It seems that the market grows without goods, at least in its traditional aspect.

In light of the disorder that globalization causes and that is characteristic of the market, added to the prohibitive interferences and the characteristics that it assumes at the periphery of global power,
where greater or more manifestation is the norm, it was natural that there would also be an export of the technology for control, or at least an attempt to do so. It is a case of repetition of a law: when a social problem is transferred, it is followed by transference of the ideology of control. The massive population transplant, especially from Southern Europe to the Southern Cone of America\textsuperscript{69}, from 1880 – 1914, with the transference of anarchism, socialism and the protests for social demands, led to the racist European criminological positivism\textsuperscript{70}, particularly the Italian variety\textsuperscript{71} being rapidly called form by the governing elites who assumed it as their own\textsuperscript{72}.

The political operators at the periphery of power have no qualms about assuming the discourse of organized crime as their own, among other things because they consider it harmless to limit their arbitrary power. They base that belief on the following: a) it is so displaced from its genetic context that its incapacity for control is obvious even for those who are less alert; b) their trust, with reason, in the way in which they control all power and their unlimited capacity to corrupt any institution and in the capacity of their scribes to rationalize this; c) in no lesser measure, in their own ignorance of the problem, which for peripheral political operators is always secondary and only deserves their intention when they must implement some clientelist maneuver or neutralize some problem that would discredit them.

In this manner, the covering discourse of the frustrated category of organized crime extends itself around the world, is recognized by politicians from all latitudes, is translated into criminal laws, is disseminated by the mass media, gives rise to new stereotypes and so on.

**An interventionist criminal discourse in a market economy**

The discourse that incorporates organized crime is not as inoffensive as may be believed by the majority of political operators in countries at the periphery of world power, at least in terms of its economic consequences. It would be too simplistic to believe that its total ineffectiveness regarding obvious functions leaves it with latent functions, those that it does not seem to regard seriously, since it limits itself to discussing the first.

In principle, it is a question of a frustrated category, in other words, an attempt at categorization that ends up in a diffusion that is not ion. When this is in the framework of punitive intervention, a supplementary quota is added to the selective arbitrariness of those interventions.

In these conditions, prohibitions interfere in the market, generating a disproportionate growth in income from what is prohibited (services or goods) and this is translated into a rare protectionism, because it is protectionism based on the criteria of penal and not economic selectivity. From the economic point of view that protectionism is completely irrational and its arbitrariness can be totally dysfunctional.

On the other hand, punitive intervention is always arbitrary (selective) but, since legal and illegal appear inseparably mixed, a nebulous notion as the guiding idea for intervention does nothing but add greater arbitrariness to the chosen penal intervention, which, in some manner is demanded in the form of abstention (non-investment due to the perspective of insecurity) or in the demand of some income disproportionate from the size of the investment, as the price of insecurity.

Punitive selectivity is not entirely arbitrary, because it is generally guided by the standards of penal vulnerability of the candidates for criminalization, which in this case are the weaker companies, who are easier prey for extortion. With that, the penal system, more corrupt at the periphery, interjects itself in the market as monopolizer of the Mafia-type activity extorting the business leaders who are more vulnerable because of their weakness, and who in time, due to the difficulty of competing with large corporations and the added cost of extortionate protection, end up being excluded from the market. In this way, the penal system is converted into a factor of economic concentration, that do es not
necessarily mean exclusion of illegal activities from the market, but merely their concentration together with the legal ones.

All of this is said, in addition to the fact that in competition between large corporations, the penal system can also enter, as it is always used to entering, as a factor at play in the struggles for hegemonic power, leading to the loss of covering for those who lose out in such a fight: the rare cases in which the penal system falls on someone invulnerable happen because that someone lost invulnerability in a hegemonic struggle with another competitor of almost equal power.

In summary, and contrary to what one might usually believe, punitive intervention in the market is a phenomenon that introduces itself in all the changing and unstable openings of indiscipline that open up, without a guiding category and without ceasing to intervene as well in legal activities. It ends up being a set of measures for irrational protectionism or selected arbitrariness, which with excessive frequency empower the illicit activities themselves. Corruption (particularly in peripheral countries) destroys competitiveness in the weaker business leaders and eliminates them from the market and may take part as a decisive element in struggles among the stronger. Few forms of interventionism can be more negative for a market economy.

This supposed remedy for activities that threaten competition is nothing less than one of the strongest threats the market may face, much more irrational and destructive than the thoughtless and wrongheaded protectionist measures that at least are debatable in economic terms, while the penal interventions, a general rule, hide their economic character under the discourse of ethical absolutism.

Criminalization by means of a frustrated category: authoritarian penal law

The transport of a frustrated category to the field of penal law is nothing more than criminalization that appeals to an idea that is diffuse, undefined, lacking in real limits, and thus, a violation of the principle of legality, that is, the first and fundamental characteristic of liberal penal law or law with guarantees.

Even though in terms of scientific logic the failure in characterization should determine that it would be no more than an attempt in the criminological field, political logic operates in another manner and, thus organized crime made its entry into penal legislation, with the predictable consequence that elements of authoritarian penal law were introduced. The failed concept in criminology was taken to legislation to allow penal and procedural measures that were extraordinary and incompatible with liberal guarantees.

It is not our intention here to review the tortuous path of penal and procedural legislation managed with a basis on this categorization that failed in the scientific field and succeeded in the political field. We will limit ourselves to pointing out the major legislative principles that have adopted it in the legislative projects that call for adopting it both penally and procedurally.

A) In penal matters

a) The impunity of hidden agents and the so-called “penitents” constitutes a serious injury to State ethics, in other words, the principle that forms an essential part of the state of law; the state may not make use of immoral measures to avoid impunity.

One should not confuse state action that tends towards discovering and convicting a guilty party with the effort to save a human life or another important judicial asset that is being attacked or that is in imminent peril of aggression. In the latter case we find ourselves with a police and non-penal measure and the judicial assets that are in collision are the life and physical integrity of an innocent person and the administration of justice, and the inclination must always be towards the former because of the well-known weight of judicial assets (or weighing of evils) of the state of necessity. That
concrete threat that leads to police action has nothing to do with the injury already suffered or with the danger of new injury in case the author of the other carries out a new analogous conduct. That is the substantial difference between penal coercion and police coercion, which is often overlooked when rationalizing the use of immoral means by the state or the penal system.

Confusing both situations the state authorizes its employees to commit violations, sometimes with a scope and extension that are even more inadmissible or scandalous, giving rise to ambiguous situations in which it is possible that cases of corruption are overlooked by invoking a state of necessity or something similar.

As for the so-called “penitent,” this has nothing to do with the traditional giving up of an attempt. This classical “bridge of gold” – as VON LIZST called it – takes place before consummation, while the penitent performs an action after it. On the other hand – and this is more determinant – the one who is desisting must be the true penitent, since his or her desistance must be completely voluntary and free, while the false “penitent” is nothing more than a delinquent negotiation a benefit in exchange for information, in other words, an informer. The state is making use of cooperation from a delinquent, bought at the price of his or her impunity, to “do justice,” which liberal criminal law as repudiated since the time of BECCARIA.

There is nothing in terms of common penal law and according to the principles governing quantification of the sentence with a benefit for a delinquent because of information provided, nor does it mean a better prognosis for conduct of the person. From the ethical point of view, such an act by an informer is not an element that improves judgment regarding a previous behavior, and it general, it further degrades the person.

b. The sentencing system (mandatory sentencing) of recent American law or the high minimum penalties of written law from the continental European tradition, often appealed to in the cases covered in this failed category, harm the principles of rationality, proportionality and humanity in sentencing, while at the same time intending to reduce judges to the role of simple computing machines that lack any evaluative capacity.

The system of fixed sentences disappeared during the XIX century, after having been established in codes such as those of revolutionary France and the Empire of Brazil, but reappeared at the end of the XIX century, either due to the effects of the American fixed sentences, faulted as being unconstitutional by several American federal judges, and to very high minimum sentences in some Latin American laws, which, however, no one has dared to challenge as unconstitutional.

In no less violation of the most elementary rationality are the absurd maximum sentences, which go beyond forty and fifty years of prison. These are really lacking in seriousness, since no one can believe with any good sense that prisons should become asylums for the elderly with the passing of years. It is only in the United States, where they are attempting a penal policy that is on its way to a total catastrophe and brag about having a million and a half prisoners, that something so absurd is believed; in the rest of the world we know that within forty or fifty years governments will have other more important concerns and the jails will have perhaps been supplanted by control technologies that are cheaper, albeit no less dangerous.

Also no less dangerous than what was presented above is to appeal to the usual “label fraud” and change the name of sentences, calling them “security measures” or something else: it is not a case of returning to the old stratagem consisting in violating all of the limits in liberal criminal law through the old recourse of calling the sentence by another name, thus allowing its retroactive application, as well as disproportion, irrationality, cruelty, etc., as is the frequent intent with those laws and projects.
c. There are many ways of violating legality without abandoning the traditional forms of doing so in criminal law in the Continental European tradition, but, in a different twist, the exportation of the nebulous idea of organized crime has desired to bring into our laws one of the most well-known, criticized and clear mines of violating it known to Anglo-Saxon criminal law, the concept of conspiracy. Contrary to what is scientifically correct, in other words, to adopt the institutions of another tradition that serve to improve our own, the ones adapted are capable of worsening it.

Conspiracy is one of the most diffused and disputable concepts in Anglo-Saxon criminal law. English legal historians have determined that it was born centuries ago as an independent law for false accusations and that it was soon extended to all crimes, as the rule of law or legality was extended. In other words, as the ability of courts to create new categories of crime was being reduced, through the empire of law, conspiracy was being extended, as a judicial resource for violating it.

In effect: some crimes were clearly determined by common law and others by statute law (by laws of parliament), without the courts being able to broaden the catalogue of either, they appealed to a supposed diffuse criminal type, in which one could arbitrarily introduce an action imaginable and define it in an original manner: agreement to do an unlawful act or a lawful act by unlawful means. To complete the panorama of uncertainty, one should clarify that the word “unlawful” is not understood only as illicit, but also as “immoral.”

This has nothing to do with illicit association in Continental law, because it is enough that there be a proposition directed to a person, even though it is not admitted; because it is sufficient to propose one single crime in particular; and because the measure can be lawful. This curious formula has been used not infrequently to pursue labor unions and certain political forces, and its history has not been at all praiseworthy in terms of the service it has provided to public freedoms.

Besides the introduction of conspiracy, the general tendency to criminalize preparatory acts that are atypical from the point of view of traditional formulations of an attempt are no less serious.

B. In issues of criminal proceedings

a. In almost all laws that are found on the idea of organized crime the preventive capacities of the police are expanded, which leads to a serious detriment to the principle of judiciality and as one of the most appropriate forms for rapidly extending the use of torture and occasions for corruption.

b. At the same time there is a tendency to limit the right to defense in various forms, with one of the most usual ones being secret proceedings, extended indeterminately, incommunicado status for the accused, prohibition or difficulty in communicating with the defense counsel, secrecy related to the identity of judges, inspectors, witnesses and so on.

c. The conspiratorial character attributed to organized crime almost always leads to restriction of the principle of public criminal proceedings.

d. Generous authorization is given for intercepting correspondence, telephone calls and other communications, in a way that seriously affects reserve and privacy.

e. Without a doubt, all such proceedings are accompanied by limitations to prison release, so that the principle or presumption of innocence is inverted.

f. Evidence of a doubtful nature is admitted, among others, which presented by the famous undercover agents and informers, which is not resolved by the retention that they should be accompanied by objective evidence. In our law the informants are not witnesses, so that they are free to falsify facts.

g. In expanding the diffuse concept of organized crime around the world, it is not uncommonly accompanied by rules that establish special jurisdictions, sometimes special commissions of a very doubtful judicial nature, violations of the principle of the judge designated by law before the fact, etc.
In general, one may affirm that transforming into law a frustrated criminological category invented by American criminologist under pressure by politicians, police corporations and the mass media, has no other effect than to harm legality in criminal law in multiple ways, and prosecution in criminal procedural law, which is explainable, because these in reality are the two faces of liberal criminal law. A authoritarian or anti-liberal criminal law have had their characteristics established for many centuries, especially through foundational works such as the Inquisitor’s manual, and it is exactly this that we are seeing every time that in a case such as this liberal criminal law is broken.

Every time phenomena such as these are produced in history, they appear in the framework of a war against a cosmic or almost cosmic enemy, who personifies evil itself. American politicians have a great propensity towards political clientelism in this way, so that this is not the first time they have undertaken a war against a social problem or one of an economic nature by means of criminal law – and, regrettably, it will not be the last – with the usual result that they have lost all such wars and endangered their democratic institutions, without mentioning the sorry and negative example that such fables provide for the world, given the reproductive capacity of what goes on in that country.

**Conclusions**

a. No one doubts the real existence of illicit associations, societies existing to commit transgressions, gangs or bands.

b. In every market economy undisciplined sectors appear and disappear, as the result of their own dynamics, which are occupied by businesses, the same as in disciplined sectors, but those businesses very few times are illicit associations, given that in most cases they combine lawful and unlawful activities in different measures.

c. Outside of the cases of genuinely illicit associations there is no clear or even approximate limit that would allow one to distinguish between a “legal” company and an “illegal” one, because they always combine activities and in fact it is very rare for a “lawful” business not to incur some illegal activity. The attempt to categorize illicit activity as “organized crime” has failed on the scientific level, since the only thing that it has been able to prove is the existence of a market phenomenon.

d. The “Mafia myth” extended to all illegal activities on the market is a scientifically false conspiracy theory, maintained by the media, fiction, political clientelism and the police, which criminology has made efforts to elaborate but was unable to do so, although it had found favor with many criminologists.

e. The pretension of taking the “mafia myth” to criminal law implies a totally arbitrary interference in the market economy, which may lead to economically catastrophic effects: economic concentration, limitation of small and medium-sized businesses, corruption in corporations due to concentration of legal activity, excessive protectionism, irrational alterations in some goods and services with a resulting increase in legal activity because of absurd profitability.

f. At the penal judicial level this punitive penal intervention based on a false and unlimited concept implies a serious setback to liberal criminal law and the resulting establishment of authoritarian (inquisitorial) criminal law, injuring constitutional and international guarantees and encouraging corruption in agencies of the penal system.

**AUTHOR’S NOTES**
1 See for example the different assessments of multitudes by authors such as H. TAINÉ, Les origines de la France contemporaine, La Révolution, tomo I, Paris, 1878; G. TARDE, Essais et mélange s-socio-logiques, Lyon - Paris, 1900; SCIPIO SIGHELE, I delitti della folla, Torino, 1910; G. LE BON, Psychologie des foules, Paris, 1895. About this period, in general, JAAP VAN GINNEKEN, Folla, psicología e política, Roma, 1991.

2 In general, almost all authors from the period seek punishment for the leaders, in whom they seek to find degenerative signs. For example, C. LOMBROSO - R. LASCHI, Le crime politique et les révolutions par rapport au droit, à l'antropologie criminelle et à la science du gouvernemente, Paris, 1892, especialmente el tomo II: PASCUAL ROSSI, Los sugestionadores and la muchedumbre, Barcelona, 1906; la primera edición de La folla delinquente de SIGHELE, Torino, 1891.

3 In Spanish one may recall the pioneering work of CONSTANCIO BERNARDO DE QUIRÓZ in Spain, soon extended to Mexico; in Portuguese CHRYSLITO CHAVES DE GUSMAO, O banditismo e associações para delinquir, Río de Janeiro, 1914.

4 All sorts of organizations are mentioned, including the political ones, and among them there is frequent reference to the Carbonari. On these: INDRO MONTANELLI, L'Italia giacobina e carbonaria (1789-1831), Rizzoli, Milano, 1978.

5 E.g., C. LOMBROSO, Gli anchichi, Torino, 1894.


11 Thus, law 9.034 of May 3, 1995. "Deals with the use of operational means for the prevention and repression of actions practiced by criminal organizations."


15 MALTZ, op. cit.

16 BYNUM, op. cit. page 7.

17 BEQUAI, op. cit., page 2.

18 REUTER, op. cit., page 8.


23 REUTER, op. cit., page 8.


27 EDWIN H. SUTHERLAND, Criminology, Lippincott Co., 1978, page 270.


29 Cf. BEQUAI, op. cit., page 3.

30 CRESSEY, op. cit., page 314.


32 Cf. REUTER, op. cit., page 9.

33 Cf. BYNUM, op. cit., page 7.

34 Cf. REUTER, op. cit., page 3.
37 The same is recognized for Germany by MARION BÖGEL en op. cit.
38 CRESSEY, op. cit.
40 ADOLFO HITLER, Mi Lucha, Sgo. de Chile, December 1939, page 126: "There they refuse to accept the immigration of elements that are harmful from the social health point of view and absolutely prohibit the naturalization of certain and specified races, thus taking some timid steps towards a way of looking at things that looks very much like the concept of a National State".
41 We refer to the best-seller by RICHARD J. HERRNSTEIN and CHARLES MURRAY, The Bell Curve, Intelligence and Class Structure in American Life, New York, 1994.
43 BEQUAI, op. cit., p. 7.
45 Cf. JOHN GALLIHER - JAMES CAIN, Citation Support for the Mafia Myth in Criminology Textbooks, in “American Sociologist”, 1974.
49 Cf. REUTER, op. cit., págs. 3-4.
54 Cf. BEQUAI, op. cit., page 34.
55 E.g. the story recounted by BEQUAI, op. cit. page 12.
56 See ERCOLE SORI, Las causas económicas de la inmigración italiana entre los siglos XIX and XX, en Devoto-Rosoli, "La inmigración italiana en la Argentina", Buenos Aires, 1985, p. 15.
57 Cf. JOSEPH R. GUSFIELD, El caso morágalo: el proceso simbólico en las designaciones públicas de la desviación, in "Estigmatización y Conducta Desviada", recopilación de Rosa del Olmo, Universidad del Zulia, s. d. pág 73
58 Cf. JOSEPH R. GUSFIELD, El caso morágalo: el proceso simbólico en las designaciones públicas de la desviación, in "Estigmatización y Conducta Desviada", recopilación de Rosa del Olmo, Universidad del Zulia, s. d. pág 73.
60 cit. by BEQUAI, op. cit.
64 B YNUM, op. cit., page 8.
66 See MARC FERRO, La Gran Guerra (1914 - 1918), Buenos Aires, 1985.
68 See JOSÉ PECO, La reforma en el Senado de 1933, Buenos Aires, 1936.
69 See DEVOTO-ROSOLI, op. cit.
70 In general, all of criminological positivism operated within the racist paradigm of the period, particularly in the version of HERBERT SPENCER (Principes de Sociologie, Trans. by M. E. CAZELLES, Paris, 1883).
71 The racism of Italian positivism is notorious, especially in La Criminología by RAFAEL GAROFALO (translation by P. DORADO, Madrid, s.f.)
72 One may see the early Argentine positivist production: LUIS MARIA DRAGO. Los hombres de presa, 2ª ed. Buenos Aires,
1888: the bibliography indicated by HUGO VEZETTI, La locura en la Argentina, Buenos Aires, 1983.


74 Regarding this, IÑAKI AGIRREAZKUENAGA, La coacción administrativa directa, Civitas, Madrid, 1990.

75 FRANK VON LISZT, Lehrbuch des Deutchen Strafrechts, Berlin, 1891, -216.

76 See Opere diverse del Marchese Cesare Beccaria Bonesana, Patrizio milanese, Parte Prima, Prima Edizione Napoletana, Napoli, 1 770, 1, page 1 17; Dei de litti e d elle pe ne, a c ura di FRANCO VENTURI, E inaudi, 1981, page 8 9; Trans. by LAPLAZA, Buenos Aires, 1955, page 188.


78 Approved in 1 831, see, by DE JOSINO DO NASCIMENTO E SILVA, Código Criminal do Império do Brasil, Río de Janeiro, 1863; Code Criminel de l'Empire du Brésil, Trans. by VICTOR FOUCHR, Paris, 1834.


80 The Argentine Supreme Court had found for the unconstitutionality of the minimum sentence for armed automobile theft, which is higher than the minimum for simple homicide. Later on, with another composition, it changed its criteria with an argument that implies that it is renouncing the power to control constitutionality of sentences, which is lamentable.


83 Law 24.424 introduced in Argentina the term "confabulación", which is a poor translation of conspiracy, although, given the form in which was legislated, it is clear that the person presenting the law did not know what it was about.


85 ELISABETTA GRANDE, Accordo criminoso e "conspiracy". Tipicitá e stretta legalitá nell'analisi comparata, CEDAM, 1993.

86 This is admirably expanded by LUIGI FERRAJOLI, Diritto e Ragione. Teoria del garantismo penale, Laterza, 1989.


Chapter V

Is a non-Authoritarian Enemy Criminal Law Possible?

Eugenio Raúl Zaffaroni

The most recent proposal for a criminal law of the enemy

The current interest in enemy criminal law has brought forth a proposal by Günther Jakobs, formulated in a brief work¹ that has given rise to criticism², to which are added discussions as to its constructions in the purely dogmatic field³. Those debates make it necessary to take precautions, since, especially in terms of enemy criminal law, one walks along the edge of the offense, which is never scientific or illuminating. Therefore, we do not wish to qualify the proposal and still less to disqualify it without sufficient analysis.

If we have not misunderstood what Jakobs is proposing, we believe he is setting forth the possibility of a non-authoritarian enemy criminal law. While it is true that all authoritarian criminal laws are also “for the enemy,” the reverse might not be exactly so. We believe that Jakobs does not achieve this objective and the demonstration of that hypothesis is the purpose of this chapter, in the conviction that, scientifically speaking, affirming that a theory has not achieved its objective does not imply any disparagement whatsoever. Nor do we link Jakob’s theory of crime with his proposal for enemy criminal law, beyond the methodological objections that we formulate at the end of these pages, that is, his tendency towards sacralization and legitimization as a result of use of data.

Polarization in current criminal law

Jakobs affirms that punitive power fulfills the symbolic function of reaffirming the validity of the norm — his well-known theory of the sentence — in criminal law for the citizen, while in criminal law for the enemy operates as a mere impediment. Nonetheless, he maintains that both functions always make themselves present; the refore, regarding the terrorist, the contention serves to reaffirm the norm’s validity, and in the common thief, that reaffirmation, although it translates into a privation of freedom, means an impediment to repeating the behavior during time in prison. The professor from Bonn complains that the contemporary doctrine does not handle that polarity.

Strictly speaking, we believe that doctrine in all ages has dealt with solving this question, which is not at all new. Except for some extreme positions, for practically two centuries — not to go farther back — there have been a bundant attempts to combine neutralization⁴, in other words, in different terminologies, criminal law for culpability (of the act, of sentences, looking at the past, etc.) with criminal law for dangerousness (of the author, of measures, looking at the future, etc.). At the base of all of those denominations is found the polarity to which Jakobs referred, and one can maintain that it is the central and never resolved problem of all theories that legitimate punitive power. Decidedly, with one name or the other, we believe that it is the result of criminal law’s eternal lack of its own discourse.
regarding the sentence, which it sometimes legitimates with elements of administrative law (restraining) and other times with elements of private law (retribution). Ratification of the validity of the norm is no more than a metafunction (or parafunction) of all legitimate coercion by the state: a civil penalty, for example, fulfills a restitutive or reparative function, but one cannot deny that at the same time it ratifies the validity of a norm and has preventive effects.

An uncommon philosophical polarization

Jakobs affirms that the distinction between a criminal law for a citizen and another for an enemy should be understood using a philosophical key. For him, it is based on contractualism and he maintains that Rousseau and Fichte defended extreme conditions, by considering that every delinquent was an enemy. As a counterpart to those authors he presents a position that he considers more prudent, that of Hobbes, who distinguished the common delinquent from the enemy, and was followed in this regard by Kant. Thus, there would be a philosophical polarization between Rousseau/Fichte as extremists on the one hand, and Hobbes/Kant on the other hand, as moderates.

Along the lines of Hobbes and Kant, someone who remains out of the contract – and so in a state of nature – represents a danger, his or her presence is a threat, and thus, Kant affirmed that anyone could require such a person to enter the contract. This is consistent with the idea of the human being permanently at war in a natural state. If that anthropological conception is true, if the natural state of the human being is war of all against all, and the only guarantee of peace is the state, someone who remains out of the contract is a savage at war – an enemy – and someone who intends to rise up against the sovereign is also an enemy, because with this the bellum, the chaos of total war is reestablished.

Remaining within the contract as citizens and as persons would be lawbreakers who do not threaten the state as sole guarantor of the peace, meaning that common thieves, for example; instead, those who represented such a threat would be enemies and mere individuals. Someone who robbed a bank to spend the money on prostitutes and alcohol would be a citizen; someone who did so to aid resistance to the state would be an enemy.

If it is true that this is the consequence of adopting the theses of Hobbes and Kant, it is not certain that the opposing thesis would be that of Rousseau and Fichte. Regardless of the fact that it is doubtful that these authors maintain that every delinquent is an enemy, it is not for nothing that no historian of philosophy places Hobbes against Rousseau and Fichte, but that all do so for Locke, representing the two traditional versions of the state: absolutist with Hobbes and liberal with Locke.

This theoretical polarization of the XVII century state was reproduced in the XVIII century in a German version with Feuerbach’s objections to the Kantian theses on the idea. It is not a lesser philosophical error to omit every reference to the Locke/Feuerbach line, as it the liberal conception of the state had not existed. At least one may affirm that this is not the usual contraposition and we definitely believe that this is the key to the failure of the enterprise that Jakobs proposes.

The Hobbes/Locke confrontation

Although no one can consider Hobbes a positivist, he as undoubt edly a n important forerunner to the movement. All of his construction is based on causality and a certain mechanism. His anthropological conception is very particular; humans develop their faculties through their desire for power. He considers that competition, mistrust and the desire for war are the causes of disputes, which in the natural state determine a state of permanent war. In that state there are no rights, since each one has what he or she can obtain and conserve; nor are there moral judgments. It is a brutal
state, of which he affirms that there are examples in America. To put an end to that state, humans achieve the social contract, through which they deliver all power to the sovereign, who is not part of the contract, because it is agreed upon between the subjects. Because of that – for Hobbes – the sovereign cannot violate the contract, which is established because of feat (of others or of the sovereign). As that sovereignty is the only thing that can contain war, it cannot be partial: sovereignty must be total. The subject can hardly retain any rights, because before sovereignty there were no rights, or to put it better, there is the right to do everything that power allows each one to do, which is precisely what the subjects hand over in the contract and it is inconceivable for them to claim anything.

For Hobbes, resistance to the sovereign’s power is inadmissible, because that would mean reintroducing the bellum omnium contra omnes, the war of all against all, and precisely because of that, those who resist the power of the sovereign cannot be punished, but only submitted to forced containment because they are not delinquents but enemies. Once cannot consider as punishment the harm inflicted on someone who is a declared enemy. Because that enemy has never been subjected to the law, he cannot transgress it. Either he was subject to it and declares that he is no longer, denying, as a result, the possibility of transgressing it. Therefore, all of the harm that can be caused must be understood as acts of hostility. In a situation of declared hostility it is legitimate to inflict any sort of damages. One can thus conclude, thus, that if by acts or words, knowingly and deliberately, a subject should deny the authority of the representative of the State, whatever may be the penalty called for in case of reason, the representative may legitimately make him suffer as he sees fit. In denying subjection, he has denied the penalties called for by law. As a consequence, he must suffer as an enemy of the State, meaning according to the will of the representative. The penalties are established in the law for subjects, not for enemies, as is the case of those who, having become subjects by their own acts, rebel and deny the power of the sovereign by their own will.

It is clear, then, that the enemy for Hobbes is the one who resists the power of the state, because in that way, war is reintroduced. However serious a crime may be, its author is not an enemy, but one who resists the sovereign is the enemy, as an outsider or foreigner, or one who goes back to being one through leaving the contract with an act of resistance.

The thinking that opposes Hobbes’ idea of an absolute state is that of Locke, for whom in the natural state there is a natural law, and therefore there are rights. Locke’s contractualist metaphor is much more realistic than that of Hobbes. For Locke it is implicit that civil society predates the state, which some take to presuppose two contracts. What is certain is that once civil society is constituted, the majority decide the state contract, and hence, cannot assign all rights, but only those necessary for conserving those rights. The legitimate resistance that overthrows a sovereign, to Locke, does not dissolve civil society, although that is the effect that Hobbes attributes to it. For Locke, a critic of absolute monarchy, someone who carries out an act of legitimate resistance demanding respect for rights previous to the state contract, is a citizen exercising rights: to Hobbes, a defender of the absolute state, such a one is an enemy who needs to be repressed and contained with unlimited force, without even respecting the boundaries of the sentence, because such a one has ceased to be a subject. Someone who, to Locke, is exercising the right of resistance to oppression, is for Hobbes an enemy worse than a criminal. For Locke, the sovereign who abuses power loses the condition of sovereignty and becomes simple another person; for Hobbes it is the subject who resists abuse of power by the sovereign who loses subjection and begins to be an enemy.

The Kant/Feuerbach confrontation

In support of his thesis Jakobs cites Kant, and strenuously insists on a note by him in the second section of his treatise Perpetual Peace: a Philosophical Sketch published in 1795. In that note, Kant
affirms that there may be peoples or humans in a natural state, whose very anarchical presence represents a danger, and in those conditions there is the right to obligate them to enter the contract. Anyone can force those who insist on remaining outside of the contract to come under it, because that is the only way to guarantee peace. In that sense, Kant was following the tradition of Hobbes, and along identical lines was denying the right to resist oppression, because for that philosopher, destruction of the state represented loss of the external guarantee of the categorical imperative, and thus, the return to the natural state and resulting restoration of war of all against all.

Feuerbach’s response to Kant was not long in coming and in 1798, he published his Anti-Hobbes, which was, strictly speaking, an Anti-Kant. This was not a merely speculative dispute, for in the question of the right to resist oppression lay the question of attitudes towards the French Revolution. Feuerbach defended rights prior to the contract. He affirmed that rights also existed in the natural state, e.g. blacks sold as slaves had a prior right to freedom, although they could not exercise it because they had been impeded in doing so by force.

To Feuerbach, the sovereign is part of the contract, and because of it he is given the right to choose the means to carry out his ends. Dissident regarding those choices — politics — cannot establish any right to resistance, which only appears when the sovereign acts against civil society and intends to return it to the state of nature. By deviating from the purposes assigned by the contract to sovereignty, it is understood that the sovereign loses his character as such, and thus, resistance is not to the sovereign but to a particular person with power. There is no right to resistance to the sovereign, but to one who has ceased to be one by departing from the ends that the contract assigns for exercising sovereignty. By not admitting that resistance, one would fall into the contradiction of maintaining that the contract imposes the duty of obeying someone who wishes to destroy society.

That also explains Feuerbach’s liberal jusnaturalism: there is not only a practical moral reason, but also a practical judicial reason, which indicates that there may be an exercise of rights that are prior to the state contract. While the first indicates a moral duty, the second indicates the judicial space as a subjective right in society, independent of the will of the sovereign.

We also believe that it is clearly demonstrated that the question of the enemy does not involve contraposition of Rousseau/Fichte with Hobbes/Kant, still less because the first were radicalized and the second moderate, but in the discussion on the absolute state and the liberal state, between Hobbes and Locke first, and then between Kant and Feuerbach, where the key lies in the right of resistance to oppression, which the defenders of the absolute state not only deny, but assign the character of enemy to those who intend to exercise it.

Hobbesianism in the past century: Carl Schmitt

The Hobbesian thesis was also developed in the last century with particular sagacity, reaching its highest level in the thought of Carl Schmitt, whose most specific writing in this regard is found in a work from before he joined Nazism, published in 1927 and reprinted several times since then, including after the war: *Der Begriff des Politischen*. In it Schmitt asks about the distinction of substance that he makes about the essence of the political, in other words, that which is equivalent to good and evil in morality, to beauty and ugliness in aesthetics, to profitable and unprofitable in economics, for if this essence is not achieved, the political would lack autonomy. His answer is that the specific political distinction to which it is possible to refer the political actions and motives is the distinction of friend and enemy.

He affirms that such a distinction indicates the extreme degree of intensity of a union or a separation, of an association or dissociation, which has no reason to appeal to the other distinctions or to base itself on them. Thus, regardless of whether good or bad, beautiful or ugly, the enemy is simply
the other, the foreigner, and it is enough for him to be existentially, in a particularly intensive sense, someone else or foreign, so that in an extreme case it will be possible to have conflicts with him that cannot be decided either through a system of pre-established norms or through the intervention of a third party who is uncommitted and thus impartial. In the case of the extreme conflict, it is the politician who decides if the otherness of the stranger in the concretely existing conflict means the denial of his modes of existence, and if because of this it is necessary to defend oneself and fight, to preserve one's own, peculiar mode of life.

Schmitt does not intend that it is desirable or undesirable for humans to group themselves into friends and enemies, but that they accept the data of the reality, and he does not intend for any aggressor to be an enemy, the same as Hobbes. As such, he distinguishes between the inimicus and the hostis; the true enemy would be the hostis, with whom the possibility of war would always be raised, as the absolute negation of the other or the extreme realization of hostility. If the world were to have a single government and all possibilities of war had been cancelled, for Schmitt, politics would have ceased; it would be a world without politics. If in that world the pacifists had the strength to confront the wars, so to speak, making war on war, they would be confirming the essence of the political. As for humanity, he affirms that, as such one cannot have any war, since one does not have enemies, at least on this planet. The concept of humanity excludes that of the enemy, given that the enemy also does not cease being human, and this does not present any specific difference. He thus affirms, citing Proudhon, that whoever speaks of humanity, wishes to deceive. He affirms that a war in the name of humanity would lead to extreme inhumanity, thereby discrediting the League of Nations and the Wilsonian discourse.

Schmitt affirms that even the bourgeois and constitutional state, notwithstanding all of the limitations imposed on it by its Constitution, can do no less than recognize that when it needs to defend the Constitution itself, the fight is carried on outside of it and outside of the law, purely by force of arms.

The concept of the political as the power of defining the hostis links Schmitt to theology and to the political thinking that he refuses to describe as pessimistic. Just as all theologians affirm that because of original sin humans are not good, this fact is also recognized in political thinking whose clearest is considered to be that of Hobbes, emphatically maintaining that his bellum was no fearful and unbalanced fantasy, but the elementary presupposition of a specifically political system of thought.

Starting from a similar anthropological perspective he not only denounces liberalism but the denial of politics, but also directly denies the historical existence and even the possibility of a liberal policy, reducing it to a simple liberal critique of politics. He indignantly notes that what liberalism saves from the State and politics is reduced to the guarantees of conditions of freedom and the elimination of disturbances to freedom.

There are several revealing observations in Schmitt for a criminal law of the enemy. In principle, it is important to note that his theory is not constructed faced with a concrete enemy, but he elaborates it at a more abstract level than all of the others, and because of that, mentioning him is unavoidable. On that abstract plane he maintains that politics should always have an enemy, meaning that if there is none, in order for there to be politics, an enemy must be constructed or found, which seems to be historically confirmed as to punitive power, which spends eight hundred years seeking enemies when it intends to free itself of all limits, meaning that Schmitt's affirmation is true in the sense that the authoritarian state – not all politics – will always require an enemy.

If political liberalism does not exist, penal liberalism would be merely the critique of authoritarian criminal law and also would not exist; the only criminal law would be authoritarian. The history of criminal law would be made up of a succession of discourses to legitimate emergencies, liberal criminal law would be merely a succession of discourses critical of the previous ones, and thus a mere historical illusion. So till less would there be limits to repressive power when it was a case of...
defending the Constitution itself, since that defense would be carried out outside of that. Hence, in other works he expressly rejects the function of custody of the Constitution assigned to judges and unleashes a polemic with Kelsen. With the constitutional system in peril, it would be the end of all of the guarantees and limits, with which the Constitution itself would provide the most perfect argument for its annihilation.

The synthesis of the Schmittian thesis could be that outside of the authoritarian state, always constructed in the face of an enemy, there are no politics. From that one may deduce that set against authoritarian criminal law there would be no liberal criminal law, but simply a liberal critique of the former. It would be enough to involve the need to defend the Constitution against an enemy for all of the liberal limits to punitive power to immediately cease. Given that there can be no politics without an enemy, the Constitution woul be a pipe dream, because the constitutional state could not eliminate politics and, thus, it would be a loss for the Constitution itself.

The penal reflex of the enemy during the last century: Edmund Mezger

The prehistory of criminal law of the enemy may go back to Plato, who developed for the first time in Western thought the idea that the wrongdoer is inferior due to his incapacity to rise to the world of pure ideas, and when that condition is irreversible, he should be eliminated. Leaping many centuries, the first theorization about the enemy in penal scholarship — albeit very crudely — is due to Rafael Garofalo, who affirmed that penal science has as its object defense against the natural enemies of society, and that indigence by judges was no more than the triumph of logic achieved at the expense of social security and morality. In the eyes of the people the codes, the proceedings and even Judicial Power, seem to have reached an agreement to protect the criminal against society, better than society against the criminal.

Garofalo defined the enemy through the recta ratio of those civilized peoples, of the superior races of humanity, with an exception made for those degenerate tribes that represent evildoers in society. As a faithful follower of Spencer, he affirmed that society needed to produce an equivalent to Darwin’s natural selection, and thus, the enemies needed to be eliminated, which he justified with the sharp remark that through a laughter on the battlefield the nation defends itself against its external enemies; through a capital execution, against its interior enemies.

But leaving aside such crudities, it is unquestionable that the most refined elaboration comes from the XX century and seems in good measure to be the penal reflection of Schmitt’s theories, a task carried out by Mezger, who was the best-known German Neokantian criminalist in the Spanish-speaking world. His thesis on culpability due to conducting life is a clear manifestation of the author’s criminal law: those who conduct themselves as enemies gradually reduce their scope of decisions, and thus, their crime; if it was not reproachable in acto, it was in causa, which corresponds to reproaching them for all of the choices of their existence that have culminated in that act. The offense is not reproached, but the construction of the personality that expresses it in the form of an existential action libera in causa. Hence, he is coherent in affirming that the stranger the act is to the personality of the agent, the less reproachable it is, and vice-versa.

Mezgerian idealism directly sought the enemy personality to neutralize it. Mezger participated with Franz Exner in preparing the project on strangers to the community (Gemeinschaftsfremde), destined to be eliminated in the concentration camps and who were certainly the same persons who, according to the positivists, incurred the status of dangerousness without wrongdoing.

Mezger wavered between the concept of enmity towards law (Rechtsfeindlichkeit) and blindness towards law (Rechtsblindheit), in other words, between considering a as an enemy one who felt in a manner contrary to the state that was regenerating racially with Nazism, meaning, purifying itself in
order to reestablish the hegemony of the superior race\textsuperscript{44}, or one who did not see that regeneration. This meant he oscillated between Garofalo and Plato and used both terms successively. For Mezger enmity towards law supplied the effective knowledge of the anti-judiciality of the crime: The judicial blindness of the author refers to an attitude that is not in agreement with the healthy intuition of the public regarding the just and the unjust, so that, under normal conditions, one should not excuse, but, to the contrary, configure the foundation for punishment\textsuperscript{45}. Not only should one stress the reference to the healthy intuition of the people (a Nazi formula of the analogy, which Mezger also participated actively in introducing into legislation\textsuperscript{46}), but – as has been correctly noted – the examples used to illustrate the concept are terrifying: the outrages against the race (sexual relations between Germans and Jews, punished by death), abortion and sodomy\textsuperscript{47}.

All of Mezger’s construction is based on the idea of an enemy of the law who, in reality is an enemy of the values imposed by an omnipotent state, and who is not any offender, but one who shows with his or her life conduct (Lebensführung) a personality that is incompatible with those values that make up a racially purified superior race (settled on soil and race). The stranger to the community was one who because of his personality or form of conducting his life, especially due to his extraordinary defects in understanding or of character will be incapable of fulfilling with this own forces the minimal demands of the community of the people\textsuperscript{48}. From that definition and from the precise definition that follow in this distressing text, one deduces that the strangers were not the authors of serious crimes, but of those who bothered people, those who disturbed the peace, those who did not work, the drunkards, those who made up the positivist evil life. For them Mezger proposes the extension of police law, not of criminal law.

The idea that the stranger should be submitted to administrative law and not criminal law may be found in Hegel. Given that every judicial relation presupposes freedom of the will, someone without self-awareness cannot enter into that relation, since the field of law is the spiritual, and its precise place and starting point is the will, which is free, so that liberty constitutes its substance and determination; and the system of Law is the kingdom of freedom realized, the world of the spirit expressed by itself, as in a second nature\textsuperscript{49}. From that starting point, it is easy to affirm that the stranger is not self-conscious, and because of that does not share that second nature, which is judicial; from that there is just one step to convert such a person into an enemy as one who is refractory. It is fair to recognize that Hegel himself did not go that route, but his pejorative expressive regarding colonized cultures allow one to infer it\textsuperscript{50}.

It is clear that for Mezger – and perhaps for Hegel, or at least for some Hegelians – the strangers or enemies are excluded from criminal law and administrative treatment is reserved for them. It is a matter of perspectives to establish if they propose two criminal laws (or binary or common and for strangers) or if it is a question of a single criminal law and the rest is police law, but it is certain that the punitive power of the state is split in two: one for common people and the other for the strangers, who are the enemies.

The frustration of the aspiration for a non-authoritarian enemy criminal law

We have seen the development that the thesis of the enemy has had from its Hobbesian starting point to its development in the following centuries: denial of the right to resistance in Kant, policy reformulation in Schmitt and the repressive pathology of Mezger. It is appropriate to ask if Jakob’s intent in going back to Hobbes and Kant offers a development that will guarantee a different and non-authoritarian line.

In principle, Jakobs starts by recognizing a reality, which is the legislation of fighting that is spreading around the world in these days: war or struggle a gainst organized crime, serious crimes,
sexual criminality, corruption, drugs, economic criminality, terrorism, etc. In each country one might recognized laws analogous to those that Jakobs mentions in Germany and some much less cautious. Faced with that reality, he proposes to assume and separate this criminal law of fighting, meaning of the enemy, from criminal law for the citizen. The professor from Bonn alleges that a clearly delimited criminal law for the enemy is less dangerous, from the perspective of a State of Law, than mingling all of criminal law with fragments of regulations that should be in a criminal law of the enemy. In that way, he tries to separately package this punitive power with its intended containment to save at least part of criminal law, which would remain faithful to traditional liberal criminal law. The proposal gives the impression that, faced with the advance of criminal law of the enemy, he resigns himself and assumes it as reality, intending only to isolate it in order to set a limit.

In principle, it is not possible to ignore the fact that the various forms of authoritarianism take advantage of laws for fighting, protecting and defending, meaning the frontalist laws that intended to set up a criminal law of the enemy. The circumstance that laws of this nature are currently being propagated is also an unquestionable fact. Nonetheless, as for resigned acceptance of reality it is worth remembering the objection that Rousseau formulated to the method of Grotius: Grotius denies – he said – that the human powers have been established for the benefit of the governed, citing slavery as an example. His constant manner of reasoning is to always establish the fact as the source of the law. In effect: the circumstance that there have been slaves, in other words, that the governments have not been established for the benefit of the governed, does not indicate that one should not establish things that way nor that it is not desirable; likewise, the circumstances in which authoritarian laws are propagated does not oblige us to legitimize them.

A second consideration is that separation of both criminal laws is impracticable, since Jakobs himself recognizes that it is a question of a polarity and that a component of enemy criminal law exists even in the more common sentences. In the best case, one could only separate the very notorious, obvious or declared suppositions, meaning that separation would depend upon a question of degree that would not guarantee one would avoid contamination. On the other hand, authoritarian criminal law has always been installed as exceptional and soon become commonplace.

Accepting – merely ad argumentandum – the possibility of keeping the so-called enemy criminal law or containment law separate, one should ask who defines its extent, in other words, who decides who the enemies are. The answer does not seem very different from that of Schmitt, except that the latter postulates it as a proper and exclusive function of politics and Jakobs limits himself to recognizing it as a reality. That possibility of unlimited political definition of the enemy eliminates every guarantee that it will not reach the extremes that Mezger rationalized during his days. Jakobs undoubtedly does not have that in mind, but in his proposal these delirious extensive pathologies do not crash against any safe dike.

To admit – as Jakobs does – the legitimacy of a war to persecute delinquents, at the cost of the lives of innocents who suffer the consequences of those attacks, in a direct reference to the Iraq war, opens up the way for unlimited international anarchy and implies a serious historical retrogression: the First World War also had a crime as a pretext (the assassination of the Austrian archduke and his wife). Not to mention the fact that transporting the same criteria to supposed internal or civil wars gives rise to the famous dirty war, which was the discourse for legitimating state terrorism in the name of national during the 1970s.

It should be noted that every state of law recognizes the possibility of an eventual need for exercising coercive power as mere contention, but they have constitutionally limited the state of siege, of blockade or of exception, provided for in the constitutions with the appropriate precautions. It was exactly through ignoring those precautions that there were abuses absurdly beyond limits of those few provisions to try and legitimate the dirty wars outside of criminal law. In other words, there was the
pretext that major sentences depriving persons of freedom decided by the dictators were administrative detentions enabled by exceptional or emergency dispositions. However, neither outside nor inside criminal law is the rea ny constitutional authorization to exert pure containment power, so that the limited constitutional provisions for the states of exception correctly understood, meaning within the strict limits and conditions established in the supreme texts cannot be invoked in such cases.

Neither does the difference that Jakob’s establishes regarding international criminal law clear. That author affirms that such law has a marked character of enemy criminal law, and that it exercises punitive power not to reaffirm the validity of the norm but to establish its validity. We believe we understand that he refers to the cases in which international courts condemn in the absence of action by national courts, meaning that the sentences imposed by international courts would have the objective of establishing the internal validity of the norm and not of ratifying it. Independently of Jakob’s theory of the sentence itself, we believe that such an opinion derives from the thesis of double law, since from the perspective of single law the norm is valid and if it is not applied by national judges, an international court will apply it, or, according to the universal principle, any court in the world. No validity is established with this, but a norm valid in both international and internal law is applied.

Consequences of the sacralization of the dynamics of punitive power

Parmenides and Heraclitus mark the eternal pendulum of thought regarding the being of all things, but also of each thing. Although we insist that we do not consider his thesis on enemy criminal law a necessarily linked to its dogmatic construction, it is possible to observe that in all of Jakob’s theorizations there are two methodological characteristics that throw a negative weight on this theme: (a) One is his tendency to enshrine or immobilize a Parmenidic search for security. One may clearly observe this in his sacralizing of social roles as a criterion of objective imputation. The roles lose all of their dynamism, and become as if photographed as if assuming did not capture the images cinematographically but instantaneously. (b) Another is his tendency to assume the facts by considering them legitimating due to the mere fact of their being.

The characteristics determine – on the one hand – that Jakobs assume the reality of authoritarian laws as a mere datum and not question the supposed necessity for an intended enemy criminal law, and on the other hand, that he ignore the dynamics of power in a state of law, dealing with statically resolving a question of dialectical nature. The state of law always encapsulates a state of police, and the pressures of the latter sometimes translate into authoritarian laws, with science having the function of knowing criminal law in order to be able to contain or neutralize such laws. In that way, every real or historical state of law makes use of judicial power programmed by knowledge of criminal law in order to contain the police state that remains in its breast in a relation involving tension.

To intend to compartmentalize forces that permanently interact in a contrary fashion when one of them tends to expands its limits and the other constitutes precisely its containment leads to an error of perception whose results may be tragic, for while it tends to free from all containment the pressures of the police state, it leaves the judicial power of containment of the state of law without a function. That is the greatest risk of a Parmenidic vision of punitive power, which generates a perceptive distortion that makes it possible to legitimate the power of the police state and neutralize the containment function of the state of law.

AUTHOR’S NOTES
N. Abbagnano and could not openly confront the prestige of the old and respected Kant. M. Federico Sciacca, Problemas dogmáticas decadentes, Porto Alegre, 2004. From this title and the criticism pointed out in the previous note one concludes that the debates are proceeding in a tone that somewhat exceeds that which is habitual in our discipline.

It seems better to maintain that only murderers are enemies, but not every delinquent. At least in Rousseau that seems deducible in Chapter V of Book II that Jakobs cites, without mentioning the contradictions in Rousseau himself, who in Chapter IV of Book I affirms that a State may not have as an enemy anything but another State, and not men, since one cannot set up relations between things of diverse nature. In fact, he states that without a declaration of war there are no enemies, but only bandoliers.

Leviathan, 1,8,10.

Ibid, 1, 13.

Ibid, 1, 18.

Ibid, 2, 28.

John Locke, Ensayo sobre el gobierno civil, 2,6.


Werkausgabe VIII, Die Metaphysik der Sitten, p. 756.

Anti-Hobbes oder über die Grenzen der höchsten Gewalt und das Zwangsrecht der Bürger gegen den Oberherrn, Erfurt, 1798.

The reference to Kant in chapter I is unquestionable. Also, the note in which he expressly cites Kant criticizing his position regarding changing of the constitution. (chap. 3). He takes care to respectfully separate Kant from Hobbes regarding the inviolability of the sovereign in chap. 6. It is clear that Feuerbach was twenty-three years old when he wrote Anti-Hobbes and could not openly confront the prestige of the old and respected Kant.

See Erik WoIf, Grosse Rechtsdenker, Tübingen, 1951, p. 543; also the investigation by Mario A. Cattaneo, Anselm Feuerbach, filosofo e giurista liberale, Milano, 1970.


Although Schmitt writes as the Kronjurist of the Dritte Reich (Cf. Joseph W. Bendersky, Carl Schmitt teorico d el Reich, Bologna, 1989), his reference regarding the question of the enemy is noted without meaning any pejorative intention, since Schmitt’s ideas were taken up by many critics of the bourgeois liberal state with different political persuasions and including some who openly opposed to his politics. In that sense one may see the presentation by José A Rico to El concepto de lo politico that we cite; also Luciano Albanese, Schmitt, Editori Laterza, 1996, p. 7; Julio Pinto, Carl Schmitt y reivindicación de la política, La Plata, 2000, p. 179.


Schmitt, p. 23.

We respect the translation that we have cited, but it should be observed that the word Schmitt uses is Fremde, stranger, in other words, the same that Mezger would soon use, Cf. infra n° 5.

Schmitt, p. 23.

Ibidem.

Ibid, p. 25.


Ibid, p. 51

In that regard he cites Lorenz von Stein, p. 44. That is linked to his proposal about the custody of the Constitution: Carlo Schmitt, Il custode della Costituzione, Giuffré, Milano, 1988.

The fall of the Ancien Régime is attributed to the illusion of human goodness, in that it was unable to perceive the menace of its hated French Revolution.

El concepto de lo politico, cit., p. 61.
Ibid, p. 68.


32 This Schmitt intended to save by making a hierarchy of constitutional norms, which one may observe in his concept of the constitution as a plurality of laws: Schmitt, *Teoría de la Constitución*, Madrid, 1992, p. 37.


Ibid, p. 11.

Ibid, p. 15.

Ibid, p. 102.

38 He considered him “the greatest of the contemporary philosophers,” idem, p. 97.

39 Ibid, p. 326. That proposal was taken up again by Nazism: Helmut Nicolai, *Die rassengesetzliche Rechtslehre, Grundzüge e. nazionalsozialist. Rechtsphilosophie*, München, 1932


41 It is true, by the way, that liberal Neo-Kantions such as Max Ernst Mayer and Hellmuth von Weber were not translated. Gustav Radbruch himself – as was the case with M.E. Mayer – was translated by legal philosophers, but not by the penalists.


43 New light is being shed on this draft project through a detailed investigation by Francisco Muñoz Conde, *Edmund Mezger y derecho criminal de su tiempo. Estudios sobre criminal law en el nacionalsocialismo*, Valencia, 2003; this project and the concrete proposal by Mezger are also examined by Michael Burleigh/Wolfgang Wippermann, *Lo Stato razziale, Germania 1933-1945*, Rizzoli, 1992, p. 158.

44 He expresses this clearly in the first and last chapters of this *Criminología*, Editorial Revista de Derecho Privado, Madrid, s.d., pp. 3 and 284.


46 On his participation in the reform, Muñoz Conde, op. cit., p. 85.


51 Jakobs, op.cit., 4ª conclusion in the summary.


53 See e.g. las *strafrechtliche Nebengesetze* of the National Socialism that Dalcke reproduces, *Strafrecht und Strafverfahren*, Berlin, 1938, pp. 385 and ss.

54 Rousseau, *Contrato social*, I, 2.

Chapter VI

Girardin: Abolitionism between the Second Empire and the Third French Republic

Eugenio Raúl Zaffaroni

When one speaks today of penal abolitionism to indicate the set of movements that intend to abolish punitive power, it is common to mention as forerunners the anarchists and socialists of the XIX and even the XVIII centuries, but there is no mention of the very valuable contribution of an author who was not affiliated to those political currents but, to the contrary, was closer to conservative positions, to the point of being considered an opportunist to some degree. This was Émile de Girardin, who wrote a quite singular abolitionist book in 1868 and published it in 1871.

Girardin was a French journalist who was born in Paris in 1806 and died in the same city in 1881. He wrote several works for the theater, including one in collaboration with Alexandre Dumas. In 1836 he founded La Presse, which was the first large circulation and low-price daily, which he supported at Thiers until 1846. The modern mass-circulation press was inaugurated precisely with the daily founded by Girardin, who thanks to small advertisements and publicity, was sold at half the price of the other dailies. He was thus the initiator of the modern press, which raised serious polemics in the journalistic world. Armand Carrel, founder of the National in 1830 and converted to militant republicanism, considered himself offended because a journalist had converted daily journalism into a commercial issue, and due to that, challenged Girardin to a duel, losing his life in that encounter.

Girardin was a deputy in 1834 and in 1849 a member of the legislative assembly. He was expelled after the coup d’état of December 2, 1851 and on his return to France went back to publishing La Presse and founded the daily La liberté, through which he rose in defense of the liberal empire, to soon support the Thiers government in Le Moniteur universel and Le petit Journal and next attack Mac-Mahon and De Broglie in La France. He was married to a famous writer: Delphine Gay (1804-1855).

His abolitionist book of 1871 is cited very rarely. Matteoti refers to it as one of the few works to not only de-legitimate aggravation due to relapse, but to dare to directly deny the right to punish. We believe that it is worthwhile to dust off this old book, because in highlighting the abolitionist position of someone who has no ties to anarchical and utopian thought one disarms the myth that de-legitimization of punitive power is an issue only for authors with those tendencies in the XIX century and Nordic Europeans in the second half of the XX century. With Girardin we find ourselves before a French politician, a singularly successful journalist, who supports abolition with arguments that today may seem someone curious, but that on the other hand are simply the thoughts of a liberal astounded by the devastating panorama presented by the structural characteristics of the exercise of penal repression. On the book’s cover, under the title appears an engraving of a crucifix, which is explained in the text, when Jesus Christ is considered as the most notable victim of the power that de-legitimates and MENTA as useless in its pages.

Since the book was published, more than one hundred and thirty years ago, only the variable circumstances of punitive power have changed, but its structural traits continued unaltered – it could not be any other way – and in its regard, the author’s observations conserve all of their validity and are sometimes notably fresh and current.
The exposition is quite coherent and opens with a reflection on liberty that occupies almost the entire preface. He remembers an old polemic from 1850, in which he maintained that between the freedom to say anything and the freedom to do anything there is an enormous difference, because saying has nothing to do with doing. He expresses that he immediately had major doubts in this regard and twenty years later — when he was writing the book — he became convinced that freedom is one and indivisible. If the freedom to think implies the freedom to say, the freedom to say implies the freedom to do. Should I then admit the freedom to do evil? And why should I not admit it, if after having admitted the freedom to think evil, I admit the freedom to speak evil? But then, in what does society DEVENE? That is the question I have thought about for twenty years, to conclude that freedom is unique and indivisible and that when one wants to divide it, freedom ceases and arbitrariness appears.

He affirms that he reached that conclusion as the result of what today we would call cultural relativism and that in his words he considers the testimony of history: what is forbidden in one country is not forbidden in another; that which one religion sanctifies another condemns; that which under one name is a crime ceases to be so with a change in name. And he adds that he last happens with homicides and with the collective robberies known under the name of war. Do the individual homicides and robberies perchance make more blood run than the collective ones for which triumphant arches are raised? He maintains that if war and conquest did not exist, it would certainly be maintained that they were incompatible with the state of society, meaning that, if society exists with similar impunity, would it also exist with that of homicide and of individual robbery? Society without war would not lose manpower with military service, taxes would greatly reduce, public debt would be quickly amortized and society would be the kingdom of science, of liberty, of the production of wealth, instead of being that of violence, oppression, destruction and misery. When war and conquest close their schools of death and robbery, the general wellbeing would make crimes of homicide and robbery on an individual level completely rare.

He makes the notoriously up-to-date statement that no one wants to rob when he can make more with his work than he would make with robbery. If robbery was not punished, someone who robbed with impunity could also be robbed with impunity. What, then, would be the advantage of robbing? If robbery ceased feeding homicides, they would be reduced to a few cases of derangement. What will this transformation be? He answers that it will be that which logic prescribes, so that the kingdom of indivisible freedom may be the kingdom of human reason. He asks if that transformation will be carried out violently and with a coup or scientifically and progressively, and responds by inclining towards the latter alternative, which today would be defined as reformist. Girardin is not an unreflective utopian, but perceives the long road ahead, resignedly observing that the justice of an idea is independent of the means for applying it: that steam is a force is one thing, but finding someone who will invent the boiler and not become discouraged by the explosions and failures is another. Defending the idea that man, the brother of man, does not have the right to sentence him, that society does not have the right to employ the barbaric methods that it uses and that there are better ways to contain the idiot and the madman, implies provoking a first reaction of incredulity, which will give way to reflection that will generate objections, which, for their part, will engender the solutions. And when society lives without jail keepers and executioners, with fewer homicides and robbers, it will
seem as if their existence today without slaves or servants, considering that for centuries it was maintained that such would be absolutely impossible. Consequently, he maintains that he is publishing his book without the least hope of watching the triumph of his ideas, but hopes to appeal to meditation by thinkers and to the controversy of journalists about the most important question of his time, which is the foundation of liberty. With a certain degree of omnipotence he trusts that the sole power of the truth of his idea will regenerate the world after his death. Since he represents a relatively conservative point of view, he makes it clear that he is not criticizing for the sake of criticizing, that he never criticizes an existing institution without thinking about what should substitute it, that if he questions the legitimacy of the right to punish, he does so to substitute a defective wheel in the social apparatus with a better one: simpler and stronger. He wishes to do with freedom what Watt and Fulton did with steam; they were not the discoverers, but simply the ones harnessing its strength. Freedom has won the right to think and shortly later won the speak and print what it thinks, but it is incomplete, because for fullness it lacks the right to do, with no other limit than reason exercised through reason. He closes Aristotically regarding the reform that he is proposing: neither timidity nor temerity.

In the first chapter (On penal servitude) he demonstrates that the sentence is an evil aftertaste of slavery. The corporal punishments, the afflictive punishments, are the last link in the long and heavy chain of slavery, why is exactly why they are called “penal servitude.” Girardin is not precisely timid, since he makes it plain that with this work he is continuing the work of Beccaria, who had fallen short in limiting penal servitude, so that now it is he who is responsible for perfecting its de-legitimization, now against all penal servitude. The penalty has a civil origin. In Rome the free citizen who had challenged the law’s severity was declared a slave of the sentence, “servus poenae.” That slavery stripped him of his inviolability. With that recourse, the Roman punitive power applied slave sentences to citizens. In France the assimilation of the noble with the servant for the same purposes was progressively produced.

Girardin cites Du Boys to reaffirm that the origin of the sentence was to satisfy a desire for vengeance. He aid that vengeance follows composition, recognizing that the latter has a pacifying effect and that it amounts to a reconciliation, that the medieval asylum was an imitation of the Greek and Roman asylum and that the rigor of the sentence increases with the spirit of domination. He makes a lengthy case against the dissuasive effect of the atrocity of tortures, showing with historical data that where the laws have been harsher, crimes have multiplied. He establishes periods, affirming that there was a period in which punishments were cruel and a third in which they became milder, which would be that of Beccaria. He proposes a fourth, in which the sentences should disappear. It is interesting to note that this division into periods generally coincides with what was used by criminological positivism a few years later, especially by Ferri, and repeated up to the present (private vengeance, public vengeance, humanization, and for the Ferran positivists, the scientific period, which Girardin replaces with disappearance.

He observes that Beccaria defends the right to punish in the name of utility, and affirms that in the same vein (more than that of justice) he will have to deny it. He maintains that corporal punishment is the greatest obstacle that civilization has encountered in its progress, to the point of citing the critique of slavery formulated by Montesquieu and affirming that it is completely valid for penal servitude. He thus concludes that the punishment cannot be justified through its legitimacy or through its utility.

In the second chapter (On the legitimacy of the right to punish) he makes use of the arguments that de-legitimize punishment. Outside to the narrow boundary of legitimate offense – he affirms – society does not recognize that one man has the right to punish another. If man does not have the right to punish, by what right does society have it? If society has received it from God, let it start by
demonstrating the existence of God and then prove that he has delegated that right to it. If society in itself does not have it, given the form in which it exercises it, how can it legitimate having it for use? If this use has not been more than a long and cruel abuse, more useful for barbarity and oppression that for civilization and liberty, on what will it base its legitimacy? Nothing testifies to such legitimacy, but everything confirms this abuse. There is not one page in history that has not been stained by blood. What is history but the bloody martyrology of countless victims sacrificed by ignorance, superstition, tyranny, cruelty, iniquity, armed with the right to punish. He adds that to deny these doubts it would be necessary to resurrect from their tombs the guilty immortals, at whose head is Jesus Christ. He vehemently rejects the social contract argument (Beccaria, Hobbes, Locke, Vattel) and also that the right to punish derives from legitimate defense (Blackstone, Romagnosi, Carmigiani), as well as the thesis of social defense (Beccaria, Rossi), affirming that society defends itself by improving things and not appealing to reproducing violence. To the reactionary thesis – which even so is not omitted from the unexpressed thoughts of many respectable persons in our days – of Leibnitz and Joseph de Maistre, who deduce the legitimacy of expiation, he answers, among other things, that moral deformities exist in nature in the same way as physical ones, but asks how the state can want expiation when it glorifies in the name of conquest the same things it punishes in individuals. If required military service is no more than required instruction in murder under penalty of the firing squad for those who refuse, war is the school of all crimes and all excesses. Killing five hundred thousand men and stealing the oil on which they were born is a glorious act immortalized by history. If crime is punished in individuals, no one punishes the crimes committed by state against state or people against people, there is no expiation in that regard. With what authority can society demand expiation if it is guiltier itself? The only expiation he admits is that of reparation, which for robbery is restitution, but the freedom that is taken from the thief does not restore the money to the victim, nor does the life that is taken from the murderer restore the life of the victim. To Guizot and Cousin, who maintain that legitimacy derives from justice, he answers that for that justice would need to be single and universal and not local as is now the case, where what is a crime in one country is not in another. What can one say about justice that burns heretics and wizards? What can one think of justice that punishes thinkers in the same way as thieves? What shall one call justice that has condemned, tortured, killed, crucified, burned, broken on the wheel, quartered, imprisoned or exiled the greatest philosophers, the most celebrated writers, the most illustrious wise men? Justice is an expression of society, but that is not the expression of humanity. To say that punishment is a form of justice is nonsense, since a society’s justice may be the form of human iniquity and a mask for barbarism. He next turns to the Kantian tallion, considering it a poor argument for a philosopher of Kant’s caliber, and denies its legitimacy, also based on the arbitrariness of social laws. As a result of this tour of the legitimating theses, he concludes for the illegitimacy of law to punish, and thus moves to asking about its usefulness.

In the third chapter (On the usefulness of the right to punish) he puts forth the opinion that punishments have no utility at all, with the curious affirmation – to which he will turn more specifically on various occasions – that the only penalty that would really be useful would be the death penalty. Because of that, he maintains that Maistre was right and not Beccaria, who falls into a series of contradictions. Logically, it is Beccaria, the death penalty critic who is wrong, and it is Joseph the Maistre, apologist for the hangman, who is right. Beccaria is inconsequent, since all of his proposals contradict each other: but de Maistre is an imposter, for supposing a God who does not exist, a creator God burning with impatience, punishing his creature with uncontrolled fury. I do not accept either the penalty according to Beccaria or the double penalty according to de Maistre. I say double, because the condemnation pronounced by a God who judges men after death, if it accumulates with condemnation of the man judged by man, constitutes a pléonasm that violates the principle of “no bis in idem.”
Someone who affirms the innocence of the hangman denies the existence of God; one who affirms the existence of God denies the innocence of the hangman. The same guilty party cannot be justly punished two times for the same fault, the first time before his death and the second time after it. Joseph de Maistre is not a Christian but a pagan.

This deals with the situation of social stigmatization that weighs on people who have been freed to de-consecrate the efficacy of sentences that deprive them of freedom and highlights the paradox that the only punishment with a real negative special preventive effect would be death. If one cannot prove the usefulness of the punishment with society having usurped the name of justice to disarm man, has the time not arrived in which man will disarm society in the deserved name of science?

In the fourth chapter (The penal scale) Girardin reviews the punishments in the Code Napoléon and cites authors who criticize its useless complexity. For the purposes of analysis, he reclassifies them into five categories: punishments of deprivation of life, liberty, homeland, civil and family rights and of a sum of money. In the fifth chapter (One deprivation of life), he insists in his curious affirmation concerning the death penalty, clarifying that he is against it, but that before it is suppressed the penalty of deprivation of freedom should be suppressed, meaning that abolitionism would rise on the penal scale instead of descending. He maintains that the advantages of the death penalty are that it does not pervert, deprave, corrupt the enormous staff needed for execution, does not increase crime and so on.

As to its irreparable character, he considers that the forced labor sentence that sickens and kills is also not reparable. He highlights the contradiction between considering life valuable and having no problem in allowing states to destroy innocents so easily due to a small conflict over territory. Although he observes that the death penalty has been abolished in several countries and that its application is less and less frequent in France, he concludes that he is opposed to all corporal punishment and not only the death penalty, and that he would maintain the latter temporarily for murderers exclusively after the disappearance of the remaining sentences and until the total extinction of the punitive power.

In the sixth chapter (On deprivation of freedom), he analyzes the complicated system of sentences depriving freedom in the Code Napoléon and formulates a critique of each one of them, beginning with a life sentence at forced labor, which he considers to be penal servitude par excellence. He holds forth at length against the sentence of deportation, showing not only its failure in the French case but also in Australia, which seems to be a reiterated theme in the penal literature of his time, given the primitive confidence in that punishment as a penal substitute. Regarding the temporary forced labor sentence, he says that he understands it less than lifetime sentences. He maintains that prisons are a higher school for crime, so that society is incredibly contradictory in maintaining a penal echelon system that encourages crime instead of containing it. As for imprisonment, which was a sentence in which the condemned was shut up in a maison de force for five to ten years, he says that it is the prison preparatory school. He goes on at length about the consequences of prison, about the regime, about the never resolved issue of the freed prisoners who relapse as a result of their social stigmatization, and concludes that a sentence depriving one of freedom is not more than a death sentence slowly executed, so that its disappearance is necessary.

In the seventh chapter (On deprivation of one’s country) he criticizes the deportation sentence with the sagacious observation that if France can send its wrongdoers outside of its territory, it should have the duty of receiving foreigners on its soil. It would not be remiss to remember that during Girardin’s time Argentina was sending de linquents to Paraguay. In the eighth chapter (On the deprivation of civic, civil and family rights) he maintains that depriving persons of the condition of citizenship is indefensible and that such penalties are unnecessary, as publicity could easily fulfill the same function. He occupies the ninth chapter (On deprivation of a sum of money) with the question of fines and reparation of damages. Regarding the first, he notes its inequity, and as for reimbursement, he
recalls with admiration the old English provisions that required reparation in common with the delinquent’s origin.

The tenth chapter (On the abuse of the sentence) may be the most interesting one in the book, since it demonstrates that whenever there has been punitive power there has been of abuse of it, meaning that abuse is a structural and not conjunctural note in the exercise of punitive power. If it is characteristic for man to generally abuse all things, it is fair to recognize that society, which has attributed to itself the right to punish, has, at no time and in no country shown itself more prudent than that.

He is not referring here to the ferocity of the sentences, in other words, to their magnitude, but to the acts submitted to it. The history of religious intolerance alone would fill volumes, for which reason he limits himself to citing some isolated examples, beginning with the Mosaic Law. He records that death was the punishment for killing a vulture in Egypt, for sacrilege in Athens (the case of Socrates), in Rome, for Vestals who allowed the flame to die and for Christians, especially under the decree of Diocletian, who were submitted to the punishment for high reason, meaning being burnt alive (vivicomburium) or handed over to the beasts (damnatio ad bestias). He next records the punishments for blasphemies and other sacrileges and heresies, Torquemada, the punishments of Jews for marrying non-Jews or for being served by non-Jewish servants, and the expulsion of Jews from Spain. He follows with examples and concludes that even when the abuse of punishments did not have this incomplete numbering as an irrefutable testimony, it would be absolutely confirmed by all the sufferings inflicted on countless martyrs of their faith and of their opinion.

He then moves to persecution of witchcraft and sorcery, which dates back to the Mosaic law itself (Maleficos non patieris vivere, the Exodus states), continues with the Greeks, in Rome with the Cornelia law and others, then moves on to medieval and modern Europe, to ending with the punishments imposed on those who made attempts on the lives of monarchs through sorcery.

He continues by reviewing the ridiculous definitions of the crimes of lèse majesté, from imperial Rome until England. How many punishments and sufferings have not been caused by Slavery, without which Plato affirmed that society could not subsist. He remembers the Spartan and Athenian laws; regarding the latter he notes that the testimony of slaves was not valid and to compensate for that failing there was recourse to torture; the quaestio answered by the slave under torture was valid, which would also be the case in Rome. He quickly moves to the punitive powers of the pater familliae, the sanctions against unmarried persons and the sentences aga inst those who made attempts on the lives of monarchs through sorcery.

As for gambling, he points out that it is the greatest proof of the impotence of sentences in containing human passions. He records the penalty for illegal hunting, the penalties for suicides, the penalties for using tobacco in Russia, Turkey and Persia, those for contraband, and regarding the latter, he reproduces a phrase from Blanqui that is quite contemporary:

Citizens owe no taxes except to the state. When you require a man to buy a shirt or a sheet under the aegis of prohibition, you impose on him a tax to the benefit of a manufacturer who provides him nothing in exchange.

For those who believe that the severity of punishments will contain those who falsify revenue stamps, let them remember the terrible punishments threatened in the XVII and XVIII centuries, as well as those for contraband. He also refers to the atrocious penalties for other conduct: the duel; for those who do not declare to which party they belong; for calumny; for staging a theater play; to losing the instrument used to commit the crime; to executions of murderous bulls in 1313 and 1499; to excommunication of caterpillars in 1516; to Gaspar Bailly, who in the XVI century published a book on proceedings against animals and the proper defense technique. He notes that failing to become an informer, which honors a man, has in every time and country been the subject of very serious punishment. Thus it was in France, including in the Code Napoléon until 1832, for those who did not denounce crimes of lèse majesté and plots. He records the prohibitions in the Convention for emigrants, the sumptuary laws (sanctions for the number of servants or animals and for eating certain foods, using certain clothes, building a new bedroom in a house, etc.). He recalls that the first
German printers who took books to Paris were condemned as witches and saved themselves by fleeing and the no less interesting ban on teaching any logic that was not Aristotelian, restored in dictatorial Argentina. He concludes in the following manner: After having read these very incomplete principles, how could one not agree that the annals of criminal punishment testify less of the ignorance and perversity of peoples than of the stupidity and cruelty of the governors. But they also prove that greater than the arbitrariness of the punishment is its impotence.

After rejecting as absurd the so-called specific sentences, such as cutting off the hand of a thief or a blasphemer’s tongue, etc. (eleventh chapter, On specificity in sentencing), he begins the next chapter (On penal elimination) with an observation that is fully relevant today: What characterizes penal progress, much more than mitigating the sentences, is the successive impunity for acts that were considered crimes or wrongdoing, as well as their more exact, more precise determining, more founded on the truth, in other words, their definitive elimination. According to that criterion the current tendencies in penal legislation around the world would be clearly regressive, as is noted by authors who still maintain liberal lines of thinking.

Girardin relates that the annals of more civilized countries abound in extreme and cruel punishments for witchcraft and sorcery, as well as for people who believed they had the freedom to think and to express themselves, and more recently the so-called press crimes. He asks who would be to blame for those condemnations, the condemned or the judges, and concludes that it is time to finally emerge from the penal labyrinth in which society has left humanity lost for centuries. He affirms that to do so it should start by eliminating the crimes that exist only in the imagination of ignorant peoples and backward legislators; in the second place, the numerous and unnecessary distinctions in the penal scale should be cancelled. In this way, he states, there will be a reduction in the number of wrongdoers that repression has produced and that penitentiary experience testifies to, because punishment has never corrected others who would have been corrected without it, be cause of the return of their absent conscience; instead, he maintains that punishment has often impeded correction. Repression – he affirms – is a pillow on which society has slept for too long. If it delays in awakening, it will be swallowed by the revolution that is undermining the soil on which we have carelessly built our dwellings, an implacable revolution, which we can only escape through a radical reform, one of whose first steps must be penal reform. They are blind who do not see that the prisons that tranquilize us are the headquarters for our threat. What is the first act of the victorious crowds? Is it not freeing the detained, bringing them into the ranks and sometimes making them chiefs? Having nothing to lose, they risk everything: there is no excess, it has been seen, which will detain them.

He roundly affirms that the time for legal repression has ended and the time has arrived for penal elimination. That elimination will not be excessively hasty or excessively radical. Until the day for the definitive abolition of all corporal punishment, of all of the different penalties of penal publicity and of the proportional fine for the fortune certified by the tax transformed into insurance, there should be no more than one crime, homicide, and a single sentence, death. He continues by demonstrating how various criminalized conflicts could be resolved without punishment; although some of his solutions are simplistic, others make sense, broadly speaking: one prevents corruption of public employees through effective control that will make it almost impossible; if illegal arrests are still possible, it is the fault of society. As for robbery, he reasons that after persecution of heretics was abandoned in France the number of Protestants diminished, the same as happened with witches and sorcerers, and finally, he observes that when the punitive power is interrupted violently after each revolution, far from increasing, homicides and robberies diminish.

He maintains something that seems to occur in our daily reality: a society offers more security when it has fewer criminal laws and even though he does not believe that the punitive power can disappear very rapidly, he at any rate believes that one should ponder the major faults that produce
punishment, which are people who are freed and recidivists\textsuperscript{78}. Girardin did not perceive that the penal system provokes reproduction because it needs a clientele to feed itself, but he hit the nail on the head regarding the phenomenon of client reproduction. In the words of his time, given that the problem of freed prisoners has no solution, he follows Montesquieu in affirming that a good state should dedicate more time to preventing crime than to punishing it, thus concluding that all corporal punishment should disappear\textsuperscript{79}, except that of death, whose disappearance he reserved for the end, because if was not reproducing.

In the thirteenth chapter, \textit{(On attenuation of sentences)} he says that attenuating sentences, their short duration, can seduce those who believe they have the power to correct the guilty, but it is an illusion that will not be shared and that will be rejected by those who have a firm conviction based on in-depth study that the sentences, whatever they are, pervert the condemned instead of correcting them\textsuperscript{80}. He cites several authors who make it clear that the moral state of France in the era of cruel sentences was not superior to that of its own time\textsuperscript{81}. Although he does believe that attenuated sentences are positive from the point of view of humanity, society and morals as a real penal progress, it should still not be thought that they are more effective than cruel sentences, meaning that he concludes that neither is effective\textsuperscript{82}. The great problem that Girardin poses for punitive intervention is that of the freed prisoner, whom he calls the soldier of all revolutions\textsuperscript{83}, who represents a greater threat on leaving prison than on entering, which he reaffirms with numerous opinions. If it is certain that freedom leads to recidivism, if it is true that corporate punishment is converted into a school for perversion and revolution, in order for it to cease being a school for cruelty and tyranny, we must curb it\textsuperscript{84}.

After concluding the de-legitimating critique of punitive power in the first book of his work, Girardin dedicates the second book to construction, meaning to imagining society without corporal punishment. The first chapter of this second book \textit{(On penal publicity)} is dedicated to demonstrating how social sanctions can adequately replace formal sentences with much less artificiality and greater benefit. Human freedom and corporal punishment are two terms that exclude each other; but if there is a radical incompatibility between indivisible liberty and legal penalty, there is not between indivisible liberty and penal publicity\textsuperscript{85}. Publicity is the necessary presupposition for social sanctions, the true natural penalties, to work. There are many social acts – says Girardin – that are punished through contempt, hatred, misery, ruin and lack of consideration, and that are not brought to the judges’ attention. In other words, he proposes publicity that will free conflicts so as to face social sanctions. The penalty that I propose is not some invented penalty, it has nothing arbitrary about it, it is the inherent consequence of the action itself, it is this action that is the body’s shadow, it is what should be, it is publicity, no more, no less. As gravity is a law, publicity is as well. Publicity is to the social order what light is to the physical order\textsuperscript{86}.

As to the inevitable objection that without a formal penalty there would be an increase in crime, he maintains firmly and very modernly that criminality and punishment are two independent terms\textsuperscript{87}, which he proves with abundant data from his time. The independence of the two variables is thus not a new ascertainment at all, even though it is always denied by judicial penal discourse.

In order to orchestrate publicity, Girardin proposed a \textit{life record}, which was a sort of letter that citizens should carry, in which would be recorded the entire course of their existence and condemnations would be noted. It was a sort of record of repeated debtors that was quite impracticable in its time. The book includes a detachable page with the model, albeit an ingenuous one, which the author imagined for receiving the data. He supposes that he will be accused of trying to bring back branding and defends himself by saying that this would be a mark transformed by society and that it would exclude barbarity. He asks wrong there would be in persons who had blotted their life record receiving a corresponding social sanction. He cites Montesquieu and Rousseau in supporting the efficacy of his proposal and ends
by asking: and giving as the only answer to crime committed that of crime recorded, what will society do? And he responds that he will be reproached by his family, his community and his birthplace, all of them, and cannot elude this reproach any more than he can elude his shadow. He recognizes that in some manner he is proposing reestablishment of the sentence of voluntary exile, in other words, of exclusion from society. The only acts that he temporarily leaves out of his proposal for publicly marking faults in a record system and leaving them freed for social sanctions were homicides, for which he proposes to temporarily maintain the death penalty until it could disappear, taking into account that its frequency was on the wane in France.

In this aspect, Girardin’s position was extremely interesting, since starting with a reality of penal scales that was crowned by the death sentence for murder, he was against having abolition begin with the death penalty and inverted his proposal, meaning that he first opposed eliminating corporal punishments and shortly after that eliminating the death penalty. He expresses himself in a manner that criminology would later recover and present as innovative with the sociological critique of the total institutions of the 1960’s, and he expresses himself in the following manner on the transitory moment before disappearance of the death penalty. Experience proves that every penitentiary system, whatever it may be, de moralizes the guardians, making them cruel and tyrannical without moralizing the detainees, who leaves cynical and hypocritical. This is evidently not yet the society without corporal punishment, but it undoubtedly will be a great step forward until the society of the year 1900, until a society in which there will no longer be any penalty save for penal publicity and where pecuniary penalties replace legal and corporal penalties. Of all of the sources of depravation, the coarsest will have been suppressed; of all of the schools of tyranny and cruelty, to most dangerous ones will have been closed.

In the second chapter of this second book (Society without corporate punishment) Girardin deals with showing how a society in which sentencing has disappeared should be reorganized. If I have accumulated evidence that, whether they are aggravated or attenuated, the penalties in effect are all equally important, whether they propose to amend the condemned or to intimidate him, the consequence that logic will extract is that we must seek a way that is different from what society has followed for so many years, obstinately marching against the flow of humanity. According to Girardin, society’s mistake – that constant repetition has est ablish a s a truth beyond question – is thinking that concentrating a group of persons considered dangerous due to their perverse natures will neutralize them, when in fact it has done no more than to increase the danger and reproduce it. He maintains that one should do the exact opposite, in other words, distribute them so that they lose themselves in the immensely superior totality of the population. To do this they should be placed under the surveillance of their pecuniarily responsible family, but above all, that of their birth commune (comuna materna). It seems incredible, but in 1871 he defines the function of the welfare state, except that it is in the hands of the municipality. He prophetically foretells its failure in the hands of a centralizing state, which he considers to be an obstacle that complicates everything, and revalues the function of the municipality. Let there be treatment of the condemned, the freed men, the alienated, the abandoned children, those invalidated for work or laborers deprived of work due to causes beyond their will, let all of those and other social problems be treated. There is nothing which, after the family, the normal commune cannot resolve. He clarifies that in this regard the idea of the phalanstère is fruitful, but specifies farther on that he does not join in the utopian socialist conception in that regard, but demands that the commune assume its real municipal function and nothing else. He hammers away against state centralization and maintains that the centralized state is a state condemned to forced labor. That is why he defends a free commune in a free state, in which they would be the links in a chain (which would be the state). He calculates that in France this would require about five thousand communes. He uses numbers to show how to resolve the penitentiary problem, since each commune would be responsible for a handful of
prisoners, totaling no more than ten. With this, the evils of penal concentration and overpopulation would end. He rejects the idea of a halfway house (patronato) after freedom and demands that this stage intervene before prison and its place, and not after the evil has been done and is difficult to remedy. He resolves the financial question of the communal welfare state that he proposes through a reform of the civil code, which makes the comuna materna the heir of a child of all of its inhabitants, as a form of compensation for all of the new tasks in which it invests. In that manner he proposes to attack the root of what causes robberies and homicides, preventing them before they are born: it is a question of suppressing ignorance and misery at the source. If that idea were false it would not be true that the criminality that falls to the blows of the courts and police would be more rare among those who know how to read and write than among those who do not, among those who reason that those who do not reason, among those who have wellbeing than those who do not.

He resolves the financial question of the communal welfare state that he proposes through a reform of the civil code, which makes the comuna materna the heir of a child of all of its inhabitants, as a form of compensation for all of the new tasks in which it invests. In that manner he proposes to attack the root of what causes robberies and homicides, preventing them before they are born: it is a question of suppressing ignorance and misery at the source. If that idea were false it would not be true that the criminality that falls to the blows of the courts and police would be more rare among those who know how to read and write than among those who do not, among those who reason that those who do not reason, among those who have wellbeing than those who do not.

He continues by defining in detail the ideal of a welfare state, maintaining that with technical and administrative advances by the state and the economy it is inconceivable that there be a single illiterate adult, a single inhabitant not insured against all contingencies, without certainty that they have access to wellbeing, among them hard work and probity demand less effort. As work becomes less burdensome robbery will become rarer and as robbery rarefies the risks of homicide will diminish.

Girardin considers that a society without corporal punishments must educate for solidarity and cease to train the military for killing, and as it educates for values it should educate for honesty. He does not propose banning alcohol, but instead affirms that by giving people the opportunity of going to a café they will stop going to a bar, roundly maintaining that the increase in wellbeing will raise the level of morality.

He maintains that once a principle is enunciated one must have enough courage to extract all of its consequences, without neglecting any. That defect he observes in those who defend in any means a corporate penalty, as expiation or as retribution, as intimidation or correction, who admit it halfway, who admit it without full rigor, an inconsistency that is condemned by the uncertainty of their hesitation, in both the old and the new world.

He compares the risks of war and conquest with homicides and robberies with the statistical probabilities of being a victim of an individual act and considers that the first are much greater. Metaphorically, he considers society to be a besieged and isolated city, which might reach the point of practicing cannibalism, but as that ceases to be necessary it disappears; in the same way he believes that robberies and homicides will disappear, as civilization has made cannibalism disappear, and thus civilization will take the place of barbarism. He maintains that society has the task of de-habituating humans from homicide and robbery and to achieve that proposes: extinguishing war, investing the budget for war in education to move away from general ignorance, eliminating inveterate and inherited misery, establishing pecuniary liability for relatives in the same degree in which they qualify for an inheritance, pecuniary responsibility for the comuna materna to the defect of the family, compensated by the inheritance of a child. He also proposes to free the state regarding crimes and wrongdoing, with liability being placed on the families and the communes, transforming the obligatory tax into an insurance premium that will cover all social risks, to substitute the passport with a life record or general and special social security insurance policy. He defends establishing social welfare through retaining one-hundredth per hour of work, collected and deposited by the employer, offering mutual and real estate credits and replacing all existing sentences by a fine, interdiction or death, until these can also be made to disappear.

Regarding penal slavery he insists: The extreme difficulty – or impossibility – of reintegrating freed prisoners into a society that has rejected them without pity, that has struck them, branded them, jailed them, ossed them into perpetual misery and obstructing their capacity to rise again,... that impossibility is the sovereign condemnation to penal servitude. It is obvious that what he calls penal
servitude is the result of the reproductive function of the penal system. Of it, he affirms that the slavery of corporal punishment cannot continue. Everything one could say of it will be as false as what Aristotle said when he declared that there could not be a society without the slavery of its time. Nonetheless, the ancient slavery and feudal servitude disappeared without taking society with them, for which reason he is fully confident in a society without corporal punishments, which will be a very dynamic society capable of saving itself from a modern revolution, which would be achieved not by weapons but by votes. He states that just as it is too late to cry "fire!" when the flames are already devouring everything, it would be too late to cry "let us have at ignorance and misery!" when the freed prisoners, recidivists and others have destroyed everything driven by ignorance and misery.

Girardin asks: Can society subsist without the right to punish? In other terms, can it substitute the culture of man for man for that of punishment of man by man, which is only possible when man dominates man? To achieve that he proposes to suppress military training, stopping half a million men marching with weapons and trained to respond to the cry of "fire" by killing their someone, maintaining only the gendarmerie, substituting bodily recruitment with intellectual recruitment, the spirit of rivalry with that of reciprocity, armed peace with assured peace, nationalism with rationalism, the old international politics with inter-communal politics.

Girardin was firmly convinced that punitive power would disappear, as had other things that at his time seemed to be consubstantial with society itself. Neither paternal power, nor marital, nor domestic nor public power, nor the same penalty are today what they were during the epochs I have just finished summarily remembering, and what today seems to us incredible atrocities were at the time considered just sentences and legitimate necessities by men such as Cicero and Tacitus, and by judges such as Paul and Ulpianus. Farther on he remembers Fachninei’s critique of Beccaria’s book and in the response by Muyard de Vougans in 1780 to that author’s critique of torture, and laconically observes that nine years after that work, the revolution broke out. He remembers the derogation of torture in 1780 and the later efforts to eradicate all of its manifestations and revise the ordinances of 1670, which brought for rejection from the judges (the so-called parliaments). He concludes with the following paragraph: Torture, quartering, and all manner of torments without which it seemed society could not exist, have disappeared. Today molten lead and boiling oil are no longer poured on the patient’s wounds, and society subsists, nonetheless, as it will continue to do so after prison, reclusion, detention, life and temporary sentences at hard labor, deportation, and finally, in the first year of the next century, the death penalty.

In the third chapter, finally, the author appeals to controversy. He recognizes his limitations, considers the possibility of overcoming wars, laments that Bismarck unleashed the war on France, paints the Paris Commune as a lamentable act that even burned all of Paris, and, finally, calls for a controversy to debate the idea that he has launched in his book.

We find ourselves faced with an author who can be considered a forerunner of the welfare state, who in 1868 – before the Paris Commune and horrified after it – adopts what he calls a reformist path and predicts that the future welfare state, managed by municipalities and not by national states, would make corporal punishments disappear and with that crime would drop. Although this did not happen as quickly as Girardin intended (according to his timeline sentences could disappear more or less rapidly and the remnant death penalty would disappear in 1901), more than one hundred and thirty years later one cannot deny that one part of his forecast has come to pass: the welfare state has arrived in some regions of the planet, although it has not spread to the rest. Where it has arrived, the welfare state has made the death penalty disappear and the remaining corporal punishments have been greatly reduced. For all that, punitive power has not totally disappeared, but now, the welfare state itself is tending to shrink and disappear with the resulting new expansive tendency of punitive power, which is recovering the characteristics that Girardin had considered overcome by the limiting liberalism of Becaria.
Girardin’s work is the work of an authentic abolitionist and also of a politician. He is not a utopian or an old-style revolutionary, but a progressive liberal who dreams of a welfare state or a municipalized state that provides for needs. The virtue of his work is that it clearly de-legitimates punitive power, with the same arguments that almost one hundred and fifty years later continue to be undeniable. His tactics of having prison disappear first and after that the death penalty is that of a politician: he would conserve for this penalty for awhile for crimes that cause great alarm (he was the first mass circulation journalist). His error consists of not warning us of what Foucault noted a century later: maintaining the penal system is not interesting because it prevents nothing, but for the form of power that it exerts and that translates into surveillance for the whole population. The question that remains is the following: today, when electronic technology allows us to carry out the publicity that Girardin called for in a much less ingenuous and much more effective manner, one should ask if that means of control and surveillance will not tend to replace the penal system, and also if that control would not be much more repressive than punitive control itself, and if the two would not achieve symbiosis and increase the levels of repression. It is suggestive that one of the most debated rights in our day is the right to privacy in light of the incredible advance of publicity.

AUTHOR’S NOTES

5. Girardin, op.cit., p. 3.
19. Ibid, p. 16.
27. Ibid, p. 32.
28. Ibid, p. 34.
29. Ibid, p. 36.
32. Ibid, p. 42.
33. Ibid, p. 43.
34. Ibid, p. 44.
35. Ibid, p. 46.
37. Ibid, p. 52.
38. Ibid, p. 57.
40. Ibid, p. 61.
41. Ibid, p. 63.
42. Ibid, p. 65.
43. Ibid, p. 75.
44. Ibid, p. 82.
45. Ibid, p. 113.
46. See for example, in 1875, the work of Concepción Arenal, *Las colonias penales de la Australia and la pena de deportación*, published in her *Obras Completas*, Madrid, 1895, Tomo X.
47. Girardin, op.cit., p. 114.
48. Ibid, p. 117.
49. Very often on this issue he cites Charles Lucas, who was one of the highest authorities of his time on the subject and who continued to be during later years: by the same author, *La récidive et le projet de rélégation des récidivistes, extrait du compte-rendu de l’Académie des Sciences morales et politiques*, 1883; idem, 1879.
86. Ibid, p. 280.
87. Ibid, p. 299.
89. Ibid, p. 320.
90. Ibid, p. 322.
91. Ibid, p. 324.
93. Ibid, pp. 326 and following
94. Ibid, p. 335.
96. Ibid, p. 338.
100. Ibid, p. 343.
101. Ibid, p. 344.
102. Ibid, p. 349.
104. Ibid, p. 361.
Chapter VII

Globalization and the Current Orientations in Criminal Policy

Eugenio Raúl Zaffaroni

“Proportion is not always respected by Roman laws and they punish with death the majority of expiated crimes. This disorder was born because of corruption in customs and in the state. In Rome’s better days they maintained the proportion of sentencing more exactly, but having lost virtue, extinguished the love of public welfare, neglected public education, and, thus corrupted customs, there was a growth in crimes that always were multiplied because of vices. Sentences that at one time contained the virtuous citizens could certainly not contain corrupt men. No other remedy could be offered then for public disorders than to increase the sentences, given that they could not or would not adopt the true remedy, which was the reestablishment of the ancient system and the return to good customs. Thus, the blood that at one time expiated the more atrocious crimes was now spilled to punish less severe offenses.”

“The cruelty of sentences became a principle of criminal legislation when terror was supposed to freeze the spirits.”

“With exacerbation of the penalties a distinction was also born between them according to the diverse condition of the citizens, so that the harsher or lighter sentence did not correspond to the greater or lesser atrocity of the crime, but to the nobility or plebeian status of the delinquent.”

“At the same time that the more serious penalties were being established they became more arbitrary, either because judicial arbitrariness was the necessary consequence of political arbitrariness, or be cause of the lack of an exact penal code.”

Francesco Mario Pagano

Principi del Codice Penale

Opera postuma, Milan, 1803, p.58.

Introduction

1. It is fair to recognize that globalization has considerably altered the center-periphery paradigm, with a tendency to present it in other terms that – at least for the moment – one cannot exactly predict. We believe that, for those of us for or a re ha bituated to thinking about this paradigm, however much we may be aware of that transformation, habit makes it impossible for us to completely eliminate it from our horizon of understanding, which perhaps could be done more easily by colleagues from other latitudes. Given that it is not clear how it is being modified, we do not know if this is a limitation of knowledge of the globalization phenomenon or an advantage. At any rate, it is a warning that we believe needs to be formulated.
2. There is—we know that much—a limitation of knowledge for anyone who takes up the theme, that one may not remove from prior consideration, whatever may be the paradigm used for analysis. It consists of the almost infinite edges that demand enormous precision. It would be simplistic to hide the difficulty by a partial approach to presenting it and limiting it to the aspects that we believe we understand, hiding the rest of our profound ignorance in a discrete omission. That would be an intellectual disloyalty, and would furthermore conspire against a vision of the whole. We will not try to hide our doubts or the enormous gaps nor will we avoid a synthesis that is required to maintain the vision of the whole problem, even at the risk that—because they are a synthesis—making some affirmations that may become cryptic. Anything is better than simplifications that introduce falsification.

Globalization as a fact of power and the Single thought as a legitimating discourse

1. Marching directly to the theme, it is a question of establishing a relation between one phenomenon of general power and another that is particular, each with its respective discourses and ideologies. The general phenomenon is globalization. But globalization is an ambiguous expression, because it is employed both to designate the fact of power itself and the ideology that intends to legitimate it. It is vital not to confuse both concepts, and thus we prefer to call globalization the fact of power in itself and to use the single thought of globalism (Beck) or market fundamentalism (Soros) to describe the legitimating ideology. In that understanding, globalization is not a discourse, but nothing less than a new movement in planetary power. It is a reality of power that has arrived and that, like the previous ones, is not reversible. The mercantile revolution and colonialism (XV and XVI centuries), the industrial revolution and colonialism (XVIII and XIX centuries) and the technological revolution and globalization (XX century), are three moments of planetary power. There is no lack of people maintaining that globalization is the totality of that process of planetarizing power (Wallerstein), as it would not be conceivable without the previous stages, but it is preferable to reserve the designation for the current stage, without prejudice to recognizing that—like every phenomenon of power—it has a historical gestation. As happened with the previous moments, there is a change in the perspective on the world in the sense of a new significant mark for all things, and also like them, it arrives accompanied by a legitimating discourse (theological supremacy in colonialism, racist evolutionism in neocolonialism, the single thought in globalization). That is why globalization is not the market fundamentalism of von Haydeck and Friedman: that is merely the ideology of some of its interpreters, who assume a legitimating function for the advantages that the protagonists obtain by—for the moment—seeming to achieve the upper hand. Just as with colonialism, the recognition of the irreversible fact that Cortés conquered Mexico does not imply a assuming the attitude of la Malinche, in globalization the single thought or globalism would be nothing more than malinchism facing a new fact of power.

2. The preceding moments of power produced horrors. Dispensing with—so as not to move too far from—those caused by colonialism, it is unquestionable that industrialism caused the neocolonial genocides, the frightful exploitation of the periphery by the center, but also democracy, the republic, revolutionary ideas the a wareness of hu man r ights, m eaning a l l of t he de preciated i deology of modernity, which is nothing more than humanist thought. In Brazil, the sugarcane plantation slaves were turned into famished freedmen in the cities; in Mexico the Indians were transformed into peasant servants of the absentee landholders, in Europe the peasants became the urban pariahs described by Dickens and Zola or our immigrant grandparents. Savage capitalism led to crisis and that to disciplined capitalism and the welfare state in some parts of the planet and also to the world wars, the Holocaust and the bureaucratic single-party dictatorships. And the penal system was immensely cruel and bloody in the period of urban concentration, but also the liberal reaction imposed limits that medical police racism
(dangerousness positivism) and the totalitarian and authoritarian states proceeded to eliminate. In other words, formal punitive control had an entire class of alternatives in the industrial and neocolonial era. One cannot escape the fact that globalization opens up analogous perspectives. There is no a bsolute evil, but absolute good is also not of this world; thus, we do not believe that penalists should assume attitudes that are either apocalyptic or integrated, but only – and nothing less – critical ones, which is not easy in light of the paradigm shift which, as in previous cases, tends to alter the meaning of all things and leaves us without categories of thought to allow us to come closer to understanding reality.

Characteristics of the new planetary power

1. One may summarize the principal characteristics of this new moment of planetary power in the following way: A) The technological revolution is, first of all, communicational: the speed of communication has increased to limits that were unthinkable a few years ago. B) There has been a reduction in the economic regulating power of all states, although in different measure, invoking the need for favoring a worldwide market. C) There has been an acceleration in concentration of capital, with an obvious predominance of the financial sector. D) Capital is displaced at zero cost, to where the profits are greatest, generally at the cost of reducing expenses by cutting personnel and lower taxes. E) Political power competes to attract that capital, meaning also that politicians compete to reduce its power, especially in peripheral countries. F) The use of salary, employment and taxation as variables for a adjustment, leads to growing unemployment and deteriorating salaries, while lower tax revenues allow fewer social investments. G) As a result of all of the previous points the states have lost their capacity to mediate between capital and labor. H) The labor unions lack the power to protest against the situation. I) Financial speculation is adopting forms that make the line between lawful and unlawful increasingly murky. J) The tax havens for capital of unlawful origin are known to all and no one can block their action. K) The tax system is inverted, compensating for lower taxes on capital with higher taxes on consumption, which falls more heavily on those with less income.

2. The principal consequence of this phenomenon of power is to generate a broad and growing sector that is excluded from the economy. The exploiter-exploited relation has been replaced by one of included-excluded non-relation. The specialized bibliography – especially German and European in general – frequently speaks of Brazilianization as a generalization for a model with 20% included and 80% excluded (20 to 80 society), which leads to a society where isolated ghettos of wealth are fortified in a sea of poverty. In a model like that is there scarcely any space for the middle classes. The excluded are not the exploited: the latter are necessary for the system; the former are too much, their very existence is unnecessary and bothersome, they are socially disposable.

3. The main political consequence of globalization is the impotence of national political power in the face of globalized economics. That can be explained in that the first world politicians in the 1980s ceded their power, renounced their exercise and freed economic forces that in concentrating themselves supranationally cannot be controlled or regulated. This means that there is a globalized economic model, but there is no global society nor are there strong international organizations and much less a global state. Single thought, in legitimating that situation becomes – in a certain sense – an anarchical ideology, as with every anarchism, it is so finite a radicalized jusnaturalism. In effect, market fundamentalism radicalizes the dogma of market equilibrium and makes it absolute by rendering the state unnecessary.
The general ideological disconcertment

1. A different moment of planetary power changes the world understood as the set of meanings or the why of all beings, so that it makes the previous key to understanding incomprehensible. Eduardo Galeano has rightly observed that Alice, in order to get to the inside of the world today, would not need to go through the looking glass, because sticking her head out of the window would suffice. However, we can only add that it is difficult to endure the harsh spectacle that the window shows, and also that one feels unbearable impotence at not being able to understand such a spectacle. In this emergency, unfortunately, there is often an attitude of taking the mirror for the window, with the illusion that all is in order. That confusion is an unconscious escape mechanism that is called denial but that assumes the form of autism and – as an escape mechanism – is the current response to the absurdity, which is the superlative expression of the structural disparity between reality and norm, between being and should be, not judicial – which would be less of a problem – but also ethical. No one can bear the spectacle in which all values – including those of human life itself – are converted into market values, without being able to explain it, without categories for thought that will allow one to think and act on this reality to overcome or transform it.

2. Those categories do not exist: we are faced with a world that can be described but not explain, except for some commonplace statements, because the integrated invoke David Ricardo and Charles Darwin, which the apocalyptic call on the utopian Marx. They intend to explain the XI century with ideologies from the XVIII and XIX. The anguish of the window makes us stick our head out of it without categories of thought that will allow us to explain what we see. That explains the autism, the preference for the looking glass in which everything appears backward, and thus, in apparent order.

3. When we look out to window through the discourses of the penal system, the spectacle seems even more unbearable because it is more absurd. To the emotional load of the observer as a participant of that reality is added that of the specialist, and this transcends any human capacity for tolerating the incomprehensible. We see market criminality at a macroeconomic scale without any containment of its revenues in well-known, agreed-upon and safe tax havens. State prohibitions only serve to increase the income from a thousand forbidden trades. The world seems to lack a rudder: each character, however powerful he or she may seem to be, appears to be like a disposable microchip in an enormous electronic device: they cannot stop doing what they are doing, under penalty of being immediately replaced. Theorists of this system celebrate it under the name of autopoiesis, and say that because of it there is no use in making speeches warning about the risks of social cataclysms, of the total crisis of the financial system or of global warming, in the case of a pile of microchips inserted in the device or of offering it to a large number of people smiling into the looking glasses. Some intelligent conservatives are starting to discover that Marx’s romantic utopias were a sign of the times, soon used by pamphleteers, but that he also wrote something about the concentration of capital that is worth reading, at the same time as other beneficiaries of the system are realizing that if they cannot control it they will be dragged along with its downfall.

The disconcertment of penal system ideologies

1. The general ideological disconcertment is more severe in penal systems discourses, criminological or criminal policy, considering that those have not always had a thinking content, if one understands thought in the original sense. There have been high points, such as those derived from the penal illuminism of the second half of the X VIII century or first half of the XIX, and moments of profound decadence, such as during foundations of the inquisition (XV century) or of its resurgence in
the positivist dangerousness or medical police ideology. The irregular progress of the level of thought in the penal discourse indicates the sharpening of dangers in the disconcertment in that area, the greater risk of a utism, the lower level of preparation and training so as to bear the anguish of the lack of categories of thought.

2. A very brief criminological consideration would be useful in order to appreciate the magnitude and causes for the disconcertment in current penal system discourses. First of all, globalization has definitively buried the old paradigm of etiological simplistic. A simple example that is so pedestrian and banal that it would not even deserve the slightest journalistic consideration demonstrates the almost infinite complexity of the problem: in any Latin American city a teenager threatens another with a firearm to steal his or her tennis shoes. This insignificant fact is enough for communication and for the penal system itself, to show the falsifying impracticability of any simplistic statement: 1st – The object of the robbery was made in Asia by enslaved children. 2nd – The motive for the robbery is not the need for survival, but that its object is elevated to a status symbol among adolescents because of worldwide advertising. 3rd – The enslaved Asian production replaces the work of the robber’s father or mother, fired in the country by the same company to reduce production costs. 4th – The father of the robbery victim, as a middle class person, can buy those shoes for his children because we obtain greater income from his modest invested savings. 5th – He will be happy when those reduced savings allow him a higher income. 6th – That income will increase because the accumulated capital of all of the savers will be invested in more profitable undertakings. 7th – Those undertakings will increase income through reducing jobs and in places where there are lower taxes. 8th – The higher the small income of the father of the victim is, the fewer will be the opportunities for future work for the victim of the robbery and the greater will be the chances of the middle class saver of having grandchildren whose parents are unemployed. 9th – Lower taxes will reduce social investment and the grandchildren will have even fewer opportunities for health and education than the robber. 10th – It is not rare for the father of the victim to call for the death penalty, fewer guarantees and direct police measures (homicides) and to vote for politicians who call for such actions. 11th – Those politicians end up diverting scarce social investments towards clientelism (corruption) and reducing even more the chances for the saver’s grandchildren. 12th – The more arbitrary police will be more corrupt and will allow more contraband and black market opportunities for guns that can reach more adolescents. 13th – Greater corruption in the penal system will determine that its own executive agencies will become cogs in the criminal organization or in the administrator of its own crime-friendly zones. 14th – That will increase the chances of victimization through kidnapping of the savers themselves and the resulting loss of their capital. The old criminological causality is entering an enormous crisis.

3. That complexity in the sphere of social since has an immediate consequence in judicial penal thinking: it becomes extremely difficult to reference criminal law with criminal policy objectives (as some contemporary thinkers, e.g. Roxin, intend) without taking into account this overwhelming complexity. That is why it is not strange that some may choose to leave aside those references and prefer to focus on deductive constructions of a more or less Kantian or Hegelian type, whether through radicalization of systemic thought in sociology (Jakobs) or a direct assumption of the idealist ethic (Köhler) or even – which is even worse – by a return to the technique of the commentators and post-commentators, who systematized without reference to any political function for or against. This regression is not odd, since one may observe that the single thought or market fundamentalism and idealist retributionism have the same origin (in the thinking of the XVIII century) and share the same distorted anthropological image: the single thought converts into dogma that which is an ideal, meaning that it gives as reality a guiding should be, which is equilibrium in the markets. That supposes that human conduct are always governed by reason, which presupposes that humans always act rationally. Idealist retributionism does the same; it presupposes that a human, before breaking the law, makes a
rational calculation of costs and benefits. That leads to the conclusion that increasing the costs (the sentence) reduces lawbreaking. The dogma of rationality of human action as the common basis for single thought (or market fundamentalism) and penal retribution, is clearly manifested in works and theories such as those of Ludwig von Mises, who for many years based his construction on the concept of action on Welzelian finalism.

4. It seems a lie that, with such weak foundations both economic power and the penal system are legitimated, against all evidence, including personal or introspective evidence. It is no use observing that the markets do not tend towards equilibrium but to immediate and unlimited competition or to herd behaviors that are hard to explain, that there are runs, panics and other phenomena that have nothing rational about them, or that humans kill each other in uncountable wars around the planet; it is useless to remember economic history or psychoanalysis, faced with dogmatic deductivists whose autism ignores the inspired warning of Martin Buber: **human beings are not rational, but they can learn to be so.** When one confuses should with being, rationalist idealism is distorted to the point of radical irrationalism, since **there is no worse irrationalism than considering human rationality as done,** with the resulting wreckage of any stimulus for struggling for it, every time one does not fight to achieve a natural fact.

Macroeconomic wrongdoing: planetary power

1. Industrialism created racist anthropology to legitimize neocolonialism, in other words, the planetary power system, so much so that it invented sociology (beginning with criminology with Quetelet, Guerry, etc.) to legitimate internal social control. Globalization – at least for the moment – is less creative, because, as has been seen, it resorts to ideologies from past centuries; it does not invent sciences but instead appeals to myths. In summary, those are the natural equilibrium of markets at the planetary level and the preventive efficacy of punitive power at the national level (or what is worse: the absolute need for reaffirming the norm, as an extreme of idealistic romantic irrationalism). One should not consider this decadence strange, because it is known that the more irrational the exercise of power is, the lower is the level of discursive rationality that it intends to legitimate. In this regard, one should not confuse rationality with elaborateness of the discourse; a discourse can be elaborated with great sophistication, but if it rests upon a false base, it will be no more than a better systematized delirium, and it is obvious that deliriums do not become rational that way.

2. The reality of planetary power is contradictory in comparison with the immediately preceding moments of world power, or at least they were lived in that manner. What were previously crimes against the national economy, such as hoarding, artificial changes in markets, use of confidential information, tax evasion, monopolies and oligopolies, and conduct that borders on national classifications of less sophisticated crimes, such as extortions and swindles, are now lawful conduct in the world economy. In the absence of a regulating or criminalizing power at the international level, these activities are carried out with impunity, with the particularity that they are committed at macroeconomic proportions, meaning that a astronomical sums are involved. A review of the most elemental bibliography on the subject will be enough to find descriptions of activities and observed that recourse to ancient criminal methods is incessantly incremented, because even if some operators wish to do without them, the competition will employ them and eliminate them from the market. In that manner, the so-called or organized crime – a quite durable concept, which is becoming the rule and day by day the states have fewer possibilities for containing it, because they themselves are victims of its extortions.

3. The most serious ecological crimes are committed by the economic power itself, which has been planetarized through globalization. None can detain the accelerated destruction of planetary living
conditions. The Rio UNCED 1992 conference demonstrates this, not having gone beyond expressions of good will. Economic power is in the hands of persons who have no alternative but to seek for greater income in less time, because otherwise they will lose their clientele who are seeking such income and will move to other operators. One of the greatest costs of that profitability is the progressive and unlimited degradation of the environment. The operators themselves try to calm opinions by hiring scientists who underestimate the effects of uncontrolled predation, while species disappear, desertification advances, the forests shrivel, the ozone layer diminishes and the average temperature of the planet and frequency of climate catastrophes increase.

4. In summary, in the planetary order one may affirm the clear effect of generalized anomie as an objective datum. Reality never coincides with the norm, because should be is a being that is not, or at least is not yet. But when the reality is triggered with regard to the rule it becomes nonsense, and prescribes a being that will never be and the norm ends up cancelled because it is useless and is destined to be wasted. The perspective of this anomie power process, projected without containment into the future translates into: a) a growing dominion by economic crime that takes control of the worldwide economy, given the impotence of national states and international agencies (every day economic activities at the global level will assume a greater similarity to Mafia-type criminal practice); b) a marked decline in the environment, which announces production of serious changes in the biosphere; c) in the progressive loss of power of the national states and their political operators.

The deterioration of political power: national power

1. The growing impotence of national political power to resolve social problems derived from the exclusion and degradation of social services (including public safety) is undeniable. This is a phenomenon that political operators try to minimize, but its dimensions do not allow concealment or dissimulation. In this context, the emergence of communications is producing a completely novel profile for politicians. These are people who speak as if they had power, launch their concise slogans in front of the cameras, dissipate their impotence as best they can and promise that which they know they have no power to do. In summary, faced with the impossibility of transforming reality, they assume unauthentic attitudes and their conduct is not motivated by their real effects but by those that cause their communications projection. They exhaust their acting capacities, there is growing public opinion mistrust with such profiles and the entire political activity is discredited. Political manerisms are too notorious; they lack the grace du naturel of other times. Someone who does not appear on the screen is not part of the show, and thus is outside of politics and the virtual world in which it is developing. Undoubtedly political activity is competitive and proselytizing in its essence, which is why it always has a communications or showtime aspect, but with globalization, it exhausts itself in what should not be more than one aspect of the activity. It is transformed into pure communications without content, which in the medium term is perceived by the public, who watches it as a reiterative and not very interesting spectacle, carried out by non-authentic and untrustworthy persons. The Weimar syndrome assumes planetary dimensions. It is not possible to think of a rational criminal policy where there are no rational politics, but only total degradation to a poor spectacle that ends up being a state spectacle. The criminal policy of a spectacle state can be nothing else but a spectacle.

2. Through communications the phenomenon of virtuality appears and replaces reality: the extreme idealism which led to a certain current of thought that wrongly interpreted phenomenology, which believed that it could change everything merely by changing the significant messages, but which ignored the fact that phenomenology respected and did not deny the materiality of the world (Welstoff), seems to be the tacit rule of the moment among politicians almost the world over. Just as the majority of transactions with financial capital are realized upon maturity, meaning on future money that does not
exist – which also generates virtual capital – politicians issue messages for a virtual reality in which power is symbolized. Certainly the messages are not always offensive symbolic acts, but are also wars, such as in the Balkans, with which they understand that they are symbolizing the re-empowerment of the strength they lost to globalized capital, meaning that they symbolically reaffirm their hegemony as lords of war and peace.

3. The profile of the politician as a spectacle is highly susceptible to corruption. Traditional corruption has been obscured by macroeconomic corruption as a criminological novelty not yet sufficiently detected because it presents its clearest manifestations in peripheral countries. Macroeconomic corruption is distinguished from the traditional form in which there is support for the destruction of the state and even the market itself. For directed, closed and centralized markets there were corresponding models of state management, where corruption took place in the area of hiring; for open markets there are corresponding models of regulating states, without which the market cannot function, because no one will defend it. Macroeconomic corruption occurs where the managing state is dismantled, but the regulating state is not set up – or is neutralized – meaning that under the pretext of globalizing the market, the customs systems, the central banks, tax collection are entities regulating privatized public services are all annulled. The sphere of corruption that has opened up with such maneuvers acquires a volume that recognizes no precedents. To support it secondary politicians appear, who have been called backstage politicians.

4. The anticorruption discourse is also globalized, but it is not totally clear if its meaning is unequivocal and that it does not enclose a contradiction and perhaps a dialectic. At least up to a few years ago, it was clear that the policy of the central countries was to exploit corruption in the peripheral ones. In the current search for higher profits or for slave labor and lower tax burdens, capital is moving to countries that are not states of law (or are so purely pro forma), and are thus highly corrupt. In them, the higher profits due to lower salaries and tax burdens are partly lost with the costs of corruption, meaning that there is a sort of illicit taxation that ends up being dysfunctional. The risk of globalized corruption is that it extends its previously peripheral practices to the central countries; containing it or reducing its demands can only be achieved by empowering the state of law, but states of law are not compatible with a population that is around 80% excluded. The integrated optimists suppose that this can be achieved through major growth in entertainment, which seems quite absurd, as well as hypocritical.

The criminal spectacle of the political spectacle

1. People are able to tolerate injustice, but they cannot tolerate despair. Having projects and seeking to project one self as part of the human essence. There is no existence without a project. Exclusion is despair, frustrates all projects, loses all possibilities, empowers all social conflicts (whatever their nature) and errors of conduct. Industrial civilization has generated a work culture that led it to define identity through work; exclusion and unemployment not only create a crisis for survival but also for identity, and are thus the sources for the most absurd conduct. The exploited person had an identity and a place: the exclude and everything he symbolized. The excluded person does not have a target and a role: he is simply a excluded person, without considering the errors of conduct that led him to deny a target for the excluded people themselves. The social issue is weakened by not having an included-excluded social relation, relations themselves are destroyed and not only those of cooperation, but if any are strengthened they are those of conflict; with indifference and lack of knowledge space is opened up for a progressive process of mistrust, wariness, fear, panic and paranoia. Social exclusion be comes a cute through t he de terioration of social investment a nd i ts
resulting services: health, education and welfare. Structural violence can do no less than generate violent responses.

2. It is thus uncontestable that exclusion – not poverty – generates higher levels of social violence, because in itself it is structural violence. In light of this there are no rational responses for the politics of spectacle; quite the contrary, among the deteriorated social services, that of security services is noteworthy. The absence of a response to exclusion makes any primary prevention illusory, but the deterioration of security services and their participation in so-called organized crime and in corruption (which is its true consort), also degrades secondary prevention. Since time immemorial, at the periphery of world power the public security service has been entrusted to militarized and underfunded police forces. With precarious salaries and equipment, they lack the professional consciousness that can only grow with unionization, which is also the most important vaccine against corruption. To compensate for their work conditions, police are allowed a quota of illicit financial collection (usually gambling and prostitution), which is shared inequitably: the verticalized pyramid-shaped power translates into a sharing of illicit collection that is exactly inverse, meaning an inverted pyramid. In that way there is an exchange of governability for enclosed corruption.

3. But globalization has thrown this traditional exchange mechanism into a terminal crisis: the destruction of the regulating state and the worldwide traffic impede any demarcation for consented corruption, because they penetrate all existing illegal traffic, especially drugs, arms and persons. The deteriorated service itself introduces one of the main enablers of violence; the peripheral countries are flooded with weapons introduced through organized contraband, while the police end up participating in the most horrendous crimes. The rich are ghettoized, security services are privatized, there is increasing selectivity in victimization, there is an accentuated contradiction and violent conflicts between the police, the criminalized and the victimized – all selected from amongst the most dispossessed levels of societies – who definitively are functional to the extent that they hinder their own understanding, coalitions and political protagonism.

4. The powerless politicians have no response, but their show must go on. Any irresponsible person can all for vengeance in the mass media, which are open to the most ridiculous discourses. And the showtime politicians produce penal laws, which are cheaper and provide them with publicity for a day. For a few minutes on television they demand the handing over of the lives, liberty, honor and possessions of their own fellow citizens, many of whom – one should note - applaud the handing over of their own writes in exchange for the illusion of a badly defined slogan. Zero tolerance, heavy hand and other slogans mean only greater police arbitrariness. The politicians become even more powerless, because with corruption as the base autonomous and corporate police power are reinforced, and with them the ineffectiveness of prevention, the extortionate capacity of corporations that are increasingly committed to illicit traffic and a new empowerment for the same problem. There is almost no difference between the attitudes of political forces that follow traditional ideological tendencies: conservatives and progressives, reactionaries and liberals share the same rules. The progressives and liberals seek to neutralize the imputations from conservatives and reactionaries, with even more repressive laws than the one the latter had approved. Right and left lose their meaning in terms of the traditional definitions; perhaps Bobbio’s proposal was not a mere definition, but a complete reconsideration: left and progressivism, in globalization, would seem to be a symbol of the fight against the discrimination and exclusion that it presupposes. We will return to that later. In synthesis: a) the population ends up caught between fear of the police and aggression on the streets; b) the politicians are discredited because of their poor performance and worse spectacles; c) the parties lack representativeness, their moral authority destroyed by corruption; d) penal legislation is tied to pre-modernism; e) law is despised as useless; f) the middle classes are ready to identify anyone different as the enemy; g) the extra-system
demagogues lie in wait. The *Weimar* syndrome is not a pure coincidence, only *Weimar* was in Germany and *the current situation is expanding from the periphery to the entire world*.

5. At a strictly legislative level, penal laws have assumed the function of reaffirming the virtual power of the impotent and powerless politicians, directed to the population with the intent of re-normalizing situations that cannot be resolved at the level of read deeds. The intent is to regulate that which no power can regulate and prepare an economical penal legislation that will not be applicable in practice, because it would produce an immediate displacement of capital that political power is not in a condition to avoid. They wish to regulate the market by creating crimes when there is no effective regulating power, so that they do no more than to make illicit services and objects more expensive. They *administratize* penal legislation before the ineffectiveness of administrative legislation, which in reality is a *banalization* of criminal law, which is considered useful for achieving any object. They reduce procedural guarantees and restore medieval institutions, such as informants and anonymous witnesses, judges and inspectors. Never before has penal legislation encompassed such a broad range of conduct as it does now: every day there are fewer administrative misdeeds that are not criminal at the same time (as crimes or as contraventions). The classification no longer selects some illicit acts from the framework of illegality, but seems to select those that it excludes from its space, and tends to be a continuous system of penal prohibitions with non-penal exception. The material for preparing symbolic legislative messages is being exhausted.

**The center of the margin: the process of leveling**

1. We have insensibly been describing peripheral realities and warning of their extension into the central world. As we said at the beginning, we do not know exactly in what form and with what characters this projection will occur, but there is no doubt that the center-periphery relationship is clearly changing. Up till a few years ago we spoke of a *criminology from the margin* and of a *marginal realism* in criminal law. The margin was our Latin America; the center was the north. We believed that to face the criminological critique from the north, we should attempt our own *marginal* form. The dizzying dynamism of globalization tends to change the position of the margin and leave us without a *center*. Today ever-growing *margins* are beginning to appear in the old centers: that is why people increasingly use the term *Brazilianization* to describe the phenomenon that is rapidly becoming universal: the formation of isolated ghettos of the included in a human sea of the excluded.

2. Perhaps the most victimizing target of globalization are the labor sectors in the old center, where *there are more who have more to lose*: there is no longer full employment in the old central countries and the objective seems to be to have their salaries complete with those from Malaysia and Thailand. Marginalization is becoming *globalized* and the *exploiter-exploited* dialectic is also being replaced by a pure division between included and excluded, before which even the limits of the bronze law do not exist, exactly because for the system, the best result is to have the excluded disappear. Countries that try to mitigate this process with welfare measures see the results in their falling behind in the race for *growth*: their GNP does not grow or grows at a slower rate than that of countries that ignore the consequences of social exclusion.

**The immediate perspectives of punitive power, from discourses of the penal system and human rights**

1. It is as evident as it is inevitable – at least in the short term – that human rights will deteriorate. There are no signs that allow one to predict a rapid or immediate reaction in the contrary direction. With the disempowerment or subordination of politics, *globalization* has generated two
symmetric and opposing symmetries: regionalization and fragmentation. Faced with the political spectacle, xenophobic outsiders instigate fragmentation and attribute all ills to regionalization and to the newly arrived. It is not possible to have the Yugoslavian horror on the one hand, when states break up and sectarian groups declared independent in Mexico and Brazil, albeit with inverted poles, some pit northern states against the southern ones. We live in a cruel reality of racism, ethnic wars and Xenophobia. Buchanan, Le Pen, Haider, Bossi or Peters are real and are as present as Yugoslavia, Africa and the nuclear experiences of India and Pakistan. None of those perspectives is encouraging for a not very irrational exercise of punitive power.

2. The judicial penal discourse could raise a light resistance and contribute a more realistic vision, but the marked tendency to flee to idealism (or to systems closed by another methodological route) and share the anthropological perspective of single thought do not prognosticate any great efficiency in containment. The theoretical constructions of penal law in the form of closed systems (not fed with data from reality and deduced solely from the function that the constructor arbitrarily assigns to the sentence) warn of what scientists see as the risk of artificial intelligence in robotics in the future and call the risks of feedback that drive the system insane. In reality, a closed and deduced system, placed in judicial hands to resolve all cases, is nothing more than the program for a complicated – and perhaps not so complicated – robot for manufacturing sentences.

3. The closed or robotic system of penal law tends to include and rationalize the legislation produced in disorderly fashion by the politicians of the spectacle state in its growing and incessant production of messages of virtual power. They reach the point of maintaining that theorization should be functional to such messages, because otherwise it would be excluded from the system. That is why there are those who resignedly offer themselves with a good will to be at the service of such messages, and, even more, to train future generations of jurists so that they will only learn how to do the same. Thus, there is no lack of an intended penal theory that insists on the mere symbolic effect of the penal law and assumes it, prepared according to the demands of the theatrical politicians, ignoring the fact that penal law is translated into secondary criminalization in a way that is selective for the most vulnerable. Centuries-old theories are renewed without awareness of their origins, which are actually often ignored:

a) the principle of lesivity is renounced, no longer with crimes of abstract or fictitious danger, but with the thesis that there are accumulative misdeeds, meaning that they do not affect anyone, but if we all practiced them they would affect everyone: that was the argument used by Feuerbach two hundred years ago to rationalize punishment for sodomy.
b) The old rationalizations of Sprenger and Kramer from the Malleus Maleficarum of 1484 or Eymerich from the Inquisitor’s Manual of 1376 are brought back to legitimate illicit evidence introduced in extraordinary criminal proceedings and which – as happened before – tend to become ordinary.
c) It is maintained that there should be a two-speed criminal law: one with greater guarantees for the weak and another with fewer guarantees for the strong, ignoring the fact that in the latter will do nothing else except reach the less powerful, the non-powerful who aspire to power, and those who have lost out to others even more powerful, and that it will also become ordinary in time.
d) It is recognized that criminal law for the powerful would be applied more exceptionally, which is why it is proposed to compensate impunity with a greater penalty for those few cases where it applies; it is forgotten that this rule was proposed by Bentham and refuted by Carmignani as lacking any logic. Its practical translation that it will be a greater penalty will be applied to the less powerful who are caught so that people will believe in its efficacy.
e) It is also maintained that the lower the gravity that a penalty has, the less will be the guarantees that should surround its imposition. It is forgotten that day-to-day configuring power – which is more important than punitive power – is managed with lower penalties and to misdemeanors, while harsher penalties – including the death penalty – have very little configurative importance, given that the majority of the population abstain from similar crimes. On the other hand, it is reasonable to deduce the result of a proposal that intends to reduce the guarantees for
sentencing for the powerful, the less powerful and the powerless, but also for light sentences – which the powerful do not incur – and also those that are imposed due to emergencies, meaning for everyone.

Possible perspectives

1. At any rate, it is not a question of despairing and leaving the window and choosing the looking-glass. There various penal discourses in the XVIII century from both the practical scholars and the post-commentators as well as those of Beccaria, Verri, Howard and Sonnenfels: while the first made efforts at reasonably explaining the cases in which torture is imposed and carried out, the second wished to abolish it. It is unquestionable that globalization will give rise to penal judicial discourses that are equally disparate and encountered, when not surprising. A planetary power process is always extremely complex and contradictory, and, in the withdrawal of its conflicts, it leaves space for discourses of incompatible power. Among the penalists there have always been those who showed a preference for the post-commentators and who inclined towards Beccaria, Verri and Sonnenfels. The important point will be how the various discourses will play out in the dynamics of the power process called globalization, whose beginning we are now seeing.

2. In reality, globalization is disconcerting, because the first thing it places in doubt is nothing less than knowledge itself; it requires us to think with humility, without pretensions to omnipotence, in a very prudent manner. That seems to be the only way to extract some conclusions and provide a few explanations. It also requires us to control our emotions, to contain the impact produced by a world completely different from what we are used to, and thus, to overcome the pessimism of the anomic and apocalyptic as well as the optimism of the autistic and the integrated. From that modest interrogation, perhaps one can infer some of the future of the globalizing process and deduce some lines of behavior regarding it, in the condition of preferentially asking what we see, without becoming disillusioned by not being able to explain things totally. After all, technology has accustomed us to using devices whose purpose we understand, but not how they work, much less how they are built.

3. If what we are witnessing now through the window is another moment of power, we must presuppose that, like the previous ones, it has limits. A device in which everyone is a microchip cannot be so perfect and in fact is not. Extortion only reaches as far as the limits of fear; when one has nothing to lose, fear ceases and blackmail fails. The deregulation of everything, meaning, the minimization of political power to optimize profits, also has limits; when there is no regulating power nothing can be regulated, nothing is lawful or unlawful. Market crime also cannot be regulated. All activities are converted into organized crime (with the due reservations regarding the meaning of that expression). In macroeconomic terms, the uncontrolled speculation at every moment places the entire machine on the brink of disaster, globalized unlawfulness corrupts the entire structure of power and transforms it into a dysfunctional search for profit, the monopoly destroys the market, unemployment destroys the capacity for consumption. One may think that something will happen with ingenuity, even if after some disaster. The very operators of the globalized economy are starting to demand regulations. They are aware of the risk, even though the showtime politicians are the only ones who do not seem to notice; they have become so accustomed to doing nothing serious that they confuse the projection of their pantomimes shadows with action. This is a modality that was previously reserved for the periphery, but is not observed with concern in the central countries. The failure is with the media-hungry politicians, who are incapable of confessing their limitations and presenting them clearly to public opinion, and that perhaps – which is even more serious – are even not aware of them. While, some financial operators are beginning to warn of the danger, the showtime politicians are the international bureaucracies obstinately insist on their virtual reality, confusing the mirror with the window. However, the voices of alarm indicate that least not all of the operators are suicidal.
4. At the level of internal punitive social control in each state, the empowerment of autonomous authority for police corporations cannot be made infinite, because as they become autonomous they venture into crime, displacing or competing with other powers and even leading coups d’etat. However impotent and incompetent the showtime politicians may be, at some point they perceive the growing risk they are running, at least in the central countries. One may think that they retain some vestiges of class conservation instinct. However, it is also true that in Weimar they never woke up to the risk.

5. But the safest thing one can affirm regarding the future—perhaps the only thing—is that thousands of millions of excluded persons to not stand looking into mirrors until they disappear. Globalization has many dimensions and contradictions, but perhaps the most notorious occurs with communications, with whose technological revolution it maintains a link that is almost identification. Competition lowers costs rapidly in the communications area. At the end of the XIX century, the freed Brazilian slaves, the Mexican campesinos and the English mine children were not aware of each other’s existence. Globalization will not be able to avoid the formation of a globalized civil society and its own technological revolution will drive it, despite all of the obstacles people may wish to raise. On the other hand, the newly excluded—the middle class—will learn how to survive from the formerly exploited and will provide them with the entertainment that they lacked. At the margins—old and new, meaning at the old periphery and the exclusion of the metropoles in the old central countries—no one will be quiet for very long, and they will not always be driven by the errors that feed prejudices and discriminator or that meekly offer their cheek to repression.

The meaning of action

1. Although it will not be easy and will require a path full of contradictions and misunderstanding, the dialectic between included and excluded is as inevitable as the catastrophe of the model if no organizing regulation is achieved. The social fabric will be rebuilt, and even if it will be on a basis that we cannot even imagine, alternative cultures and responses will arise, because the excluded also have an imagination and have something that the included lack: time. It is not possible for a human to not exist without ceasing to be human. When the paths for existence are abruptly closed (the projects) others open up and humans continue existing. That is know by the same ideologues of the excluding society, and thus, they propose entertainment for the remaining 80%, meaning to invent a virtual reality for their projects of virtual existence, stripping them of humanity. But they forget that a human being will also not be content solely with existing in non-authenticity, in the impersonal entertainment of the das man and in idle chatter. At least, in the lifetime of every person there are critical moments when that is not enough. The program for entertaining the leftover 80% is nothing less than a project for transmuting humans into something different, which for the moments seems to be nothing but the obese eating high-calorie fatty foods sitting on sofas with eyes glued to television screens vertiginously showing scenes of violent hyperactivity.

2. If the ideology of this first moment of globalization is exclusion of the 20 and 80 society, it is necessary not to abjure globalization as a phenomenon, but to accommodate oneself to its dimensions and inside it provide an opposing ideology and action, in favor of a inclusive and non-discriminatory global society. It will not be possible to leave this negative stage of globalization by appealing to the revolutionary methods of neocolonialism or industrialism. A t t he moment of planetary power for globalization one does not transform reality by taking the winter palace, not because of ethical reasons or other arguments against violence, but simply because there is no winter palace. There is little one can do to transform globalized reality by using national political power, due to its deterioration and subordinate role. The most desirable asset because of its transforming effect is knowledge. Power is exercised by those who have knowledge and information. If it occurs that the included 20% do not
exercise a monopoly of knowledge, it will be removed, or at least there will be a dispute for power. This should therefore be the area to dispute, no matter how cyclopean the enterprise may seem to be and how absurd compare to the categories of industrialism’s political thought and which we are coached.

3. The immediate objective for driving the new dialectic between excluded and included is the guarantee of minimal conditions for food, health and education for the excluded. However weak the states may be, that objective can be achieved by availing ourselves of the secondary and tertiary structures (provinces and municipalities) that are well administered. With the survival of the excluded thus assured, the necessary education for making use of information and providing that information will be enabled by globalization itself, with its growing and contradictory lowering of communication costs. The included lack the time for taking advantage of all of the non-garbage information that they receive, while the excluded have time to spare. If knowledge is power, it is necessary to take control of knowledge. Controlling this power will allow a) competition with the included, b) its differential and countercultural employment regarding the excluded, c) the appearance of globalized cultures according to new and reactive norms for utilizing knowledge.

4. From those new and alternative globalized cultures will emerge new forms of thinking and knowledge, means of reworking knowledge itself and for opening the way to a new knowledge that will not be one of dominus, that will not be the knowledge of the inquisitorial interrogator, knowledge to be able to hold sway. Knowledge that asks but is not prepared to listen, but a knowledge in dialogue with everything that is in the world. Just as the knowledge acquired by fighting (of the warrior) gave way to that acquired by interrogation (of the lord, the dominus), it will be necessary to move from it to dialogue (of the frater). Only an alternative culture of the excluded can achieve this knowledge, in light of the planetary survival crisis that is the final development of the inquisitorial interrogation knowledge of the dominus.

5. It is not clear who can call up a coalition of the excluded from around the world to fight for this knowledge, aware of the power it implies. Certainly such a call would not sound strange to the feminist movements, since they represent half of subordinated humanity, as they learn to flee from the traps that patriarchal society has for them so that they will be dedicated to sending messages in penal laws and thus join in with its spectacle politics. As with any struggle, the coherence of the coalition will guarantee its effectiveness and allow it to confront any violence with the most effective peaceful or non-violent means. It is true that even though there is no call to arms, it is no less certain that the dominant and growing exclusion, added to the minimal conditions for survival, time and information, are components that cannot help but produce a competitive and confrontational dynamic between the excluded and the included, with the ritual money but lack the time and cannot digest the information.

6. It would seem that the true global society would need to start to configure itself by taking ownership of the knowledge of the different excluded groups. Its effectiveness in transformation will depend upon its capacity for coalition, but when outside of the wealth ghettos, in the pueblos jóvenes, favelas and villas miseria one can produce theses with the same materials as those found at Harvard or Heidelberg, the dialectic of globalization will be fully functional.

7. The struggle for knowledge is indispensable for avoiding a consecration of discrimination, a sort of self-fulfilling prophecy of racism. The dialectic place in movement by the excluded, aided by those who do not wish to be totally excluded, is the main hope for the cyclopean task of stimulating the new African leaders, for incorporating into the coalition of the excluded the forgotten peoples of the entire planet, before the knowledge of genetics makes it possible to enshrine biological differences and transform discrimination into real genetic privileges.
The penal knowledge of globalization

Progressive penal, criminological and criminal policy thinking in globalization will have the task of attempting to contain the punitive power that wishes to devastate the alternative cultures of the excluded and who – certainly – will not spare its efforts in doing so. It must be assumed that this punitive power will assume new forms, because penal control in a short time will totally change its appearance. It is already technically possible to replace prisons with electronic control of behavior, which is much cheaper, and thus applicable to a larger number of persons. The powers of observation and surveillance have increased considerably, but in a few years will reach levels never imagined. Intelligent houses and buildings will be a major technological advance, which will undoubtedly bring many conveniences to the included, but will also mean the end of privacy and every building will be a potential prison. The role for progressive penal thinking will be together with human rights non-governmental organizations engaged in preservation of alternatives that arise outside of the ghettos of inclusion. On this side will be the colleagues, who are descendants of Beccaria, Verri and Sonnenfels, Howard, Feuerbach and Carmignani, and who will engage themselves in an increasingly committed task of preparing judicial penal discourses that will preserve social spaces for the alternative cultures of the excluded in the new globalized society. Unfortunately, there will be no lack of discourses with delayed explanations, which Francesco Carrara depreciated as la schifosa scienza. That will be inevitable, as it has been in the previous moments of planetary power, and especially in the immediately preceding one.

2. From what we seen from the window, we are sure that something will change: a) before the entire world economy is converted into a large Mafia-type or ganization and s hatters with the first victims being its own operators, b) before the police corporations become bands of assassins that depose governments and usurp political power, c) before the 80% excluded population of the world disappears, d) before the Le Pens, Buchanans, Haiders and one thousand insane Hitlers – or even more insane – take over the governments, a nd e ) b efore t he gl obalizing t endency of Brazilianization is replaced by the tendency towards Yugoslavization. Obviously we must watch from the window to discover what will change, in order to contribute towards thinking about and driving such change, in order to minimize the obstacles that may be found in such change. Nothing is produced alone but is everyone’s responsibility.

3. The penal system will follow the alternatives of these and perhaps – also and unfortunately – of some afterwards, with its moments of absurdity and others of mere disparity. And the judicial, criminological and criminal policy will legitimate or de-legitimate the absurdities, and as a result some authors will wish to cultivate the schifosa scienza or the true penal science. The previous experience indicates that no one remembers the earlier times, except as a curiosity.

4. The only truly painful thing is that – according to all previous experience – the path to a global society, the coalition of the excluded and the struggle for ownership of knowledge will not be linear. These are civilizing paths that have always been plague by marches and countermarches, contradictions and distractions, dead ends and failed experiments. All of history teaches us that many penal and criminological discourses have started out with enthusiasm and got ten lost in twists and detours, and the sad thing is that in all this many fall dead. Let it be said with the sincerity of an active and non-ingenious optimist, meaning someone who does not confuse the looking glass with the window and tells what he sees from the window without selling gratuitous optimism, under the penalty of adding to the globalized spectacle in a malinchista attitude.
AUTHOR’S NOTES


Chapter VIII

The “Dangerous Classes”:
The Failure of a Pre-positivist Police Discourse

Eugenio Raúl Zaffaroni

Rivacoba’s admiration for penal and liberal illuminism meant that his conversation frequently gravitated towards that theme. He preferred the summits of thought of penal discourse, and avoided the moments of its police and racist decadence. For my part, I more frequently venture into those low places, not out of morbid curiosity, but to try and understand their discursive structure in order to better neutralize their sadly sinister effectiveness. Rivacoba’s fine sensitivity towards anti-liberal discourses rapidly exhausted his patience and kept him from accompanying me on those incursions into the deteriorated suburbs of penal thought. That is why I do not remember – despite a dialogue of more than thirty years – having discussed with Rivacoba the police origin of positivism nor can I affirm that he totally shared that opinion. However, without a doubt I know that he held in high esteem the efforts of others to dismantle the effectiveness of authoritarian discourses, especially when they consisted in paths through arid heights his scarce patience did not allow him to travel. That is why I consider that this excursion through the origins of positivism will allow me to discharge the police of an ideological stigma that they do not deserve: their contribution to positivist hegemony was enormous but corporate, not ideological. Positivist racism is a discourse completely provided by its associated corporation, that is, the medical ideology of its time.

Positivism returned to its inquisitorial discourse, especially in Central Europe, breaking the branches of that tree, which in its medieval origin covered the armies of demons with the foliage of uncountable signs of degeneration or the biological infrahumanity of racist evolutionism, as ingenuous as it was coarse. When in the middle of the XIX century the European bourgeoisie took power, the liberal discourse ceased to be functional for its interests; it needed another one, which would legitimate its hegemony, but at the same time would consolidate the new agency that had arisen with the industrial revolution: the police. Every time that it lacked its own discourse, it was provided by the medical corporation, with the result being the medical-police discourse of positivism. In the struggle between corporations for ownership of the criminal question, the discursive hegemony, which had heretofore been held by corporations of jurists and philosophers, passed to doctors and policemen. Positivism was preceded by previous medical discourses, but those had not arrived at the appropriate moment; the physiognomists and phrenologists essayed their theories too early. Hegemony a rived when its discourse was assumed by the police corporation; that was the opportunity for Lombroso and Lacassagne.

This chapter has the objective of verifying and ratifying that the police corporation needed the medical discourse because it had not been able to elaborate its own, despite trying to do so. I demonstrate here that the attempt at a discourse by the police corporation before positivism was not successful due to the structural weakness of the product, its resulting contradictions, and, to a large part, ended up dysfunctional for legitimating unlimited police repression. If the doctors had owned discourses but had lacked the power to achieve hegemony, the police corporations had power but had
not achieved an appropriate discourse.; it is curious that its scarcity of elements was such that, to a large degree, the attempt was almost illuminist and a social critique.

The work analyzed here is that of H.A. Frégier, police chief of the Seine zone, published in 1840, but written at least two years earlier. It is a very original document, with opinions that are sometimes surprising. It is little known, but was cited in parliamentary debates in 1888, in the closing days of imperial Brazil. For the first time the expression dangerous classes was used, but not in Frégier’s work, but as the title that the Académie de Sciences Morales et Politiques had used for the contest in which the author presented his prize-winning book, in the following terms: Investigate, according to positive principles, what are the elements that make up in Paris or in any large city, that part of the population that forms a dangerous class due to its vices, its ignorance and its misery: indicate the means that can be employed by the administration, the rich, the accommodated, the intelligent workmen and laborers, to improve this dangerous and depraved class.

The academy presupposed that the dangerous and depraved class was made up of workmen who were neither intelligent nor hardworking, characteristics derived from vices, ignorance and misery. The author expressly answers that he will also focus on the literate dangerous class, due to the role that intelligence plays in depravation.

The work is divided into four parts: statistics, living habits, measures for avoiding expansion of vice and remedies. Strictly speaking, the scheme is simple: the later positivist terms would be description (quantification and characteristics) and prevention (primary and secondary).

The discourse is based on exclusively moral points of view: vice is the cause of all ills. Although it is a police work, its theoretical framework is the moralizing psychiatry of that time period, founded on the confidence that material progress entails moral progress. That is why he affirms that vice is inherent to human nature, so much that the virtuous person is nothing more than a less vicious being. The vice of the rich deprive charity of what they hand over to their passions, while for the poor man it deprives his family. Despite the moralizing tone of the work as a whole, the author is surprising in his insistence on the principle of offensiveness. Where there is no offense or harm, penal action has nothing to do: that is the line that separates the domain of civil law from that of moral law. Nonetheless, it is no less certain that the lack of morality is the source of wrongdoing, which is why a good governor should pay attention to it.

While vices affect all social classes, for Frégier those of wealthy classes are not as dangerous, because they dissipate that which they have in excess and offer fewer cases of criminality. The poor and vicious classes, it happens, have always been and continue being the greatest producers of all sorts of wrongdoers. That is why they are more properly called dangerous classes. A vicious individual of that class is always a source of feat, even if the vice is not accompanied by perversity. The moment such a one ceases to work because of his vice, he becomes an enemy of society. He distinguishes the idle class from that of working laborers, even though some of the latter share the vices of the former. The most suspicious part of the dangerous class are the convicts and freed prisoners; the latter form the most depraved and fearsome sector of the dangerous population. He notes that there are those who combine a lawful activity with evildoing, who are generally form honest homes, which they have abandoned to seek refuge in large cities. From this class and the upper class come the swindlers with fine manners who operate in the casinos and the gallant salons. Obviously, he does not forget the women: The women, albeit in smaller numbers, play an important role as the first cause or the instrument in all sorts of attacks that afflict society: they are recruited from all ranks of the social hierarchy and over all forms of depravity: the prostitute, the flatterer, the accomplice of the swindler and the thief.

He distinguishes between vice from perversity, but since the first moves towards the second, one cannot separate them, and he thus ends up including both in the concept of dangerous classes, although
he excludes activists in popular seditions, because he considers them as emerging from extraordinary moments and only wants to occupy himself with what is permanent.\footnote{13}

Because the poor and vicious part of the working class is the one that most contributes to crime, he begins by numerically assessing the industrial population, which he considers as being made up of workmen, working women, apprentices and junkmen. It is interesting to note that police control of this segment was a failure due to disorganization, since Frégier complains that he had never been able to make the legal system of saving accounts effective for workers. He calculates the number at 75,000, but soon, based on other data from the lodgings controlled by the police, especially the so-called furnished houses, estimates it at 78,000 for the low season and 105,000 for the high season, with one third being single, some 40,000 working women married or cohabiting a nd a nother 20,000 s ingle w omen. Thinking that every working family has two apprentices, he establishes their number at 100,000, so that he reaches a total number of workmen, working women and apprentices at 235,000 in the low season and 265,000 in the high season.\footnote{15}

He clarifies that the portion of these who launch into vice could in no way be completely controlled by the police. He frequently invokes the distinction between morality and law in that respect: Our society, although strongly advanced, could probably not support preventive measures by the police that had the objective of focusing, in cabarets and other places of that nature, on drunks and gamblers, to deprive them of the means of freeing themselves from their vicious habits, which he contrasts with the United States, where he affirms that they do not distinguish between laws and morality.\footnote{16}

His estimate of the number of the vicious, presented without a greater empirical basis, is quite high, since he assigns it at third: 35,000 workmen and 20,000 working women. Without a reasonable explanation he calculates that, as there are degrees of vice, half of the vicious workmen and two-thirds of the working women should be considered as the number of the most depraved.\footnote{17}

The idle class is the antechamber of all that is most abject, corrupt and dangerous for society. It is made up of gamblers, public women (prostitutes), their lovers and pimps, ruffians, brothel madams, vagrants, swindlers, crooks, male and female thieves and their accessories. He affirms that the dominant vices in the individuals designated here are indolence, gambling, intemperance, libertinage and in general all low and immoral passions.\footnote{18} They live in a state of continuous excitation that hastens them into crime. The different unlawful activities combine with each other and one person can do several simultaneously, which he uses as a pretext to explain the imprecision in the data he is managing; since a thief can be at the same time a pimp and a prostitute a swindler, it is not possible to make exact statistics available. He classifies the public women into registered prostitutes (3800), who may be free (two-thirds of them inhabit furnished rooms or rent unfurnished ones) or be in houses of tolerance (one-third), or non-registered or rebellious, who are the ones who make up clandestine prostitution (4,000). He counts the number of lovers and pimps at 7,800.\footnote{19}

As for the vagrant, he affirms that this is the type who originates all potential for evil, being found in every place where illicit or criminal industries are performed, estimating their number at 1,500. He next analyzes lodgings for the dangerous classes, from the most miserable boarding rooms to those who are able to find private houses with good references from their neighbors. He complains that the kindness of our customs, the humanity of our laws and the extreme discretion of landlords all conspire in favor of impunity.\footnote{21} He concludes that the total of the dangerous class in Paris is 63,000 individuals of all sexes and ages.\footnote{22}

As a good policeman concerned with order, he does not neglect to note the scarce public interest in statistics and suggests the form for elaborating them for better knowledge and control. He proposes a census of workers by profession and registration of industries, from the business leader to the apprentice, as part of the desire for disciplined control from which he is not free. To calculate the total of unknown delinquents (which would soon be called the obscure number), he proposes comparing the
data from detention sheets with the number of denunciations, even though he clarifies that it would be an error to suppose that every denunciation means a different wrongdoer, because the same person can commit several crimes.

He then moves to focus on the customs, habits and lifestyles of the vicious and dangerous classes, by ginning with the vicious portion of the working classes. He recognizes that the working classes have gifts of virtues, especially of solidarity in facing need and disease, even though these are the product of primitivism: *Their moral qualities are derived from primitive human virtues and they practice them with a zeal and simplicity that are worthy of praise from all people of good will.*

He bucoliclly describes the relations of the employer with the worker and of the worker with his companions. He recognizes that extramarital children are raised as legitimate and that the workers hand over almost all of their wages to their wives, even though some do so by halves and others keep it and the wife maintains herself with her own wages. *The cabaret is the place of rest and recreation for the worker.*

He goes to complain about mistreatment, about humiliations, and family conflicts, although he does not always become drunk from drinking alcohol. A worker asked about his custom of frequenting a cabaret will say that it is due to weakness of character or pride. Even owners of small factories share this custom. He considers that the bosses should impose a certain discipline in that regard. He describes in a somber tone the indigence brought about by wastefulness in the cabaret and the condition in which one returns to his wife. In a small number of cases he recognizes that passion for wine absorbs all other passions, describing the wife and children spying on the husband as he leaves on payday in order to try and save the wages, *but wine wins out and the brute ends up in the cabaret in Bacchic orgies.*

But not all women are good models: there are those who give themselves over to vice and return home Monday morning almost drunk, giving a bad example that corrupts the children. He attributes to certain workers who live in common-law relationships the practice of swapping wives. They defraud their providers and there are cases in which they are served dinners and do not pay for them.

He ponders the virtues of the honest daughters of workers, good daughters, who only go out on festival days with their parents, and later on are good wives. Those who work in workshops or stores require greater care from their parents, their voluntary relations with colleagues have nothing worth criticizing, while they maintain principles of prudence and decency. But if it is the case of a workshop where decency is not the norm and insolent comments by gathered workers are allow, they cast in doubt the moral principles of new female workers.

He criticizes parents who retain all of their daughters' wages, keeping them from being able to wear clothing in keeping with their condition and causing an aversion to the household that leads to a breakdown in relations. Female workers are divided into employees in shops and in factories. The former have superior education and manners. Vice operates in both, but is more refined in the first case. Factories are the antechambers of corruption, since the women's wages are low and when they have a family they need someone to support them, which they generally find in marriage or as concubines, although some go from disillusionment to disilllusionment and fall into prostitution. Others find themselves loaded down with children and abandoned by their lovers. Workers in the spinning mills find themselves obliged to take their children to work and live in an insane mixture of ages and sexes, with no one taking care of morality. From the age of twelve children are placed as apprentices, which takes a load off of their mothers, but that means that they go to their courses at school after ten or twelve hours of work. Working women in factories are often impregnated very young, by workers who ignore the plight of the children. Nor is it strange to find drunkenness among female factory workers.

Frégier dedicates special attention to the junkmen, who have to work at least three shifts to earn the minimum wage. He reports that they live in miserable and unsanitary conditions, that they store the
items they pick out in their own homes, that they get drunk the same as the other workers, but instead of
wine they prefer rum. He then moves on to consider the customs of the vicious portion of the accommodated classes,
although the title does not seem to fit the contents with total precision. He refers in principle to those
employed as clerks or copyists who, since typewriting did not exist at the time, offered their services on
the street or inside the Palace of Justice. He affirms that among them are found scholars fired from
their studies, officers expelled from the army, former prisoners, children of repudiated families, who
make up the dregs of society. The main vices of the depraved class of copyist are drunkenness, gluttony,
gambling and idleness. These are people who because of gluttony consume what they make in food, so
that nothing is left to spend on clothes or for sleeping anywhere but in revolting places. He paints the
lives of students in positive colors, but then dedicates attention to their disorderly behavior with women
and gambling, and there is a shopworn reference to the Jews who exploit them. He describes the cases
of students who fool their parents with their supposed studies, but who are visited by them and punished
by having their funds totally cut off. He affirms that the students most inclined to do this are those in
their first year, corrupted by others on finding themselves alone and uncontrolled in the city. A minority
of students are swept along and end up doing petty thefts in restaurants and other minor infractions. At
any rate, he notes that they should be viewed benignly and clarifies that he does not intend to raise
himself up as a censor of the morals of a class to which he has the honor of belonging.

He affirms that the employees in commerce have more solidarity that the students. They suffer
through a harsher apprenticeship in which they make less and are always tempted to steal from their
boss, who will only notice because they talk and news of inappropriate spending reaches his ears. He
affirms that flattering women seduce employees in the shops and that the public balls are the most
scandalous.

The author introduces himself in the treatment of the customs of the dangerous classes and the
causes of their depravation and misdeeds, describing the neighborhoods, homes and boarding houses
where the wrongdoers spend the night and explains the organization of the Paris police. The dangerous
class prefers to concentrate in certain districts, because of their central position. He notes that the Cité
district has a particularly sinister aspect, which contrasts with the neighboring monuments. The streets
are narrow (eight feet) and harbor small shops, and meeting places for prostitution and bandits. He
mentions other neighborhoods where brothels and bars abound: Saint Jacques, Sainte Antoine, Palais
Royal, Saint Denis, St. Martin des Champs, St. Thomas d’Aquin, Porte St. Martin, Les Invalides,
Arsenal, Hôtel du Ville, Observatoire and the Temple neighborhood, one of the most infected. The
houses of prostitution are a source of infection, the rooms lead to corridors without light or air, there is
dirt everywhere, only a few have beds or cots.

Entering the theme, he starts with the gamblers, whom he describes as persons in whom the need
to gamble absorbs other needs. These being people from the needy classes, since the only
occupy themselves with their need for gambling, they are destined to end up as thieves or vagrants. On
the other hand, the passion for gambling is shared by almost all delinquents, because of the strong emotion
that it provides. Frégier does not miss a chance with this argument to excuse the police’s difficulty in
fully recovering the booty from robberies and thefts. The prisoners have are not ashamed of gambling
over any thing, including the bread that they need to survive. He closes by reporting the case of a
prisoner who, in the infirmary, gambled the food and drink he needed to recover his strength and who
ended up dying of starvation.

The author spends considerable time on the theme of prostitution. He affirms that it is an ill that
extends throughout the world and that in Paris it has been regulated, in contrast with the prohibitionist
policy of the old kings, and he considers it the saner solution. He complains of a refractory clandestine
prostitution, which refuses to register with the police and which severely affects morality, without
giving any reason for the without giving any reason for the registered woman to suppose she will not be affected. He affirms that such the registered person undergoes stricter surveillance by the police, she tends not to commit crimes. The women register voluntarily or are registered because of their position, even though registration does not mean authorization for prostitution. If she is of age and the authorities can prove good sentiments, they do everything possible to return her to her family. If she was not born in Paris, to continue she may elect to sign in the registry of infamy or if after the first offense she had been far from her family. At any rate the authorities use great circumspection: it is probable that they will reject the registration and to avoid her falling into clandestine prostitution they will return her to her place of origin. In any case, the authority requires a birth certificate from the mayor and through it consults the family, who always will be informed that the woman is on the brink of the abyss. Care is even greater in the case of minors, and they are interned in the Convent of the Ladies of Saint Michael for a period of one to six months, and if, despite this rigor they do not mend their ways, only then is it resolved to register them, once it has been verified that the woman is totally dominated by vice. She is made to sign (or make an X on) a document in which she commits herself to observing the health rules; he maintains that this is very important, since the woman represents a sort of agreement with the administration.

He calculates the ages of the women following research by Parent-Duchatelet in 1831, in which the numbers rise from age 14 to 28 and decline from 28 to 40, and from that point drop abruptly, so that there are none aged 50. He observes a high percentage of women who are relatives, which he takes as proof of corruption in certain families and of the moral contagion of prostitution in the poor classes. He makes a classist analysis of prostitution, noting that there is a small number of free prostitutes who live in luxury, charge high fees, have powerful lovers; these are followed by those from the middle class, whose clients are law students and young lawyers. He concludes that the poor ones are the most corrupt and that class differences promote refusals between them, who sometimes need to share hospitals and jails. In the prisons their correspondence is controlled by the police, but he complains about powerful lovers who speak up for them, which in his opinion proves the corruption of the elevated classes. He expresses a certain admiration for the love of prostitutes for their pimps (soutneurs), who provide them with protection from police inspectors, with whom they sometimes have violent resistance and encounters.

He classifies the brothels into public and passageway houses. The owners are known as maitresses of dames de maison, a term that substitutes others that sound offensive.

AUTHOR’S NOTES


3. Della Porta, Giovan Battista, *Della fisionomia dell’uomo, con illustrazioni dell’edizione del 1610*, Parma, 1988; Lavater, Johann Caspar, *La physiognomonie ou l’art de connaitre les hommes d’apres les traits de leur physionomie, publié par Gustave Havard*, Paris, s.d.; Lavater, Johann Caspar/Lichtenberg, Georg Christoph, *Lo specchio dell’anima Pro e contro la

4. Among the immense biography on them, the latest studies, for example: Guarnieri, Luigi, L’atlante criminale. Vita scriteriata di Cesare Lombroso, Milano, 2000; Villa, Renzo, Il deviante e i suoi segni, Lombroso e la nascita dell’antropologia criminale, Milano, 1985; on Lacassagne, Debuist, Charles, in Debuist/Digneffe/Pires, Histoire des savoirs sur le crime et la peine, Quebec, 1998, pp. 343 and ss.


7. Chalhoub (ibidem) also attributes it during the 1840s to the English writer Mary Carpenter, but at the same time recognizes its partial use, and for the reasons presented here, it is also clear that employment of the expression by the French Academy was earlier.

8. Frégier, p. 16.

Chapter IX

The legitimation of penal control over the “strangers”

Eugenio Raúl Zaffaroni

An old idea in a new overview

In theorizing criminal policy higher levels of repression are always defended for the more serious crimes, including in the more radicalized positions. Furthermore, a different repression has almost always been theorized for the non-harmful (to the police) and another for the harmful, with the others being the target of measures for segregation or elimination that are disproportionate to the gravity of the infractions committed. As a result, it is nothing new for plural penal repression to be theorized: on the one hand for the sinister (Kill them!) and for the insane and bothersome (Get them out of here!), and, on the other hand, for the occasional (People more like us, who made a mistake).

This is no different from what Günther Jakobs has proposed more recently, with the idea of a special class of sinister criminals that would be the terrorists. Except for his sincerity and precision – in the use of the qualification of enemies – the proposal is not new. One can consider that it is the banal conduct of a penalist impressed by acts of unusual gravity.

Nonetheless, this proposal has unleashed an intense debate with an unusual tone. Why has an idea older than penalism – it goes back to the Greeks – produced a scandal? We would be underestimating the intelligence of our critics if we thought that they followed only the sincere terminology used by Jakobs.

Our hypothesis starts with the presupposition that all conduct is or is not banal according to the context and the circumstances. We understand what the Professor from Bonn has said in words much clearer than many others have said before with greater confusion, but at a different moment. At this stage power is at a planetary level and threatening with a global dictatorship; the technological potential for information control may spell the end of all intimacy; the use of this controlling potential would not be limited to investigating terrorist, as all historical experience teaches. Massive communication, of formidable technical power, is thrown into a völkisch and vindictive propaganda without precedents; the planetary power manufactures enemies in series. Thus, however much it is dressed up as judicial, the unusual reaction is political, because the question that is placed is – and always has been – of that nature. The proof of that is that Jakobs himself relies on Hobbes, and thus, in the central point of sovereignty, a clear question of political science and, precisely, the ne w globalizing overview is characterized by a profound political change.

The crimes of mass and indiscriminate destruction of September 11, March 11 and July 7 are expressions of brutal violence that make up crimes of lesse humanité, but which respond to other violence and thus we could keep on going backwards. It is not necessary to fall into the extreme of dogmatically maintaining that all violence must be answered with non-violence, to verify that never has a conflict been definitively resolved by violence, unless one confuses a definitive solution with a final solution (genocide). Those that did not end in genocide were resolved by negotiation, which belongs to the field of politics. But globalization has impoverished politics until it has reduced it to its minimum expressions. The current structural decisions in practice assume the pre-modern form defined by Carl
Schmitt, meaning the mere power of marking out the enemy. This is delineated on two fronts: that of Human Rights and negotiation on the one hand, whose most important bastion is found in Europe and in the academic field of almost the entire world (including the United States), and, on the other, one of a violent solution that crushes Human Rights and ends in genocide. The awareness of this disjunction is greater in places where there the experiences of state terrorism remain in the collective memory (Europe and Latin America), not so in the United States, where there are other repressive abuses, but whose population has never suffered from state terrorism.

In this context we would propose admitting that a criminal law of the enemy cease to be the banal conduct of the penalists, who almost always have postulated it, to recover its true nature, which is political. And as such, it becomes intolerable, because what up till yesterday was banal today may be read as a type of desertion in the world political dispute.

One should clarify that Jakob’s proposal is one of the most absolute good faith, for when he proposes distinguishing one penal law for the citizen and another for the enemy, he does so imagining that both function in a state of law, as many other authors have done previously. Furthermore, he assumes a real phenomenon, which is the repressing of penal legislation, in a mixture of tactical withdrawal and resignation, seeking to impede the extension of the phenomenon to all of criminal law.

Admitting that the question is political, our hypothesis is that in this camp it will be intolerable to have the judicial category of enemy or foreigner in ordinary law (penal and/or administrative) in the framework of a state of law, and thus it has always been, even though theorized with other names. We intend to demonstrate that this can only be admitted if one opts for a model of an absolute state, as was postulated by Carl Schmitt.

**First conceptual precisions**

Abused words become equivocal and in judicial language the wear and tear is more serious, exactly because it demands precision. Thus, it does not seem tolerable to have the semantic deterioration of the expression criminal law.

From any discourse, including a technical one, one can extract phrases such as these: (a) Criminal law cannot combat poverty. (b) Criminal law does not punish that conduct. (c) Criminal law does not analyze that theme. One same grammatical subject but with three different semantic subjects: phrase (a) denotes the punitive power of the state as a real, sociological datum; phrase (b) has penal legislation as its subject and phrase (c) indicates that theoreticians and doctrinalists have omitted themselves. To sharpen the basic instrument of the word, we will successively call the subject of phrase (a) punitive power, that of phrase (b) penal legislation and we will reserve the term criminal law for the penal judicial doctrine (knowledge or science of penal law) of phrase (c).

Whereas criminal law (as a science) is the work of jurists (penalists), the real exercise of punitive power is the work of executive agencies of the state and penal legislation is produced by the appropriate policy agencies. Criminal law (the knowledge of jurists) is not destined for exercising punitive power, which is practiced by the executive state agencies, but for programming its containment, which should be performed by judges and their jurisprudence. Liberal criminal law is de stined for judicially containing the punitive power of the state, without which the state of law disappears and the police state prevails. The latter does not disappear, but always remains more or less encapsulated by the historical states of law, struggling to exceed its limits, in a constant dialectical relation.

The enemy in the exercise of punitive power

Punitive power e appere d in European societies e ight centuries a go, a s a i nstrument of corporate social verticalization of the national states. The Church as the central power reaffirmed itself
with its punitive power, first launched against dissidents (Cathars), soon after that against witches and later on against Protestants. The first enemy was the witches, who made a pact with Satan, the head of an army of demons, an invention built on prejudice against the maleficent and women’s inferiority, reinforcing the hierarchical regulation of sexuality, consolidated together with punitive power. That corporative organization enabled the colonizing enterprise into America and Africa, which set in motion an extractive economy for raw materials and means of payment, giving rise to modern capitalism, which ended up weakening the colonizing powers and strengthening the neocolonizers, displacing world hegemony from Spain and Portugal to the central and northern European powers.

Throughout this long course of events repression was always exercised in a different manner, depending on whether its recipients were peers or strangers. The peers always deserved more consideration, save for when they were political dissidents, in which case they were treated as strangers. The treatment for strangers distinguished between severe offenders (those who were directly enemies), bothersome (indirect enemies: with their conduct they challenged the vertical order) and simply inferior (potential enemies due to lack of discipline). The severe offenders (serious crimes or dissidents) were eliminated by killing them; the bothersome were eliminated through forced incorporation into the armies or for the production of energy for movement (sentences rowing in the galleys). The simply inferior were exploited (Indians, servants and blacks) and submitted to exemplary elimination by death in cases of resistance or strongly controlled (women and children; the elderly did not count because of their low numbers).

This panorama was maintained until the Industrial Revolution, which gave way to changes that did not erase differentiated control, but attenuated it (sometimes more discursively than in reality). Nonetheless, once the new hegemonic class was settled in power, it reaffirmed the duality of penal treatments: although it maintained the guarantees for the peers, few changes were introduced for the strangers. Although the death penalty was reduced to serious crimes (murder) and to dissidents (e.g. the Paris Commune), those were killed, and ceased to be a problem. The bothersome were eliminated, being placed in prisons with high mortality rates, submitted to interminable judgments, or even deported (especially by Great Britain and France, but also in Argentina), in other words, although prison replaced death in many places, it was a death penalty by chance in the large cities, as was the case with the deportation sentence that replaced the levies and the galleys, which had become unsustainable because of the technification of war and introduction of steamships.

During the last century, the duality of punitive power was maintained, and there were quite differentiated models. We believe that the following different exercises of punitive power demonstrate the attempted models: (a) the authoritarian European model between the wars; (b) the democratic European model currently dominant in the European Union; (c) the current North American model; (d) the Latin American national security model and (e) the dominant current Latin American model.

(a) In the between-war authoritarianism (Nazism, Fascism, Stalinism) there was a clear distinction between the strangers and dissidents and the peers. The dissidents were submitted to special police tribunals or executed without trial. The severe criminals were also physically eliminated. The bothersome, called strangers to the community in Nazism and parasites in Stalinism, were also destined for eliminatory concentration camps. The peers were treated according to the penal legislation that was the focus of the manuals of the period.

(b) In the European countries, the strangers are also not treated as peers. Almost all legislations recognize security measures for strangers, which replace old relegation sentences for those who seem to conduct their lives in an undesirable manner. The serious criminals receive major sentences, although not to the point of elimination. The dissidents are treated with greater consideration, due to tolerance and social pluralism. Although the diversity of repression has not totally disappeared, the division
between serious criminals, dissidents and strangers on the one hand and peers on the other has been largely attenuated.

(c) The repression set up in the United States in the last few decades – and which departs from its previous tradition – configures a pre-modern model carried out with high technology and unlimited financial resources. Differential repression is accentuated as in the preindustrial models: the serious criminals are eliminated through death or life sentences; the strangers and dissidents are submitted to elimination through very long sentences or undetermined ones (three strikes out); the dominant prison population, in an absurdly high number, belongs to African-American or Latin American minorities and sentencing is done through forcing negotiation. The peers are treated with the penal legislation explained in the manuals. The anti-terrorist penal legislation (Patriot Act) cancels constitutional guarantees. It is the only country in the Americas that continues to freely apply the death penalty and maintains a prison population that can be counted in the millions, sustained by a vindictive völkisch publicity that extends around the globe, while it is being ginning to legalize a parallel penal system for terrorists.

Labels have been applied on very different stereotypes, according to the emergency invoked, in other words, the quality of being a stranger has been handed out with notorious arbitrariness. Stated in other terms: Who always individualized the enemy or the stranger? Those currently in power. How did they do so? As they saw fit. To whom was the label applied? To those who confronted or bothered them, really, imaginarily or potentially.

(d) The Latin American national security dictatorships applied elimatory sentences for the serious criminals (life imprisonment, to a much lesser degree the formal death penalty), elimatory measures for the bothersome or police executions without trial, but they established two penal systems for the dissidents: a parallel penal system that eliminated them through unlimited administrative detentions (invoking the state of siege or war), and another underground penal system, which proceeded with direct elimination by death and forced disappearance, without any trial.

(e) Currently, Latin American repression of serious crimes is done with lifetime imprisonment. The bothersome continue to be eliminated through administrative measures, disproportionate sentences (for recidivists) and imprisonment where the rates of violence, mortality and morbidity, in other words, with a high probability of physical elimination, while police and para-police executions without trial have not disappeared. The dissidents are tolerated for the most part, even though repression of social protest is on the rise. The peers usually enjoy the benefits and guarantees found in the manuals, especially of remaining at liberty during trials, which in practice is almost a pardon, given that around three fourths of the penal population is not condemned.

With this review we verify that, (a) on the one hand, there have always been different forms for controlling the peers and the strangers, (b) on the other, the more open, egalitarian and tolerant a society is, the more the differences between repressive treatment for peers and strangers are attenuated, as happens in the European Union countries. Moreover, one is encouraged with this being the case, considering that every other position is an attempt to undermine the power of the state.

The penal judicial knowledge of the enemy

(a) The prehistory of criminal law of the enemy may go back to Protagoras and Plato. The latter developed for the first time in Western thought the idea that the wrongdoer is inferior due to his incapacity to rise to the world of pure ideas, and when that condition is irreversible, he should be eliminated. Protagoras maintained a general and special preventive theory of the sentence, but also postulated a differential penal law: incorrigibles were to be excluded from society.
(b) However, since the reestablishment of punitive power eight centuries ago, every theory of plurality of penal laws has been based on *emergencies*, meaning threats to the survival of civilization itself that assumed the character of *wars*, and thus, *reduced criminal law to administrative law and penalties to direct coercion*. The first emergency was theorized by medieval criminologists called *demonologists*, coming from the Dominican order and summarized in the famous *Malleus Maleficarum*. The first integrated model of criminological etiology, criminal law, penal process and criminalistics. The inquisitorial procedure used torture to force denunciations of other suspects, in a manner reproducible *ad infinitum*. Its advantages for power rapidly extended to the lay tribunals, where it was applied even more intensively than in the ecclesiastical courts. The judges/police/inquisitors considered themselves immune to the evils of the devil. The etiology of evil (witchcraft) corresponded to a *theocratic/biological* discourse founded on the inferiority of women (more vulnerable to evil temptation) due to genetic weakness (derived from the man’s curved rib), and they found physical signs of that inferiority (marks of the devil), disguised torture with neutral terminology, and so on. The worst enemies were those who denied the existence or the power of witches, because they considered that witchcraft was a more serious crime than original sin.

(c) With modernity, theorizations based on theocratic/biological discourses were cast aside. There was a return to Platonic idealism and a tendency to leave the stranger outside of criminal law to free him or her for police measures (administrative law), especially in dealing with those who were *bothersome* or *undisciplined* (potentially dangerous). This could be theorized by resorting to Hegel, because given that judicial relation presupposes freedom of the will, someone without self-awareness cannot enter into that relation, for the field of law is the spiritual, and its precise place and starting point is the will, which is free, so that liberty constitutes its substance and determination; and the system of Law is the kingdom of freedom realized, the world of the spirit expressed by itself, as in a second nature. Because the stranger is not self-aware, and does not share that second nature, such a person cannot be submitted to a penalty, because he or she does not act with judicial relevance and cannot commit a crime, but only represent a menace, like an animal escaped from a zoo. From that there is just one step to convert such a person into an enemy as one who is refractory. It is fair to recognize that Hegel himself did not go that route, but his pejorative expressive regarding colonized cultures allow one to infer it.

(d) With the open return to inquisitorial behavior, that criminal law was theorized as administrative law and all sentences as measures of direct coercion against dangers. The inquisitorial principle definitively puts an end to criminal law and dissolves it into administrative law. Four centuries after the *Malleus*, criminological positivism, with the same integrated scheme of etiological criminology, criminal law and penal and criminalistic procedure, has blatantly returned to the inquisitorial system. The stranger, both as a serious criminal and as a dissident, returned to being biologically inferior, not because of gender as in the case of witches, but because of pathology or belonging to an insufficiently evolved race (such a colonized person born by chance in Europe) or due to being a degenerate (involuntary product of a superior race). The law disappeared, replaced by administrative measures for direct coercion destined for containing the dangers that the offenders presented to society. Judges assumed police roles (as in the *Malleus*), and, obviously, the strangers (recognizable due to the stereotype) were much more dangerous than the peers, and, given their unchangeable inferiority, the only thing to do was eliminate them. The theoretical presentation cancelled the old differential treatment of the Hegelian matrix, the peers were also submitted to police measures, but it was the ones directed towards the strangers that were eliminatory.

The crudest expressions of that dangerousness belong to Rafael Garofalo, who affirmed that penal science has as its object defense against the *natural enemies of society* and that indulgence by judges was no more than the *triumph of logic achieved at the expense of social security and morality*. 

---

*www.matiasbailone.com*
In the eyes of the people – he wrote, in what seems to be the best tone of the vindictive publicity of the early XXI century – the codes, the proceedings and even Judicial Power, seem to have reached an agreement to protect the criminal against society, better than society against the criminal\textsuperscript{35}. As a follower of Spencer\textsuperscript{36}, he affirmed that society needed to produce an equivalent to Darwin’s natural selection\textsuperscript{37}, and thus, the enemies needed to be eliminated, which he justified with the sharp remark that through a laughter on the battlefield the nation defends itself against its external enemies; through a capital execution, against its interior enemies\textsuperscript{38}.

The enemies were not limited to the serious criminals, but encompassed the bothersome as well (petty thieves, prostitutes, homosexuals, drunks, vagrants, gamblers, etc.), characterized as dangerous classes\textsuperscript{39}, soon baptized as those of evil life and made the objects of literature with pretensions to field work\textsuperscript{40}. Sentences without crimes were destined for them (unlimited police detention measures\textsuperscript{41}).

(e) In the most juridical variant of positivism, Franz von Liszt proposed imposing re-socializing penalties for the peers who made relatively small mistakes and merely intimidating sentences for occasional offenders (very much peers). However, for those who were incorrigible (the true strangers, encompassing the categories of serious and bothersome criminals), given the impossibility of killing or deporting them, he opted for imposing eliminatory sentences: Society – he wrote – must protect itself from the irrecoverable, and because we cannot be head or hang them, and deporting them is not an option for us, we have no other choice than to deprive them of freedom for life (in their case, for an indeterminate period)\textsuperscript{42}. This last category was complicated to the extent that the doctrine hearkened back to idealism, and thus, upon taking up a gain the scheme that can be traced back to Hegel, his disciple Karl Stooss replaced it with administrative police measures\textsuperscript{43}, inventing what are now known as security measures\textsuperscript{44}. From Stooss’ Swiss project one criminal law is theorized for peers and another for strangers, with the first designating retributive sentences and the second providing measures that have one foot in penal law and the other in direct administrative coercion, since they answer to positivist dangerousness. They are definitively sentences without the limits or guarantees of the sentence, which is why from the outset the lie of the labels was denounced\textsuperscript{45}.

The combination of this breakaway criminal law, which allows an idealist development for the peers (persons) and a determinist one for the strangers (dangerous beings), was carried out in two ways: the vicariant system and the two-way system. In both, measures are imposed on those who are decidedly strangers, but in the cases in which one cannot totally assure that quality for the subject, in the vicariant system the judge is authorized to replace the measure with a sentence, while in the two-way system the sentence is imposed as well as the measure. This latter criterion, undoubtedly more authoritarian, was adopted in 1930 by the codice Rocco. There can be no doubt that the indeterminate detention measures of the texts that follow the Fascist code are destined for eliminating enemies (serious criminals on the one hand and bothersome on the other, called habitual professionals, etc.)

(f) The most extreme elaboration of the theme of differential treatment of the stranger or enemy was carried out by Edmund Mezger\textsuperscript{46} participated with Franz Exner in preparing the project on strangers to the community (Gemeinschaftsfremde), destined to be eliminated in the concentration camps and who were certainly the same persons who, according to the positivists, incurred the status of dangerousness without wrongdoing\textsuperscript{37}.

Mezger indistinctly used the concepts of enmity towards law (Rechtsfeindlichkeit) and blindness towards law (Rechtsblindheit), referring to an attitude that is not in agreement with the healthy intuition of the people regarding the just and the unjust, so that under normal conditions, they should not apologize, but quite the contrary, set the basis for punishment\textsuperscript{48}. The terrifying examples of that enmity were the outrages against the race (sexual relations between Germans and Jews, punished by death), abortion and sodomy\textsuperscript{39}. The stranger to the community was one who because of his personality or form of conducting his life, especially due to his extraordinary defects in understanding or of character will
be incapable of fulfilling with this own forces the minimal demands of the community of the people. From that definition one deduces that the strangers were the bothersome of the positivist evil life.

**The enemy, stranger or hostis in political theory**

(a) Traditional criminal law has limited itself to discussing it differentiated penal treatment of enemies or strangers, destined to neutralize the danger that they represent, is a subject for criminal law itself or for administrative law (police) and to deciding the entity that is to carry out such neutralization (from the security measures of Stooss to genocidal elimination by Mezger). With this it presumed the political admissibility of the category of stranger derived from Roman law, where the foreigner, the stranger, the enemy, the hostis, was one who a solicitously lacked rights, who was outside of the community. The maximum penalty was expulsion from the community, exile, exactly because it left the subject in the situation of foreigner, stranger, enemy, deprived of every right.

(b) However much we qualify the idea, when we distinguish between citizens (persons) and enemies (non-persons), we are referring to humans who are deprived of certain individual rights. The political question, that is, the kernel of the question, consists in determining if it is politically and judicially admissible to have an updated version of the concept of “hostis” from Roman law.

The current debate regarding enemy criminal law proposed by Jakobs makes reference to other explanations of current repressiveness, such as symbolic criminal law, the expansion of criminal law, criminal law at various speeds, etc., and there is criticism of the author’s thesis that maintains that it is a case of introducing a criminal law of the author. But what is certain is that the only form of admitting a really limited enemy criminal law would be through an extreme penal law of the author, in other words, limited to a group of persons actually identifiable due to physical characteristics, because otherwise, what is being discussed is not if one can treat some strangers in a differentiated manner, but if the state of law can limit the guarantees and laws of all citizens. This is so, because in permitting intervention in private communications one affects everyone’s intimacy. By limiting procedural guarantees one places everyone at risk of being unduly prosecuted and condemned for terrorism. By typifying equivocated preparatory acts one threatens everyone with sentences for conduct that in most cases is harmless (buying precursor chemicals to pay a house or fertilize a garden, take money to legally buy a property, carry fingernail clippers on an airplane, joke about some security measure, omit declaring a bank transfer, etc.). In other words, the supposedly novel anticipation of typification follows the almost two-thousand year old path of the lex Julia against crimes of lèse majesté, which was expanded to the point of punishing possession and manufacture of purple cloth, because it implied the risk of a preparation for magnicide.

The discussion is thus clearly political; if the Roman category of enemy or hostis is admissible in a state of law, and second, if based on it one can limit the rights and guarantees of all inhabitants. These political questions are not independent, because if one rejects using hostis to refer to an ethnically differentiated group, admitting its use will mean limiting citizen liberty. That means that differentiated penal treatment of the hostis implies an injury to the limits on the state regarding the citizen, meaning that it is a more repressive treatment for everyone, which is much more compatible with an absolute state than with a state of law.

(b) Jakobs perceives the political nature of the question, but moves it towards a debatable polarizing dilemma; he depicts a racial political sations those of Rousseau and Fichte, for whom all delinquents would be enemies, and those of Hobbes and Kant as moderate, for whom only some would be. In philosophy the current practice is not to oppose thinkers in this way, but Hobbes is usually opposed to Locke. Moreover, the positions of Rousseau and Fichte are not so radical.
In principle, Rousseau is contradictory; he seems to refer only to murderers and not to any delinquent, and furthermore, he only admits depriving of life one who cannot be maintained without danger, and, if that were not enough, in the same book he admits that a state can only have as an enemy another state, never a person. In the case of Fichte, we believe that a more careful reading will allow us to understand that although he is not proposing an enemy criminal law, he maintains that those should be the domain of administrative law, considering as such only murderers, incorrigibles and traitors, for whom he reserves noting less than the death penalty as an eliminatory administrative measure. Here, perhaps, one may find the first reference to the famous Stalinist phrase, which was that the death penalty was not a penalty, but the maximum measure for social defense.

(c) The true confrontation in political thinking is produced between Hobbes and Locke. Starting with the idea that humans develop their faculties because of their desire for power, Hobbes understands that competition, mistrust and the desire for war are the causes of disputes, that in a state of nature determine a state of permanent war, in which there are no rights, since each one has what he or she can obtain and conserve, nor are there moral judgments. To put an end to that state, humans achieve the social contract, through which they deliver all power to the sovereign, who is not part of the contract, because it is agreed upon between the subjects. As that sovereignty is the only thing that can contain war, it cannot be partial: sovereignty must be total. The subject can hardly retain any rights, because before sovereignty there were no rights.

For Hobbes, resistance to the sovereign's power is inadmissible, because that would mean reintroducing the bellum omnium contra omnes, the war of all against all, and precisely because of that, those who resist the power of the sovereign cannot be punished, but only submitted to forced containment because they are not delinquents but enemies. For Locke, who, with their resistance reintroduce war. However serious a crime may be, its author is not an enemy, but someone who resists the sovereign is an enemy, because he or she returns to being a stranger or foreigner by leaving the contract through an act of resistance.

The thinking that opposes Hobbes' idea of an absolute state is that of Locke, for whom in the natural state there is a natural law, and therefore there are rights. Locke's contractualist metaphor is much more realistic than that of Hobbes. For Locke it is implicit that civil society predates the state, which some take to presuppose two contracts. What is certain is that once civil society is constituted, the majority decide the state contract, and hence, cannot assign all rights, but only those necessary for conserving those rights. The legitimate resistance that overthrows a sovereign, to Locke, does not dissolve civil society, although that is the effect that Hobbes attributes to it. For Locke, a critic of absolute monarchy, someone who carries out an act of legitimate resistance demanding respect for rights previous to the state contract, is a citizen exercising rights; to Hobbes, a defender of the absolute state, such a one is an enemy who needs to be repressed and contained with unlimited force, without even respecting the boundaries of the sentence, because such a one has ceased to be a subject. Someone who, to Locke, is exercising the right of resistance to oppression, is for Hobbes an enemy worse than a criminal. For Locke, the sovereign who abuses power loses the condition of sovereignty and becomes simple another person; for Hobbes it is the subject who resists abuse of power by the sovereign who loses his condition and begins to be an enemy.

(d) In support of his thesis Jakobs cites Kant, and especially emphasizes a note by him in the second section of his treatise Perpetual Peace: a Philosophical Sketch published in 1795. In that note, Kant affirms that there may be peoples or humans in a natural state, whose very anarchical presence represents a danger, and in those conditions there is the right to oblige them to enter the contract. Anyone can force those who insist on remaining outside of the contract to come under it, because that is the only way to guarantee peace. In that sense, Kant was following the tradition of Hobbes, and along identical lines was denying the right to resist oppression, because for that philosopher, destruction of the
state represented loss of the external guarantee of the categorical imperative, and thus, the return to the
natural state and resulting restoration of war of all against all\textsuperscript{65}.

Along the same lines as Locke, Feuerbach responded to Kant in 1798, he publishing his \textit{Anti-Hobbes}\textsuperscript{66}, which was, strictly speaking, an \textit{Anti-Kant}\textsuperscript{67}. Feuerbach defended rights prior to the contract. He affirmed that rights also existed in the natural state, e.g. blacks sold as slaves had a prior right to freedom, although they could not exercise it because they had been impeded in doing so by force. To Feuerbach, the sovereign is part of the contract, and because of it he is given the right to choose the means to carry out his ends. Dissident regarding those choices – politics – cannot establish any right to resistance, which only appears when the sovereign acts against civil society and intends to return it to the state of nature. By deviating from the purposes assigned by the contract to sovereignty, it is understood that the so sovereign loses his character as such, and thus, resistance is not to the sovereign but to a particular person with power. There is no right to resistance to the sovereign, but to one who has ceased to be one by departing from the ends that the contract assigns for exercising sovereignty. By not admitting that resistance, one would fall into the contradiction of maintaining that the contract imposes the duty of obeying someone who wishes to destroy society.

That also explains Feuerbach’s liberal jusnaturalism: there is not only a practical moral reason, but also a practical judicial reason, which indicates that there may be an exercise of rights that are prior to the state contract\textsuperscript{68}. While the first indicates a moral duty, the second indicates the judicial space as a subjective right in society, independent of the will of the sovereign.

We also believe that it is clearly demonstrated that the question of the enemy does not involve contraposition of Rousseau/Fichte with Hobbes/Kant, still less because the first were radicalized and the second moderate, but in the discussion on the absolute state and the liberal state, between Hobbes and Locke first, and then between Kant and Feuerbach, where the key lies is the right of resistance to oppression, which the defenders of the absolute state not only deny, but assign the character of enemy to those who intend to exercise it.

(e) Hobbes’ thesis presents two important contradictions that can be summarized in one, which has not gone unnoticed by subsequent scholars. The first was pointed out by liberal criticism, in other words our Anselm von Feuerbach, and which we have just mentioned; if it is the sovereign himself who reintroduces \textit{bellum omnium contra omnes}, it is absurd for citizens to passively stand by and watch the social destruction. In that sense his state is \textit{excessively absolute}. But in another sense, Hobbes’ state is \textit{not very ab solute} and in this sense also falls into another contradiction that has been pointed out by authoritarian critics. Hobbes was writing at the time of the influence of religious wars and was thinking of \textit{inner conviction}. He distinguished between \textit{private} and \textit{public}; his “Leviathan” reached to the boundaries of the private but did not enter it. As to the question of faith in miracles\textsuperscript{69}, the sovereign decides which miracles are to be believed, but \textit{this refers to public worship, not to inner conviction}. Faith is an intimate question, its profession is public, and in the first instance Leviathan does not enter.

Carl Schmitt, the most penetrating reactionary theoretician of the past century, warned in 1938 that \textit{this turned out to be the mortal germ that destroyed the powerful Leviathan from inside and killed the mortal god}. Already a few years after its publication – he adds referring to Spinoza – the gaze of the first liberal Jew fell on the barely visible crack\textsuperscript{70}. Schmitt then begins raving that practically all of the distinctions between morality and law – the most precious achievement of European civilization\textsuperscript{71} – from Christian Thomasius forward, and including Kant – are Jewish subterfuges to erode and undermine the power of the state as the best means for paralyzing foreign peoples and for emancipating the Jewish people themselves\textsuperscript{72}. But the Nazi ravings must not cloud the truth of the contradiction pointed out: \textit{if the sovereign cannot intrude into inner conviction, when he does so there is no other alternative but to recognize the birth of the right to resist the sovereign}. Moreover, one might think that in doing so one reintroduces religious war and with it the \textit{bellum omnium contra omnes} and – in a
curious paradox — the contradiction indicated by absolutism would coincide with that of liberalism, because in such a case the sovereign would lose legitimacy, and cease to be sovereign for violating his function, however much Hobbes considers this foreign to the contract. Schmitt perceives that Feuerbach’s thesis could be maintained by Hobbes himself, but minimizes that, considering Feuerbach little more than a petulant youth and avoiding answering the issue through the recourse of criticizing the theory of psychological coercion, which is certainly the least fortunate among the brilliant Feuerbach’s theses, forgetting that contradiction of a thought is not answered by another contradiction of the thought of the critic.

(f) But Schmitt’s political criticism of Hobbes, despite having been an heir to his thought, is accurate from the authoritarian point of view, and, furthermore, is a necessary starting point for all of his conception of the enemy, he being the only one to consistently develop it to its final consequences. Their brutality does not gain their consistency; quite the contrary, we believe that it is exactly Schmitt’s formidable consistency that demonstrates that the thesis of the enemy in the field of political science ends up necessarily with his conclusions.

The Hobbesian enemy could not be one limited to acting as such, to outwardly resisting the sovereign, but to be coherent with the thesis of the absolute state, the enemy had to be someone who with his thought or faith resisted the path imposed by the sovereign. If obedience needed to be outward and inward, enmity could also be both outward and inward disobedience.

From that point on, the dilemma is clear: for liberalism there are only offenders (peers); for absolutism not only are there offenders or delinquents (peers), but also enemies in war (strangers). The function of liberal policy would be to guarantee peace among the citizens (peers), punishing offenders according to the seriousness of the violation. The function of absolutist policy would also be to guarantee peace among the citizens (peers), but in order to do this it would be necessary to neutralize the enemies (strangers) with war and punishment of offenders would become a less important question. Without neutralizing the enemies (strangers) with war there could be no peace among citizens (peers); if the state loses the war it cannot guarantee its interior peace, and the state always has enemies (strangers) that make war against it and against those for whom there is no other remedy save answering them with war. When facing an enemy in war there is no limit imposed by humanity, because it has not enemies. He might have endorsed the elegant affirmation of Joseph de Maistre — another coherent and forerunning reactionary — when he said that there is no such thing as a “man” in the world; in my life I have seen Frenchmen, Italians, Russians, etc., but as regards “man,” I declare that never in my life have I found him and if he exists, he is unknown to me. Hence Schmitt affirms that all invocation of humanity is false and can be suspected of manipulation, because any limit to the power of the sovereign against the enemy puts an end to the very concept of the enemy, weakens the state and keeps it from guaranteeing peace among the citizens. The Roman idea of the enemy, of the hostis, does not admit half measures, not even the limit of inner conviction imposed by Hobbes, because it opens up the path of resistance to the sovereign and with that impedes the exercise of sovereignty in war.

The reasoning that admits a distinction between citizens and enemies must presuppose a war (for without it there are no enemies) and one that is practically permanent, since exceptional wars are the province of military and wartime law and not criminal law or ordinary administration. Starting from that premise, one must conclude, as does Schmitt, that the essence of politics, that is, what is equivalent to good and evil in morality, to beautiful and ugly in aesthetics, to profitable and unprofitable in economics (for if it does not find this essence, the political will lack autonomy) consists in the friend/enemy distinction: the specific political distinction to which it is possible to refer political actions and motives is the distinction between friend and enemy. That is coherent, if one admits a permanent war, the essential function of politics could be nothing else than being occupied with it.
The crowning point of Schmitt’s thinking, in pointing out the essence of politics in this way is that there is no liberal politics, but only liberal criticism of politics. As a result, liberal criminal law would be nothing more than a critique of authoritarian criminal law (of the enemy), in other words, a succession of discourses that criticized the succession of discourses of enemy criminal law, but in reality it would be an illusion. One must recognize its merit in being the most formidable and coherent unprejudiced effort to deny the dialectic between the police state and the state of law, intending to reduce the latter to a bothersome and hollow disturbing illusion and as signing reality only to the former.

Schmitt affirms that this line of friend/enemy distinction indicates the extreme degree of intensity of a union or a separation, of an association or dissociation, which has no reason to appeal to the other distinctions or to base itself on them. Thus, regardless of whether good or bad, beautiful or ugly, the enemy is simply the other, the foreigner78, and it is enough for him to be existentially, in a particularly intensive sense, someone else or foreign, so that in an extreme case it will be possible to have conflicts with him that cannot be decided either through a system of pre-established norms or through the intervention of a third party who is uncommitted and thus impartial79.

Who decides which group or groups are the enemies. Schmitt’s response can be no other: the politician, in other words, the sovereign. In the case of the extreme conflict, it is the politician who decides if the otherness of the stranger in the concretely existing conflict means the denial of his modes of existence and if because of this it is necessary to defend oneself and fight, to preserve one’s own, peculiar mode of life80.

This means that in emergencies, the power to defend the Constitution corresponds to the executive and not to the judiciary, considered by Schmitt to be a bureaucratic power, useful in times of normality but not in a new emergency81. Thus, when it is a case of defending the Constitution, the sovereign is enabled to cancel all limits and guarantees, without any control by the judiciary, which he explains by maintaining that the Constitution is a set of laws and that some have priority over others; the republican principle, for example, is a priority, and thus, to save it, one may suspend all guarantees and rights82.

The Roman concept of the hostis can only be coherently maintained through a line of thought that leads to the political consequences pointed out by Schmitt. One may argue that even the war has limitation, which is undoubtedly right. But when one speaks of the hostis as the enemy introduced in “normal” or “permanent” criminal or administrative law, we are not referring to war under Geneva law. To the contrary, we are introducing a spurious or private concept of permanent war, of irregular war, which Schmitt also did not ignore. With that idea of the hostis, as an enemy in an irregular and permanent war, one ends up with the dirty war of the national security doctrine, according to which one should not respect the rules of regular war in an irregular one83. This has its roots in the French action in Algeria and in Schmitt’s own theorizing, which does not focus on it in vain, intending to find its first manifestations in the Spanish resistance to the Napoleonic invasion and vindicating General Raoul Salan84. To do this, he arbitrarily interpreted Clausewitz’s famous thesis, confusing the political moment with the military moment. Clausewitz indicated the continuity, but did not confuse them; Schmitt confuses them with the irregular war of his partisan. The continuity is real, but they continue to be two moments, and in the political moment, there cease to be enemies and there begin to be offenders. The power of war (against enemies) of the war moment begins to be punitive power (against offenders) in the political moment. Schmitt confuses them to allow enemies to subsist in the political moment; his war does not cease, but is permanent.

(f) The intention of introducing the enemy or hostis in ordinary criminal or administrative law in a clarified or limited form does not invalidate the affirmative that the only coherent introduction of the concept is that of Carl Schmitt, exactly because in it resides the contradiction that Schmitt pointed out in
Hobbes: if we admit the existence of the enemy, but place limits on singling out such a person, we cannot deny that when the defining power exceeds those limits a right to resistance appears for the citizen who is arbitrarily singled out as an enemy. With that, we weaken the state in war, which is inadmissible.

It will obviously be argued that there exists a state of law and that it has institutions and controls that impede the arbitrary singling out of enemies. That is true, but in limiting the rights of everyone in order to be able to effectively individualize the enemies, one narrows the possibilities of defense for citizens before those same organisms, since by definition were are neutralizing – or at least weakening – the controls of the state of law.

On the other hand, the concept of enemy or hostis provides for the sovereign and for mass publicity an argument that de-legitimates institutions and controls and allows them to stigmatize them as obstacles, antipatriotic, useless and blind bureaucrats, ideologues covering up enemies, useful idiots and, definitively, traitors in wartime. Almost all Latin American coups d’état have rationalized their crime by invoking the need to defend the Constitution that they themselves have violated or annihilated. Thus, the judicial admission of the concept of the enemy in law that is not strictly of war is, logically and historically, the germ or the first symptom of the authoritarian destruction of the state of law.

Some conclusions

We have traced the history of punitive power and criminal law and we end up with the basic political question. We can formulate some concluding reflections, even though the question has no conclusion, because it is a formidable political problem.

1. To begin with, the proposal by the Professor from Bonn is not new in theorizing criminal policy, since it has been maintained long before and is almost reiterative.

2. The reaction it provokes – not to mention the sincerity with which it is expounded – is the product of the current situation of world power, which makes it much more dangerous because it may facilitate the bath to regression in carrying out a universal program of Human Rights.

3. The punitive power of penal legislation in every period has distinguished between peers and strangers, meaning that there has always been a category of offenders for those to be eliminated: first by death or by deportation and galleys, later by lifetime prison sentences and indeterminate segregation sentences and, finally, security measures have been invented for neutralizing strangers.

4. Criminal law has had more than its fill of theorizing the difference between corrigible and incorrigible, peers and strangers, to the point of openly confessing that it invented the security measures because it can neither apply the death penalty nor deport.

5. Given that the strangers cannot be individualized through physical features, the question is not limited to reducing the guarantees and freedoms for terrorists and other sinister sorts, but the question to clarify is if one can limit the freedoms of a nd gua rantees f or te rrorists a nd other s inister s or ts, but the question t o c larify i s i f one c an limit t he f reedoms a nd gua rantees f or c itizens in or der to m ore e ffectively i ndividualize t he e nemies, i ncluding a ssuming t he r isk of c onsidering some citizen as an enemy.

6. The discussion as to whether strangers should be penal or administrative presupposes the political admission of the category of enemies, which is something that must be discussed with total clarity.

7. If besides citizens there are also enemies, that is because there is war, and in that case one cannot admit any resistance to the sovereign and thus, one cannot place limitations on the individualization and containment of enemies.
8. Any limitation to pointing out and containing the enemy means recognizing the right to resistance, and if there are enemies and permanent war, the only possible model for a state is an absolute state.

9. If one admits the existence of enemies and war in a permanent form, the limitations of a state of law are an obstacle to effectively neutralizing them.

10. When one confuses military and political movements the war becomes permanent and the limitations on extraordinary war disappear, giving way to the thesis of the dirty war.

11. It is not possible to avoid that consequence without clearly distinguishing the political moment (in which one can only have violating citizens) and the military moment (in which the enemies appear).

12. The admission of the judicial category of the enemy in ordinary law (penal and/or administrative) introduces the seed of the destruction of the state of law, because it is limiting and controlling institutions become an obstacle for eliminatory effectiveness: one who is a hindrance in the war is a traitor.

AUTHOR'S NOTES

1 Émile de Girardin, the abolitionist during the later years of the second empire, maintained that the death penalty was the last one that should disappear (Du droit de punir, Paris, 1871).


4 We refer to crimes of massive and indiscriminate destruction and not to terrorism, which is a judicially nebulous term.

5 Infra, n° 5.

6 The equivocations are not exhausted with this, since we could also add another that uses the same grammatical subject to designate the jurisprudence of penal or constitutional courts, for example, and we could think of another that with the same expression places the reflex of punitive power in the public imagination.

7 This counterposition may go back to Franz von Liszt; on it, Claus Roxin, Kriminalpolitik und Strafrechtssystem, p. 2.

8 Merkl, A., Teoría general del derecho administrativo, México, pp. 325 and ss.

9 A broad investigation on these prejudices in Norman Cohn, Los demonios familiares de Europa, Madrid, 1980. See the terms “fascinación” and “maleficia”, in Rossell Hope Robbins, Enciclopedia de la brujería and demonología, Madrid, 1988.

10 And to a large extent in effect until the present. About that, the detailed investigation by James A. Brundage, La ley, el sexo and la sociedad cristiana en la Europa Medieval, México, 2000.

11 See e.g., Walter Rodney, De cómo Europa subdesarrolló a África, México, 1982.

12 See Maurice Niveau, Historia de los hechos económicos contemporáneos, Barcelona, 1977.

13 This was imposed administratively through the leyes de leva, these being the first security measures in colonial times and after independence.


15 Formally in preventive prisons, about which Concepción Arenal wrote in 1877: “Imposing on a man a serious penalty, such as deprivation of liberty, a blot on this honor, as is having been in jail, and this without having proven that he is guilty, with the probability that he is innocent, is something that says much about justice” (Estudios Penitenciarios, Madrid, 1877, p. 12).

16 On the English deportation to Australia, Ro bert H uhes, La c osta f atídica, Barcelona, 1898; on French deportation: Édouard Teisseire, La transporation pénale et la relegation d’apres les Lois de 30. Mai 1854 et 27. Mai 1885, Paris, 1893; C.
O. B arbaroux, De l a t ransportation, P arís, 1857; M ichel Bo urdet-Pléville, G aleotes, forzados an d pe nados, c it.; H. D onnedieu de V abres, A Justicia penal h oje, S a o P aulo, 1938, p. 102. Against the opinion of Concepción Arenal, Salillas proposed it for Spain, La vida penal en España, cit.

17 See C. M uratgía, D irector, P residio y cárcel de reincidentes. T ierra del Fuego. A ntecedentes, Bs. A s., s.d. (1910 c irca); also U shuaia 1884-1984. C ien años de una ciudad a rgentina, editado por la Municipalidad de U shuaia bajo la dirección de A rnoldo C anciani, 1984.


19 On the concepts of underground and parallel penal systems, Lola A niyar de C astro, D erechos h umanos, m odelo in tegral de la ciencia penal, and sistema penal s ubterráneo, in “R ev. del C ollegio de A bobgados P enalistas del V alle”, C a li, 1985, pp. 301 and ss.


22 P latón, P rótagoras; on this, A lfred V erdross, L a filosofía del derecho del mundo o ccidental, M éxico, 1962, p. 35.

23 P olice power in the old administrative terminology.


26 Those characteristics were detailed by the first organic critic of the M alleus, F ridrich von S Pee, en 1631, I processi contro le streghe (C au to criminali), R oma, 2004.

27 H egel, F ilosofía del derecho, M éxico, 1985, pp. 31-32.


29 O n the d issidents, C esare LOMBROSO, G li anarchici, T orino, 1894; L ombroso/L a Sc h, L e crime politique et les révolutions, P arís, 1892; B enito M ario A ndrade, E studio de antropología criminal espiritualista, M adrid, 1899, pp. 203 and ss.; and the supranormal we re a lso c onsidered s uspicious ( L ombroso, L ’uomo di g e nio in r apporto alla ps i chiatria, a ll a storia e d all’estetica, T orino, 1 894). M ax N ordau f ollowed t his closely c onsidering a ll da ngerously c reative a rtists a s de generates (D egeneración, M adrid, 1902). L ead ers of m ass movements we re c onsidered in the s ame manner: G ustav tavo L e B on, L a psicología política y la defensa social, M adrid, 1912; by the same, P sicología das m ultidões, R io de J aneiro, 1954; S cipio S ighele, I d elitti d ella f oll a, T orino, 1910; J. M. R amos M ejía, L as m ultidões ar gentinas, B enenos A res, 1912: On the cr iminalization of m ultitudes and leaders, J aap v an G inneken, F olia, p sicología e política, R oma 1989.

30 A lthough women continued to be inferior in intelligence and, as such, with tendencies towards prostitution, as “equivalent” to crime: C esare L ombroso-G uglielmo F errero, L a donna d elinquente, l a prostituta e la d onna n ormale, T orino, 1915; a lso regarding p rostitution, P hilip K ovalevsky, L a P sicolgie c riminelle, P aris, 1903, 1 , pp. 181 and ss

31 L ombroso n otes the s imilarity between the born c riminal and a M ongoloid o r N egroid (L ’uomo d elinquente in r apporto all’antropologia, giurisprudenza e alle discipline carcerarie. D elinquente n ato e pazzo m orale, 3ª. E d., T orino, 1884, pp. 248 a nd 295). S ince ancient m times h uman c haracteristics had been assigned to animals, to thus classify humans according to them. T hat was the task begun by p hysiognomists, beginning with G io va B attista d ella P orta, D ella f is onomia dell’uomo. C on illustrazioni dell’edizione del 1 610, P arma, 1988. P ara el siglo XVIII, J ohann Caspar L avater / G eorg C hristoph L ichtenberg, L o specchio dell’anima. P ro e contro la f isiognomica. Un dibattito s ettecen to, a c cusa di G iurvanni G urisatti, P adova, 1991; a lso L ucia R odler, I l c orpo specchio dell’anima. T eoria e storia della f isiognomica, B runo M ondadori, 2000. U n m eticuloso e inteligente d e s i gnado en A rmelle L e Br as-Chopard, E l z oo d e l os f ilósofos. D e la b estialización a la e xclusion, T aurus, M adrid, 2003


33 R. G arabaloo, L a c riminologia, T rans. by P edro D orado M ontero, M adrid, s.d., p. 7, 11, 14 and 15

34 Ibid, p. 1 1.

35 Ibid, p. 15. G arabaloo de fined t he e nemy t hrough t he r e cta r atio n of t hose c ivilized p eople, o f t he s uperior r aces of h umanity, w ith an e xception made for t hose d egenerate tribes th at r epresent evil d oers in s ociety (Ibid, p. 102)

36 H e considered him “the g reatest of t h eorematic philosophers,” ibid, p. 97

37 I bid, p. 326. T hat proposal was t aken up a gain by N azism: H elmut N ocial, D ie rassengesetzliche R echtslehre, G rundzüge e. nazionsocialist. R echtphilosophie, M ünchen, 1932

38 G arabaloo, C riminología, p. 133; p. 59 de la 2ª ed. italiana, T orino, 1891

39 T he m ost imp ortant b ook, w ritten by a P aris p olicemen, a lthough showing the s hortcomings of the discourse, at the same t ime reflected the i mportance a ssigned to the problem: H. A . F régier, D es c lasses d a ngereuses de la p opulation d a ns les g randes v illes, B ruxelles, 1840.

40 I n r eality, t hey f ollowed in the t radition of F régier, m ixing p olice in formation with prejudices and moral concepts: S alillas, R afael, E l d elinquente e s pañol. H ampa (A ntopología p icaresca), M adrid, 1898; N íccoli, A lfr e do – S ighele, S cipio, L a mala v ide en R oma, M adrid, 1901; Bernaldo de Q uirós, C onstancio, L a mala v ida en M adrid. E studio p sicosociológico con
dibujos and fotografías al natural, Madrid, 1901 (reed. Madrid, 1998); Rembo, Max, La mala vida en Barcelona, Barcelona, 1912; Gómez, Eusebio, La mala vida en Buenos Aires, Buenos Aires, 1908 (con prólogo de José Ingenieros). There is an interesting literary compilation by Ernesto Ferrero with a prologue by Leonardo Sciascia, Storie nere di fine secolo. La mala Italia, Mila no, 1973; on the differential treatment in Río de Janeiro, Lená M edeiro de M enezes, O s indesejáveis: desclassificados da Modernidade. Protesto, crime e expulsao na Capital Federal (1890-1930), Río de Janeiro, 1996

The de-finition by Ingenieros is supremely illustrative regarding the enemies identified as strangers: It is a foreign and hostile orde within t heir o wn t errain, b old i n t heir l urking, open i n t heir pr oceedings. untiring i n t he r eacherous proceeding of its tragic programs (Prólogo a Gómez, p. 6).

See Franz von Liszt, La idea de fin en criminal law, Valparaíso, 1984, p. 120.


On t his, s ee t he ve ry pa rticularized a nalys is by E nzo M uso, La m isura di s icurezza de tentiva, P rofili s torici e costituzionali, Milano, 1978.

An expression of Ed. Kohlrausch, Sicherungshaft. Eine Besinnung auf den Streitstand, en ZStW, 44 (1924), pages 21-34

He was t he Neokantian penalist most dissemated in the Spanish language, which did not see translations of liberal Neokantians such as Max Ernst Mayer and Hellmuth von Weber. Gustav Radbruch himself - as was the case of M.E. Mayer - was translated by legal philosophers, but not by penalists.

New light is being shed on this draft project through a detailed investigation by Francisco Muñoz Conde, Edmund Mezger y derecho criminal de su tiempo. Estudios sobre criminal law en el nacionalsocialismo, Valencia, 2003; this project and the concrete proposal by Mezger are also examined by Michael Burleigh/Wolfgang Wippermann, Lo Stato razziale. Germany 1933-1945, Rizzoli, 1992, p. 158.

Mezger, E., Rechtsirrtum und Rechtsblindheit, in “Probleme der Strafrechtserneuerung, Fest. f. Kohlrausch”, Berlin, 1944, pp. 180-198 (p. 197-198). The healthy intuition of the people was the Nazi formula with which the analogy was introduced, a reform in which Mezger also participated (Cf. Muñoz Conde, op.cit., p. 85)

Cf. Muñoz Conde, op. cit., p. 145


Foreigner and enemy meant hostis, which came from the Sanskrit root ghas, to eat (from whence comes hostelry). Hostis is t o kill and hostia is victim. O n t his: R. v on Ihering, L’esprit d u D roit R omain d ans l es diverses p hases de l e s on d éveloppement, Paris, 1877, tomo I, p. 228

Cf. Albert Du Boys, Histoire du Droit Criminal des Peuples Anciens, Paris, 1845, p. 245

This becomes much more problematic in Jakobs’ proposal, since, starting with his normativism he affirms that the enemy should not be considered as a person. Strictly speaking, he is in fact also sincere here, since every criminal law that theorizes by admitting that some human beings are dangerous and only because of that must be segregated and eliminated, reifies them, ceases to consider them persons, and thus violates article 1 of the Universal Declaration of Human Rights. In this sense, Jakobs’ proposal should not scandalize us, but every criminal law of the enemy should, in other words, every tradition that excludes strangers from sentencing and eliminates them as dangerous. It is possible that Jakobs merely intended to postulate that the enemies have fewer individual rights than citizens, but this is not made clear in his writing. On the polemic that the expression has aroused: Luis Gracia Martín, Consideraciones críticas sobre el actualmente denominado “criminal law of the enemy”, “Revista electrónica de Ciencia Penal and Criminología”, 7-2-2005.

Cancio Meliá, Manuel, en Jakobs-Cancio Meliá, Derecho penal del enemigo, cit., pp. 65 and ss.

Cf. Teodoro Mommsen, El derecho penal romano, Trans. by P. Dorado, Madrid, s.d., II, p. 63; also Mariano Ruiz Funes, Evolución del delito político, México, 1944, p. 18


The text to which Jakobs refers is in chapter V of book II: “every wrongdoer, in attacking social law, because of his misdeeds is a rebel and a traitor to his country, ceases to be a member of it by violating its laws and makes war on it. Therefore, conservation of the State is incompatible with his own; it is necessary for one of the two to perish, and when the guilty party is executed, it is more as an enemy than as a citizen. The procedure and the sentence are the proof and the declaration that he had broken the social co ntract, a nd as a r es ult, i s no l onger a member o f t he S tat e” (page 3 7). Nevertheless, he adds: “There is no evil man who could not be made a good man for something. There is no right to put to death, not even as an example, for anyone who cannot be maintained without danger” (page 38). In chapter IV of Book I he affirms that “a State may not have as an enemy anything but another State, and not men, since one cannot set up relations
between things of diverse natures.” In fact, he specifies that “without a declaration of war there are no enemies, but only bandoliers.” (page13) (Jean-Jacques Rousseau, *El contrato social*, Trans. by Consuelo Berges, Madrid, 1973).

58 He reasons by thesis and antithesis, and although in his thesis he maintains that every delinquent becomes an enemy, based on the *rebus sic stantibus* clause, in other words, that the offender loses all rights in violating the contract. In his antithesis he asserts the emergence of a new contract, which is one of *expiation*. To the extent that it is able to protect public safety (general prevention and dissuasion), it establishes the right to demand punishment. Only when expiation is insufficient does Fichte accept exclusion from society, but based on a new contract (one of amendment) the person can claim the right to improve; it is a case of temporal exclusion. Only if the subject does not amend or in case of murder does Fichte allow for definitive exclusion. He leaves only murderers, incorrigibles and traitors irremediably out of the contract. For them Fichte reserves the death penalty, but without any tallion foundation (he believes that tallion is a theocratic theory), but as a measure of administrative security that the state should carry out merely as an administrator (J. G. Fichte, *Fondement du droit naturel selon les principes de la doctrine de la science* (1796-1797), PUF, Paris, 1998, págs. 269-293)

59 *Leviathan*, 1,8,10

60 Ibid, 1, 13.

61 Ibid, 1, 18

62 Once cannot consider as punishment the harm inflicted on someone who is a declared enemy. Because that enemy has never been subjected to the law, he cannot transgress it. Either he was subject to it and declares that he is no longer, denying, as a result, the possibility of transgressing it. Therefore, all of the harm that can be caused must be understood as acts of hostility. In a situation of declared hostility it is legitimate to inflict any sort of damages. One can thus conclude, thus, that if by acts or words, knowingly and deliberately, a subject should deny the authority of the representative of the State, whatever may be the penalty called for in case of treason, the representative may legitimately make him suffer as he sees fit. In denying subjection, he has denied the penalties called for by law. As a consequence, he must suffer as an enemy of the State, meaning according to the will of the representative. The penalties are established in the law for subjects, not for enemies, as is the case of those who, having become subjects by their own acts, rebel and deny the power of the sovereign by their own will(ibid, 2, 28).

63 John Locke, *Ensayo sobre el gobierno civil*, 2,6.


67 The reference to Kant in chapter 1 is unquestionable 1. Also, the note in which he expressly cites Kant criticizing his position regarding changing of the constitution. (chap. 3). He takes care to respectfully separate Kant from Hobbes regarding the inviolability of the sovereign in chap. 6. It is clear that Feuerbach was twenty-three years old when he wrote *Anti-Hobbes* and could not openly confront the prestige of the old and respected Kant.


69 *Leviatán*, capítulo 37.

70 Carl Schmitt, *El Leviatán*, cit., p. 111

71 This has been enshrined in the Argentine Constitution since 1853 in its article 19 with an admirable formula: *The private actions of men that in no way offend the public order and morality, nor harm a third party, are solely reserved to God and exempt from the authority of judges. No inhabitant of the Nation shall be obliged to do what the law does not command, nor deprived of what it does not prohibit*.

72 Ibid, p. 117.


75 Although Schmitt writes the *Kronjurist* of the *Dritte Reich* ( Cf. Joseph W. Bendersky, *Carl Schmitt teorico del Reich*, Bologna, 1989), his reference regarding the question of the enemy is noted without meaning any pejorative intention, since Schmitt’s ideas were taken up by many critics of the bourgeois liberal state with different political persuasions and including some openly opposed to his politics. In that sense one may see the presentation by José Arico to *El concepto de lo político* that we cite; also Luciano Albanese, *Schmitt*, Editori Laterza, 1996, p. 7; Julio Pinto, *Carl Schmitt y reivindicación de la política*, La Plata, 2000, p. 179.

76 C it. by Stephen Holmes, *The Anatomy of A ntiliberalism*, Harvard University Press, Cambridge/London, 1993, p. 1.4. Schmitt affirms regarding humanity that, as such, *one cannot have any war, since one does not have enemies, at least on this planet*. *The concept of humanity excludes that of the enemy, given that the enemy also does not cease being human, and this does not present any specific difference* (Carl Schmitt, *El concepto de lo político*, Ediciones Folios, México, 1985, p. 51).

77 Schmitt, *El concepto de lo político*, p. 23
We respect the translation that we have cited, but it should be observed that the word Schmitt uses is *Fremde, stranger*, in other words, the same that Mezger would soon use, Cf. infra n° 5.

Schmitt, p. 23

Ibidem.


On the constitution as a plurality of laws, Schmitt, *Teoría de la Constitución*, Madrid, 1992, p. 37. With this argument he legitimated the right of the German executive to suspend guarantees and to imprison legislators and political opponents during the death throes of Weimar: on that, Bendersky, op. cit


He did this at a conference given in Spain many years after the fall of German Nazism: *Theorie des Partisanen. Schwischenbemerkung zum Begriff des Politischen* (Italian tran.: *Teoria del partigiano. Integrazione al concetto del politico*, Milano, 2005). He also affirmed in passing that Spain knew how to defend itself, with a war of national liberation, from being swallowed up by international communism (p. 79 of the Italian translation).
Chapter X

The Path of Criminology

Eugenio Raúl Zaffaroni

I. Criminological knowledge as a path

1. The Divine Comedy is a singular poem, because in it Dante Alighieri summarized all of the knowledge of his time and culturally closed out the Middle Ages. To do so, he chose the tale of a journey or path: he starts by relating that he lost himself in a savage wood, on Good Friday in 1300, and seen met Virgil, the Latin poet who guided him through Hell and Purgatory, until he quietly moves away and Beatrice appears, who guides him through Paradise, where Virgil could not enter because he is a pagan. It is curious that seven centuries later, the best way of showing knowledge about the punitive power that arose in Dante’s time, is also imposed in the form of a journey or path. There is no better way to introduce oneself into the labyrinths of criminology. It is not good to limit oneself to showing the dust, which at the end of the road has stuck to one’s clothes; that would only be proof of having made the journey. But if one intends to show the path, it would also be dangerous guide who invited one to travel it without any warning, with the careless pride of an expert, because this will demonstrate ignorance of the difficulties of the path. It is preferable for one to chose modesty and warn of the risks. For in criminology, the risk is always lurking, given that it is — exactly — the knowledge and art of clarifying discursive dangers.

2. Criminology is the path of discourses regarding the criminal question. As with a path through a wood, landscapes fall behind and one is enchanted by new sights that appear, but the previous scenes do not disappear because of that; we simply stop looking at them, to the point that on all too many occasions, we return to the same point without recognizing it. Even though it is much more terrestrial, it reminds one of Dante’s path through hell and purgatory. In criminology there is always the temptation of the panther, the lion and the she-wolf, who blocked Dante at the beginning of his course (who symbolize lust, pride and earthly power — Inferno, Canto I). However, his guide will never be a Virgil: he sent Beatriz and from his lips the Divine Poet know that she would be his guide through paradise. However, a good guide in the paths of criminology knows that, along the path, Beatriz and paradise are merely mirages. The guide also knows that at the end of purgatory he or she must withdraw in silence, a la inglesa — as Virgil did — and, perhaps, it would be appropriate to remind the reader that when Dante was lamenting the disappearance of the Latin poet, he was reprimanded not to suffer because of it, and warned that it was fitting for him to reserve his pain for another wound (Purgatorio, Canto XXX). In effect, if after that he attentively followed the course, he would have forever lost his good conscience. Someone has spoken correctly and precisely of the bad conscience a good criminologist (Pavarini). That will not be the fault of the guide, but of the one who chose to walk through the wood that is selva selvaggia e aspera e forte che nel pensier rinnova la paura!
II. The path of administering fears

3. Perhaps the idea of election is not totally true, because generally one who decides to traverse the path of criminology does not do so entirely voluntarily. But when one chooses it without a bureaucratic or circumstantial impulse, one does so because one feels lost in a web of contradictory discourses, and is pressured by fear of victimization of oneself and others, both from robbers and from the arbitrary power of a police state. The driving force for the discourses and the tangle between them is always fear: some manipulate it, others suffer from it, but both tangle themselves in it, even if they do not know this. At some moments, its seems as if reason is suspended. Everything seems to depend on sensitivity to fear, as to what one fears the most: if criminal aggression or the arbitrariness of power. The old fear of chaos, of pillage and of death as a result of the war of all against all (invoked by Hobbes to justify absolutism in the XVII century and by Kant to deny the right to resistance against despotism in the XVIII), against the fear of the omnipotent state, of arbitrary power, of death as the result of police and political torture.

4. However, behind those nearby fears, there is another which is not much examined: the fear of cultural instability. In the course of criminology, the meaning of too many things changes. Solid institutions and those with very clear ends are blurred in a close analysis of the distance between what they do and what they say they do, of their effects, of their genealogy. A sizable part of the world, which seems orderly, ceases to be so. One does not fall into another world, but there is considerable change in the world we know and the one where we freely move. It is no small thing to fear losing a cultural world that, although not always comfortable, is at least known. That may be the greatest disconcertment that the path of criminology may cause, and also the greatest source or resistance that it generates. In dealing with those themes, it is not rare for some to opine that there are things that it is better not to know, but what is certain is that once they are known they cannot be ignored. If at the end of the journey, when the guide disappears, the reader suffers that disconcertment, it is because he or she has begun to understand what criminology is.

5. But not all of these fears have always existed. And fear suspends reason, leading to paralysis. The terrified subject can neither think nor move (is like the earth), suffers a semblance of death, relives the experience of the primal clay, is dumbfounded (returns to nothing), confuses the signal with signs, the drawing with the drawn, the name with the thing (Sartre). And one who exercises power knows it: power is exerted by administering fears, stimulating them by magnifying dangers, or lessening them by underestimating them. And the greatest sensitivity to fears does not depend only on personalities, on the paths of life, on the experiences of each one, on their conscious and unconscious reasons, but also varies according to social circumstances, and especially on one’s own construction of reality by means of communication. But in fear lies the key to the permanence of all criminological discourses created throughout history, because: a) fear of pain and of a violent death always accompany people; b) and this fear travels along all of history, being polarized according to whether its production is considered nearer or more probable by barbarism, which is imagined as the product of total disorder or of the order of the totalitarian state.

III. Definition as an authoritarian tautology

6. To try and be a little more concrete – and perhaps a little less cryptic – the best thing to do is show the route of the journey. That is what is usually done in introducing a course: one provides a definition, which serves to establish the horizon for projection or the epistemological boundaries (of what is of interest, and thus, of what is not of interest), the method with which one operates, etc.
honor of that tradition, one may provide a definition, saying, for example, that *criminology is the critical analysis of knowledge that is not strictly judicial about the criminal question, so as to reduce the levels of violence linked to it*.2

7. If, according to tradition, the next step were forward with the exegesis of his definition, we would be doing nothing more than to smuggle an act of authority that, with good reason, could be classified as arbitrary. In criminology, from the beginning we should mistrust all acts of power, because *this is knowledge so linked to power that it sometimes identifies totally with it*. We can never accept without criticism someone putting markers around a set of entities and declares that it is a scientific boundary. They may have a reason for doing so, but we must always demand that they exhibit it.

8. But to exhibit the reason for the definition it would be necessary to develop everything it contained, since every definition, if it is true, is *tautological* (covers everything defined). Thus, the definition can only be well understood at the end of the journey; in other words, the journey must be the verification of the non-arbitrary nature of the definition. But in that demonstration (or unveiling) it is necessary to proceed through successive approximating steps. In general, these steps are followed in a course according to a *logical preference*, which establishes what elements should be considered before others. The particularity of criminology is that the best approximation for defining it is one that replaces *logical preference* with *chronological priority*, with *chronological order*, in other words, with its path in time. A first approximation according to that order, can show the path to follow and the reasons leading one to prioritize it.

IV. The *wise criminologist* and the *naive criminologist*

9. Dante became lost in the *selva selvaggia*, and it would be good to start by ascertaining that it is the wood in which the person who accepts our hand in the path of criminology has gotten lost. We think that someone who grants us this confidence is an urban inhabitant, who was previously called *bourgeois*, or inhabitant of a burgh, an expression that has now fallen into disuse because after Marx it acquired a pejorative connotation. A sone urban inhabitant who receives news and talks with congeners at the dawn of the XXI century, this person becomes informed about any serious crime and reads and hears the opinions of the others. One affirms that the agent of the crime is mentally ill; another says that such persons need to be killed; others affirm that the cause of it all is the destruction of the family and traditional values; others that it is all due to social injustice. If the author has not been identified, others affirm that it is due to excessive procedural guarantees, while others say that it is necessary to have more rigorous control and sometimes to apply some form of violence and even torture. The disconcerted urban inhabitant questions the *wise criminologist* and this person, takes any one of these opinions as his or her own, and develops it down to its ultimate consequences. If the urban inhabitant is not very curious, he or she will be satisfied with the unfolding of cleverness, which makes it possible to exhibit reasoned developments of consequences that he or she had never imagined, and will also be astounded at the enormous amount of bibliographical material that the wise man expounds and quotes. But if this inhabitant is bold enough to question another *wise criminologist*, he or she will see that the second takes ownership of a different opinion than he or she previously, and also develops it until its ultimate consequences. And he or she can seek out a third and a fourth, and they will do nothing else but increase disconcertment.

10. Thus the urban inhabitant will go until encountering a *naive criminologist*, who perhaps will say that there are many questions that have no right answer, but assuredly the mentally ill criminal is from the *alienism* of the second half of the XIX century, that the death of the offender is
prerevolutionary expiationism of the XVIII or Garofalian neutralization of the early XX, that perpetual segregation is European colonial relegation from the XVIII and XIX centuries, that the eye for the eye is XVIII century contractualism, that social disorganization is from North American sociology of the early XX century, that the excessive guarantees are something from positivist dangerousness of the end of the XIX and that torture is a method from the XII and following centuries.

V. Criminology has been accumulating discourses for five centuries

11. The naïve criminologist may not have explained very much, but however lacking in sagacity the urban inhabitant may be, he or she cannot help but compare that situation with any other from daily life and will perceive the difference; it would be madness if, commenting on the need for a trip, his or her colleagues engaged in a passionate discussion in which each one defended the best means of travel as being everything from a primitive canoe to a jet engine, or, if it were a case of sending a message, proposed everything from drums, smoke signals and messengers to electronic mail. It would be much more serious if in medical seminars some doctors defended Galen’s theory of humors and others favored the conclusions of genetics, investigated with powerful computers. The naïve criminologist will show the worried urban inhabitant that criminology is not a paleontological museum, but a genuine zoo in which all species are conserved alive. It is very strange to find such a formidable coetaneity of the non-coetaneous (Mannheim), and thus, an explanation of that particularity. It also seems reasonable that, given the coexistence of discourses for several centuries, one will be gin to seek an explanation, following the chronological order of the discourses and clarifying the reasons for that succession. Through inquiring into this journey, the reason for its survival and force will be revealed.

VI. The discourses as struggles between corporations

12. We already know that the trees in the wood are criminology’s multiple and contradictory, intertwined and non-coetaneous discourses (or the criminologies of the wise criminologists). We have also delineated the nature of the path that will allow us to move across them. We are in conditions for taking forward a second and closer step, starting be asking from whence these discourses come (how are they born? From branches or from seeds?), and, from that, how did they arise in each period and if they hearken back to an original speech.

13. If the urban inhabitant were to verify the origin of each one of the contradictory discourses, meaning if he or she were to be beyond a somewhat inorganic repetition by ordinary people, kit would be possible to see that one discourse was prepared at a certain moment by a doctor, others by jurists, others by police, others by sociologists and others by academicians. He or she will not be long in discovering that the doctors, jurists, police, sociologists and academicians were specially trained people, who formed separate, hierarchical and verticalized groupings, which they called certain power, and that generally behave according to interests that correspond to that power: these are the professional corporations. The contradictory discourses come, then, from professional corporations that compete amongst themselves, but who also have struggles for power in their own midst, so that all of those fights translate into competing and contradictory discourses. All of the contradictory discourses were produced by members of powerful corporations at some moment, to oppose other corporations or to discuss the hegemony at the top of the corporation itself. All of the corporations have the ir wise criminologists, who produce their discourses, and do not limit themselves in exercising power outwardly, but also reproduce themselves, raising their own new members.
14. With this we will have come a little closer to the nature of the trees in the wood, but it remains for us to ask why and how the wood itself came to be. As for the why, the wise criminologist will respond that it is because humans are curious by nature, and their refined curiosity is science, which advances driven by the urge for knowledge. This would not seem to be the appropriate answer, given that in criminology, more than an advance, there is an accumulation; no discourse disappears but they are repeated and, sometimes, something new is added or two or more existing discourses are combined. It seems to be a wood whose trees are immortal, and limit themselves to changing their foliage. The naïve scientist will give a different answer: simply smiling and affirming that up till now, humans have always sought power. He or she will not attribute this to any nature, a question to be referred to the philosophers, but will be content to not that, at least during the centuries recorded by history that has been the case. The answer to the second question – how the wood came to be – is complicated, but less problematic than the first. It is not a question of getting lost in the reasons that drive the search for power, but of explaining why exercise of power itself has been developed by agencies and corporations, which throw speeches into hegemonic struggles between themselves and amongst themselves.

15. The role of the guide is to seek clues, saving the lost inhabitant from becoming entrapped in the discursive jungle. To do this, he or she must favor certain strong and original trunks, which can be used for orientation. It is not necessarily to totally rely on one of them, but to at least recognize its bark and use it as a reference. In this sense there are the indispensable elements contributed by Michel Foucault during the 1970s, which are the means by which that author interpreted: a) the appearance of punitive power in XII and XIII century Europe, and b) the transformation of the state and of punitive power in the XVIII century.

VII. The middle ages are not over

16. As for the appearance of punitive power, it is necessary to point out that the affirmation that it has always existed is false. Humanity walked the planet for thousands of years, without knowing punitive power. It appeared at different historical moments and soon disappeared. Its installation in an irreversible manner to this date, dates from the European XII and XIII centuries. Up till that time, punitive power did not dominate in the way that we know it today3. When one German harmed another, the aggressor took refuge in a temple (ecclesiastical asylum) to avoid vengeance, and there remained, while the chieftains of the respective clans gathered the reparation that the offending clan owed to the injured clan (Wergild), under threat that, if it were not resolved, war would be declared (Blutrache or blood vengeance). Another method for solving conflict was to resolve the question through a judge, who solved with direct intervention from God in person, meaning with trials from God or ordeals. The judge, in fact, was a sort of sports referee, who solved on the transparency and quality of the contestants, to allow God to express the truth. The most common ordeal was judicial contest, fight or combat, a duel between the parties or their representatives: the winner was the one possessing the truth.

VIII. Confiscation from the victims

17. All of that changed when one fine day the lords began to confiscate the victims. The clan chiefs ceased collecting reparations and the judges left behind their role as sports referees, because one of the parties (the victim) was substituted by the lord (state or political power). The lord began to select conflicts and, when they occurred, would set apart the victims, affirming I am the victim. That is how political power came to also be punitive power and to decide the conflicts, without relying on the victim for anything, so that until today victims have disappeared from the penal scenario. It is true that now one hears some discourses and timid steps are being carried out to take them into account for something,
but this is nothing more than a palliative to the confiscation, that is, a means of attenuating its excesses, and is in no way a restitution of the confiscated right. The day in which punitive power seriously restores the victim, will become another model for solving conflicts, but it will cease being the punitive power, because it will lose its structural character, which is confiscation of the victim.

IX. The abduction of God

18. Starting with that confiscation; a) the penal procedure (or judgment) ceased to be a procedure for resolving a conflict between the parties, and became an act of power by a delegate of the lord or sovereign. Because one of the parties – the victim – has left the proceedings, the sentence does not attend to his or her interests, but the interests of power. b) The penal judge has ceased to be a referee, who guaranteed objectivity and balance between the parties, and become an employee, who decides according to the sovereign’s interests. c) Because it was now no longer a judgment between parties, one should no longer established whose side God was on, because it was assumed by default that he was always on the side of power. It was thus assumed that it would make no sense to call him to a judgment, because it was presupposed that he was already there, represented by the judge. It is quite clear that not only had the victim been confiscated, but also God.

19. This last item, in other words, the certainty that God always assists the judge, determined that the proof of God would disappear, that the method of establishing the truth of the facts would no longer be a duel, a combat, but that it would involve a violent interrogation: the truth is provided by the defendant or the accused, responding to the violent interrogation (the inquisition or inquisition) of the judge. The interrogation was violent, because if the defendant did not wish to confess, he or she was tortured until being made to talk, and if this did not happen, the silence was also a confession (it was considered that it was his or her own evil that provided the strength for resistance).

X. Violent interrogation as a scientific method

20. The punitive power’s method for obtaining truth was not limited to penal procedure, but over time became a method to obtain any truth that was not religious, meaning that it gradually evolved from the penal process to the scientific method. Up to that moment, scientific truth was also being obtained through a struggle: in alchemy, there was a struggle with nature; in astrology, the subject sought to rip from the stars their cosmic secret that regulated everything; even in philosophy advances came through the questions, which was a fight involving cross-questioning between opponents. When the move was made from alchemy and astrology to chemistry and astronomy, knowledge was also accumulated through violent interrogation: since then objects that one wishes to know have been interrogated, and when the object does not respond or does not give an answer about itself that is of interest, if possible, it is violated, through an experiment.

21. Since that moment, knowledge has ceased to advance through struggling with nature and things, to begin doing so through interrogating things or beings, with questions that are also violent and may reach the point of torture (the experiment: from the opening of cadavers until vivisection, including the Nazi doctors and exposure of thousands of persons to radiation).

22. This knowledge through violent interrogation is to know to be able. Even though this new formula was expressed in 1620 in a work by Francis Bacon (in the *Novum Organum*), the idea that it is necessary to know about things in order to be able to dominate them (it is only possible to dominate nature by submitting to its laws) is of the for learning through interrogation or inquisitorially. Thus, knowledge for power is accumulated by a skinning the entities, according to the power that one wishes to exert over them. The subject of knowledge (scientific) places himself in the position of
inquisitor, is always on a higher level than the object or being under interrogation, has God on his or her side, is an envoy of God for learning, is the Lord (dominus) who asks in order to be able.

XI. The knowledge of the lords

23. One does not interrogate scientifically through mere curiosity, but to obtain some result, that will allow one to exert a power over the object being interrogated: if one studies a cow, one does so to find how to make it provide more milk; if one interrogates the soil it is to know how to achieve better harvests; if one interrogates the sky, it is to predict the rains. One does not ask anything, except for what is of interest for the power objective that motivates the investigator. For the subject interrogating – or the one financing the investigation – the only thing of interest are the answers that serve his or her purposes and the rest are ignored, because they do not matter, nor is he or she prepared to hear them, since he or she only wants to understand what is of interest, to receive the information that is functional for the power being sought. It is a lordly knowledge, only the lords no longer obtain their power by warring amongst themselves with primitive weapons, but by a accumulating knowledge that will aid them in dominating nature and other humans, who, because they have less knowledge, are inferior.

24. Therefore, knowledge through questioning and torture of violence (interrogation and experiment), as a knowledge of the lord (lordly, of a dominus, virile, patriarchal), has a paradoxical effect, which is that of crushing the lord himself. It is not easy to understand this, because for hundreds of years we have been accustomed to this lordly knowledge, despite which we continue asking about its negative effects, without being able to understand what they are obeying. We have seen that this knowledge has undesirable effects; it ends up being used to kill or to destroy; the knowledge that one acquires by asking in order to improve, is employed and ends up harming other things.

XII. Knowledge subject to the lords

25. Nonetheless, the reason for this effect of lordly knowledge is no secret: the subject interrogates the object to dominate it; it formulates the questions that serve or that it believes that serve for that purpose, but the interrogated entity does not know and answers in the only way that it can, that is, with its entire being (beings can only respond with their being: the cow with its complete cowness, the rock with its complete rockness). But the subject is not prepared to listen to the answer, given with all its beingness by the violently interrogated being, because it is only prepared to listen to what it needs or believes in needs in order to dominate. That is how the unheard part of all the answers accumulates on the subjects and crushes them. No different is the phenomenon that is summarized by stating that technology dominates humans. The etymology explains this very well: an object is what is thrown (projected) against, it is the violently interrogated being that throws itself against the interrogator with all of its beingness; the interrogator is subjected (thrown or projected down), becoming subjected by the accumulated beingness answers, which it is not equipped to hear. That is the consequence of the knowledge of dominus, which is lordly, patriarchal.

XIII. Is it possible to overcome knowledge through violent inquisition?

26. One may think of overcoming the knowledge of the dominus with the knowledge of a brother, not only of humans but with all of the other entities, as a third stage or form of knowing: from truth through struggle one moves to that obtained with interrogation, and it is possible that this may move to another that has arisen through dialogue. If one can conceive of a dynamic that, just as the duel
moved to the *inquisition*, from the *dialogus*, that is, from the knowledge of the competitor to that of the inquisitor and from that to the *frater*. But that dynamic will demand a total shift in the current paradigm of knowledge, which leads to biological hierarchization of society and confiscation of the victim, as a means of corporative verticalization of said victim. Imagine a society with the knowledge of a *frater* and not of a *dominus*, it would mean at the same time imagining it with little or no punitive power, without discrimination and without wars. The *wise criminologist* will say that this is an unattainable utopia; the *naïve criminologist* will remember that all realizations start out as utopias. But *naïve* means asking about the principle without accepting anything as a given, and, in that sense, naiveté is the opposite of foolishness. Because of this, he or she will not neglect to warn that such a proposal implies the removal of structures of power settled across many centuries and that, furthermore, they are not only exteriors but that we also introject them as part of the psychological team that has conditioned us, when we produce as subjects that we know, so that we think within the channels that we have imposed, and from which it is not easy to escape.

27. It is not possible to ignore that these three main beams have been perfectly articulated for eight centuries, because they are three indispensable elements of the same structure. Patriarchal power controls more than half of the population: the women, the children and the elderly, and in other periods the slaves, servants and serfs. The punitive power of the latter is preferentially entrusted with controlling young men and adults, in other words, *with controlling the controllers*. Instrumental knowledge is power at the service of the controllers and of the controllers of the controllers. The basic articulation is maintained, although the relations of power have become complicated in a thousand ways over the course of eight centuries, in different manners in other relations, which exclude from power and socially marginalized dissidents, immigrants, sexual, ethnic and cultural minorities, persons with special needs, the physically and mentally informed, needy urban inhabitants, the unemployed, those under psychiatric treatment, people with chemical dependencies, the obese, and others.

XIV. Discrimination as a structural product

28. As the *subjects* of knowledge (the scientists) assume the position of *inquisitor*, just as the latter did, they assume a position higher that the *object*, or being, and from that hierarchical perspective violently begin interrogation, presupposing that they have God on their side, are God’s envoys to learn, that they are the lord (*dominus*) who asks *to be able*. They can switch God and replace him with an impersonal entity (*progress*) or with their own idealization (*humanity, class, nation, race*), but there is always a God to legitimize their interrogating violence, who will guarantee their hierarchical superiority. That being the case, whenever the object is another human, the lordly knowledge presupposes, through its own methodical structure, an hierarchy: the human object will always be inferior to the human subject. There is no dialogue, but only violent interrogation. The hierarchical discrimination among humans is, thus, a *structural product of the means of learning through violent interrogation*, in the same way as is the depredation of nature and the extermination of the inferior and the different.

XV. The first privatization of security

29. The first task that punitive power and *inquisitorial* knowledge proposed for themselves resulted in the corporatization of society, in other words, the overall predominance of the hierarchical
model of the Gesellschaft (corporate) over the horizontal Gemeinschaft (community or traditional) model. Within that corporation, it was necessary to reaffirm and strengthen the patriarchal hierarchical structure, meaning, to reinforce the subordination of half of the population, as an indispensable chapter in its corporate social and verticalizing discipline. The first privatization of security (of police services and punitive justice) and the most massive one occurred with the appearance of modern punitive power itself, when the lord (state) delegated to its adult free men (superiors) control over women. The European inquisition directed its power against dangerous or fallen women, reaffirming the power of men, by freeing them from any women who might reveal themselves against them, meaning those who did not resign themselves to being simply submissive wives and mothers.

20. It was necessary to discipline society, eliminating anarchical pagan or dysfunctional elements, and replacing them by the guiding components of corporate political hierarchy and, most especially, sexually discipline society, particularly the women who – as is known – are the transmitters of culture. Their control and subordination were key elements for eliminating the dysfunctional pagan elements considered a drag on society. The inquisition did not subordinate the woman, who was already in that state, but merely reaffirmed her subordinate condition and uprooted any attempt at reaction. On may say that in this respect it was the criminological discourse that provided cover for the most successful enterprise in punitive control in history, to judge by the later silence on the theme. Discourses are not only significant for what they say, but also for when they are silent, meaning that they are not only important for what they show but also for what they hide, and their authors not only express the limitations of their knowledge by describing what they see or believe they see, but also by what they do not see. The enterprise of privatizing security for women was singularly successful, because the criminological discourse was to spend almost five hundred years without mentioning again the theme of women; for the next five centuries, criminology concerned itself only with men.

XVI. Inquisition: the state as administrator of death

31. In this context we see appearing the first modern criminological discourse, organic, carefully prepared, explaining the causes of evil, the forms in which it appears, its symptoms and the means for combating it. This was the discourse of the first major agency for punitive social control: the inquisition. In the XV century it recapitulated all of its prior experience and struck out at women, in a magnificent manual of extraordinary coherence and highly refined theoretical elaboration (the Malleus Maleficarum or Hammer of Witches, 1484). This was the first and inevitable theoretical product of punitive power; it first exerted itself and then explained and discursively legitimated its actions, in an increasingly refined manner, until achieving the degree or expositive coherence that this first work of modern criminology presents, and which undoubtedly constitutes its foundational theoretical moment.

32. The first criminological discourse was that of the inquisitors. The authors of the Malleus were two inquisitors. But who were the inquisitors? It has been said that they were judges and that is true; but they were also police, and that is true; one could say that they also were sanitation doctors or meteorologists and agronomists, and that would be true. One could say they were jurists and legislators, and that would be true. One could say they played the roles of theologians and philosophers. Strictly speaking, the inquisitors were the operators of a major punitive agency, that decided the life or death of people and that accumulated the functions that were later shared amongst many agencies. In practical terms, it was the mother agency or common trunk, branching off from which were all of the other specialized agencies, which exert the power of social control.

33. When, five hundred years later, in the middle of the XX century, Talcott Parsons – the sociologist of North American systemic functionalism – considered that social control was only the function that agencies operated when the process of socialization had failed and deviant conduct
appeared, without realizing it, he described the function of the inquisition quite well. When patriarchy failed in its task of domesticating the woman to be only a submissive female and mother, and she manifested deviant conduct because she was seeking malignant superhuman allies in order to exercise another class of power, then the punitive social control of the inquisition came into play. The only difference consists in Parsons having theorized in this way the functioning of a set of agencies, while the authors of the *Malleus* theorized only that of their own and only mother agency.

34. The essential functions of the inquisition were gradually divided. The inquisition and its method were not the exclusive remit of the authorities or ecclesiastical power. The inquisitorial process and torture were forms of punitive power exercised by all political power, which attributed to itself the right to life or death over people. But *the right to life or death* – due to obvious natural limits – only meant the possibility of *killing or allowing to live*, meaning, *to cause to die or leave alive* someone or anyone. That is why – as far as possible – suicide was punished, because *causing to die* was a divine or royal privilege; the suicide was usurping the power of God or of the lord.

**XVII. The bureaucracies: the state that administers life**

35. This idea of the state as the *administrator of death* was gradually replaced by that of the state as the *administrator of life*. Foucault situates this change in the XVIII century; perhaps he might have placed it somewhat earlier, but what is certain is that at some moment, there was a shift from the power of *causing to die or letting live*, to that of *causing to live or letting die*. The state began a favorable focus on the life of its subjects, not of each life in particular, but the life of a new collective subject, which is made up of its subjects as a *public* subject. The state took on the role of administering the distinct aspects of the life of this collective subject in all its complexity, planning according to rules for *large numbers* and producing *massive effects* on their health, education, social discipline, children and labor.

36. As this move from administering the death of individuals to that of the life of the public was being carried out, it became necessary to distribute the functions that the inquisition had assumed in the XV century among specialized agencies. The inquisition could assume them all, because it is *much simpler to administer death than life*: the task of killing or allowing to live can be done by a single agency that retains all of the power or a major part of it, but when it is a case of organizing the life of the *public*, the question becomes extremely complicated and, the more the lord wants to regulate the life of his subjects, the more specialization he will require from his collaborators to attend to all of the aspects he intends to cover.

**XVIII. The corporations divide up life**

37. The lord (the state) saw the need for creating bureaucracies, meaning specialized institutions in the different areas of life that it intended to regulate or administer. But those bureaucracies become autonomous and begin to exert their own power, competing with each other for budget shares, prestige, political power, obtaining private funds, parliamentary support and etc. A struggle begins between corporations to hegemonize the power of the state, or, at least, to obtain the best privileges possible, both for the bureaucracy and for those whose specialized training is needed for it. Normally, persons with this specialized training group themselves corporatively, that is, in an institutionalized and hierarchical manner, giving way to a plurality of professional corporations that dispute power among themselves and also carry out major internal power disputes.

38. As is natural, the autonomized corporate power is exercised, aided by specialized knowledge that translates into *scientific discourses*. Each corporation develops a specialized knowledge that it
expresses in discourses according to its own and peculiar specific dialect. Those scientific discourses produced in their respective dialogues only differ between the corporations, but the same corporation can accommodate a plurality of discourses, which reflect the internal hegemonic struggle. Aloser look at any discipline will reveal the battle of the schools in its midst, which are largely incomprehensible to the extraneus. Depending on the circumstances, those corporations dispute spheres of reality, and the inclusion of an area within the epistemological boundaries of their discourses means the corporate appropriation of that territory, and thus, a larger slice of power.

XIX. The corporations teach one not to see

39. Reality is a continuous whole; in reality there are no fissures or solutions for continuity. Nor is anything immovable, but – from Heraclitus to quantum physics – we know that everything flows and in continually changing. However, the discourse by corporations has no other recourse but to fragment that reality in a more or less arbitrary manner and, at the same time immobilize the piece of reality that it has appropriated. Its comprehension is always distorted by fragmentation and immobility. Its operators learn and train themselves, and train their own apprentices so they may acquire particular skills in observing some entities and some of their aspects, but at the same time they are training and training their apprentices to not see other entities and other aspects of the same entities.

40. Just as throughout evolution, certain animals have developed organs that allowed them to perceive the presence of food and of dangers and enabled them to take the former and flee from the latter, this same development impedes them from seeing others when they are outside of their habitat or natural environment, or when that environment is altered, those trained in the corporations acquire perception skills and agility for certain stimuli and, sometimes, slowness towards others. Their training for skill is also always training for slowness. The difference lies in the fact that such slowness is not phylogenetically conditioned, and thus can be employed for the internal hegemonic structure of the corporation itself. Some of its members glance over at other corporations, make an attempt at taking control of another field, change the markers and manifest a new skill in facing the old dominators of the corporation. To the degree that this school is considered necessary by the corporation, they will replace the previously hegemonic entities with their renewed arsenal of skills and slowness. These are the scientific revolutions, paradigm shifts or epistemological outbursts, which drive the so-called progress of science.

XX. The corporate link with broad social power

41. These autonomized bureaucratic powers organized in the form of corporations, with their own knowledge expressed in discourses through peculiar dialects that are poorly understood by the common people, have greater or lesser luck in the hegemonic struggle. This depends on various factors and also – as always happens in power struggles, particularly in the short term – on imponderables. Imponderables by definition cannot be categorized. At any rate, when it is a case of power that demands a certain meaning over more prolonged periods, the imponderables tend to lose their importance and factors that are susceptible to a certain cataloguing predominate, given that they perform the mechanics of accumulating power. Basically, the power of a corporation increases, to the extent that its discourse is functional to political and economic power. That depends on a) factors that derive from the corporation itself and b) others that derive from political and economic power.
42. Those that derive from the corporation correspond to a) the availability of a discourse that is functional, but in the absence of that, the degree of ductility that a corporation has in elaborating a functional discourse counts. In the latter case, that ductility is facilitated by the prior existence of elements incorporated into training its members and due to the greater conviction of those elements on their part, which is to say that their members can modify their discourses and offer a new one with available elements and in those that they create. Should conviction relating to those elements be low, it may be compensated by the lack of scruples in incorporating others because of their conjunctural functionality, but that is usually difficult, because it demands a conspiratorial attitude and an ethical renunciation that is very complicated, although not impossible. b) That the discourse of a corporation is functional does not mean only that it coincides with the interests of broader social power, but also that it is credible in the cultural framework: not every esoteric discourse achieves hegemony, but only those that are capable of being transmitted to the opinion of those who decide or have weight in deciding and are accepted by them, so that there is a certain consensus produced. In every epoch there have been absurd effects at criminological discourses, that have been totally ignored by those in power, exactly because their lack of institutional focus has left them useless and even discredited. Discourses also lose hegemony when, because they are at odds with the cultural framework, they cease to be credible. The same dynamic of power that is reflected in knowledge makes the foundations of hegemonic discourses lose credibility and leads to their becoming caricatures. The theocratic discourse was unable to maintain hegemony in a cultural world in which there was more and more appeal to reason and it was clear that it was nothing more than a caricature of a theological discourse. The later discourse that intended to deduce everything from reason was unable to maintain hegemony when it became evident that it had fallen into a caricature of rationality, by means of rationalization derived from gratuitous intuition. The medical discourse was unable to maintain its effectiveness when it became clear that there was no verification and that it was a caricature of science, resulting from an intuitive and unverifiable affirmation about the nature of society. c) No less important is the negotiating capacity of a corporation, which is crucial for reducing conflicts with political and economic power and for establishing a more or less stable status quo; there is generally a promotion or designation of power and functions to the members of the corporation, and other compensations that are typically established and negotiated.

43. As for the factors that contribute to increasing the power of a corporation and that do not stem from it, but from hegemonic political and economic power, one must take into account the degree of rationality in such powers in the exercise of authority. The greater this share is, the more a power discourse with a greater level of elaboration will be functional for it, and provide greater legitimating solidity. Otherwise, it will be necessary to make use of quite despicable discourses in its formulation, which can only be provided by those at the fringes of professional corporations, who also use that power by throwing it into internecine struggles inside the corporation. Generally in those cases, the struggle for power is starkly exposed and drops its weak legitimating cover. That does not mean that they are incapable of effective control for some time, but preferably based on power, which is exercised too crudely for the socio-cultural context.

XXI. Corporate hegemony and mercenarism

44. What has been presented above explains that there are two phenomena that must be carefully distinguished: a) the hegemony of a discourse and of a corporation with its respective bureaucratic agencies, in a certain historical moment, that occurs when, without a particularly skilled effort, the agency has available a dominant discourse that coincides with the interests of broader social power and that fits within the cultural framework of this moment. Because of this it is functional with
the juncture of power with a certain degree of rationality, which is what assumes a particular interest in the course of criminology and of social sciences in general. b) the other is a phenomenon of intellectual marginality or mercenarism, which occurs when in the face of excessively irrational power, someone at the fringes of the corporation maintains a discourse of inferior quality that is circumstantially functional, or when some subordinates prepare discourses of very low quality, to place them at the service of political or economic power.

45. The second class of phenomena obviously are not lacking in the course of Criminology, but are anecdotic in and, reality should be considered less as discourses – because they easily fall apart under analysis – and more as part of the conflictiveness that the criminological discourses themselves attempt to explain. We will have occasion to mention several of them. In their circumstances they are often dangerous, but seen at a distance are somewhat ridiculous, except for their tragic effects. If the guide stops to look at some of them a long the path of criminology, it is not only to entertain the traveler with curiosities or to be amused at the absurdities, but because it is necessary for us to learn to distinguish them, in Criminology, as is the case with any other discipline. In the final analysis, a traditional psychiatrist may argue to infinity with a psychoanalyst, a functionalist sociologist may do the same with a conflictivist, and a judicial positivist may do so with a usnaturalist. The specialists know – as does the public – that if the debate is along the lines of Bleuler-Freud, Lukmann-Dahrendorf or Bobbio-Welzel, that it will always worthwhile to follow it. But they also know that this cannot be confused with the irresponsible acts of intellectual delinquents, and thus, it is indispensable to learn how to detect the latter and carefully distinguish them from the first. The intimate relation between knowledge and power – undeniable – does not mean that everyone who makes a scientific discourse is a mercenary or an intellectual delinquent, however mistaken he or she may be and however useful the discourse may be for power, very much despite the fact that the latter also exist and it will be necessary to know how to identify them and distinguish them.

XXII. The corporate dispute for ownership

46. Beginning in the XVIII century, when the appearance of corporations and their autonomization began to become increasingly manifest, with their resulting hegemonic struggle and the fighting in their midst, the criminal issue began to have a very contested environment. It is extremely interesting to observe how the discourses of different corporations were hegemonic, and how they gave way to discourses from other corporations. Obviously, even if the criminological discourse of one corporation ceases to be hegemonic, because political and economic power has privileged another one that is more useful for the new situation of power, the corporation that had prepared the previous discourse will not cease to exist, or to continue preparing new discourses, but those will simply not have the primacy nor be privileged by the political and economic power of the moment.

47. Furthermore, when a corporation loses hegemony (or when it does not achieve it) in the sphere of criminology it may develop discourses that are not always incompatible with those of the hegemonic agency, but – although those discourses will appear in it – also others will appear that tend to be compatible with the new hegemonic discourse, meaning that one part of the corporation adjusts itself to the new demands of the dominating discourse in power. It is clear that the penal judicial discourse adapted itself to the biological discourse when it lost its hegemony and that became dominant. Every authoritarian penal law on dangerousness proves this conclusively.

48. All of this explains why the trees in the wood do not die, never wither, but only renew their foliage. The corporations lose hegemony, cease to receive official favor as authors of criminological discourses, extend their struggles to other fields, but do not abandon what has already been marked out in the criminal sphere. They maintain some of their cultivators who constantly renew their discourses
49. Because of everything that has been pointed out, one must not confuse this path of Criminology with a history of the discipline. History involves recording past events that are projected in their consequences and in the present, but this path refers to events from the past that continue to be directly present. No one believes that the guide who conducts us along this path of criminology takes us through the corridors and rooms of a museum of dead theories, but that he or should be ready to tread the paths through a forest of living and constantly renewed discourses, produced by corporations that fight amongst themselves to gain hegemony, under the support of negotiations with larger social powers. The middle ages have not even finished in criminology, and its discourse continues to be as relevant as ever, only one needs to know the true discursive trunks and not be impressed by the change in tones of the leaves. Here it is not a case of losing sight of the forest for the trees, but of looking incorrectly at the trees and believing that they are different. It is not easy to learn to travel through a forest where the trees are blended.

XXIII. The major stages of hegemony

50. The course of this dispute has long periods and lesser conjunctural episodes that are not worth spending much time on. During the major periods – which are the important ones – the stages of discursive hegemony accompany the major chapters of political and economic global power, which have adopted certain discourses and discarded others. Over the last five hundred years one can identify the following stages of world power: a) the mercantile revolution (XV century), which exercised planetary power in the form of colonialism (XV to XVIII centuries); b) the industrial revolution (XVIII century), which exercised planetary power in the form of neocolonialism (XVIII to XX centuries), with a 1st stage of the rise of the bourgeoisie (XVIII century to the mid-XX century) and a 2nd stage of the bourgeoisie placed in power (XIX century till the end of the XX); c) The technological revolution (end of the XX century to present), that exerts its planetary power as globalization.

51. The dynamic began in the XV century. Punitive power served to corporatize, hierarchize and militarize society, meaning to discipline it to allow colonialist expansion into other societies. That was the European phenomenon that gave rise to the mercantile revolution of the XV century and to colonialism as an exercise of planetary power. The colony was a sort of total institution at a massive level; it was the institutionalized abduction of many millions of human beings, even the majority of the population of the planet. At least two continents (America and Africa) were transformed into total institutions, with immense concentration and extermination. It was the stage of large voyages (called voyages of discovery by the colonizers, of the first submission of America and Africa, of the hegemony of the maritime powers and the legitimating discourse for transnational and national power, with a discourse in a theocratic package, according to the cultural framework of the moment. It was the foundational stage of criminology, with the Malleus as the discourse for the inquisitors, prior to the net division of the corporations and the competition between them.

52. However, throughout the colonialist centuries (XV to X VIII), the corporations were emerging and achieving autonomy; they began to elaborate their own discourses and, finally in the XVIII century the industrial revolution emerged and ushered in the stage of neocolonialism (until the middle of the XX century), those power began to grant hegemony to the discourse of the jurists and philosophers of the Enlightenment. The hegemony of the criminological discourse of jurists and philosophers lasted until the settlement of the bourgeoisie in social power, with its decline beginning in the mid-XIX century. The bourgeoisie, meaning the industrialist, commercial and banking class that
was concentrated in the burghs or cities (the so-called urban concentration of industrialism that would characterize industrial civilization from this moment forward), needed this discourse in its struggle for power with the nobility, because it was vital to reduce and limit the exercise of punitive power that the nobles had available. But when the bourgeoisie achieved hegemony and settled into power in the central countries, it was no longer interested in limiting the exercise of punitive power and fell out with the jurists and philosophers who elaborated discourse to limit it.

53. When this fact took shape, a new agency arose in some countries, while in others – where it already existed – it gained new strength and roles: the police. But the police do not have their own criminological discourse and thus, the police criminological discourse was elaborated by the doctors in alliance with the police and against the judges, jurists and philosophers. The hegemonic criminological discourse was – beginning in the mid-XIX century – the medical-police discourse, of a biological nature, which, with various nuances maintained its dominance until the XX century and still survives today in a sizable portion of European and Latin American criminology. Neocolonialism strengthened the economic links between the center and the periphery and legitimated all of its power with a racist biological discourse; it rationalized internal power with criminology and planetary power with anthropology, both supported by the medical corporation. Neocolonialism was a sort of work camp for millions of people.

54. A third moment began when the biological discourse began losing credit, because the cultural framework was changing, especially because European totalitarianisms took ownership of the discourse with singular and tragic coherence, and the very complex and dynamic societies began to ask questions about the phenomena in a collective and non-individual fashion. In that circumstance it became very clear that conflictivity is modified by social conditions and the critics of power took advantage of this fact and isolated the problem. The sociologists who had been silenced by the biological reductionism of their discipline and who, to survive, needed to accommodate their discourses with biology, broke free of that and began to perfect their own particular dialogue, to elaborate and offer discourses as the authentic product of their own corporation. This process appeared with the first crisis of capitalism (1890) and soon extended to the rest of criminology, even though some countries continued to run in close competition with its predecessor, now conveniently renewed. There were also important attempts to incorporate the criminal question on the part of psychologists, but they were never hegemonic. Even less important were the attempts of some economists, although they were not lacking.

XXIV. The current deficiency in discursive hegemony

55. Finally, we reach the confusing end of the XX century and beginning of the XXI, in which there is no hegemonic discourse from the point of view of the wider society, even though the sociological discourse maintains hegemony at the level of academic power. This is because the broader social power is at a difficult stage of transition, and is not very predictable. Political and economic power have had close cooperative relations as well as conflict, but in the 1980s, the politicians directly renounced control of economic power, which has become transnationalized as never before eluding all political control for the first time. Globalized economic power always poses its own national political powers, without there being any international power capable of containing it. In that way, economic conduct criminalized in the national states (artificial market changes) goes unpunished at the global economic level. The national states – and with them the power of the politicians – suffered a terrible loss of the attributes of sovereignty, basically of taxing power (globalized capital demands lower taxes, under penalty of moving to another state) and the punitive power (it cannot repress the extortionate and speculative maneuvers of that same capital).
56. The reduced national political power cannot resolve the growing conflictivity that generates the conditions imposed by globalized economic power, which exclude large portions of the population from production (unemployment, underemployment) and that reduce their domestic product in direct relation to the deterioration of social investments (education, health, welfare)\(^6\). In other words: it would seem that the enterprise of administering life has been abandoned, even though because of that – for the moment – the administration of death has not been resumed. In a certain sense, following the Foucaultian terminology, one may say that the old cause to die or leave alive of the old inquisitorial regime has given way to the modern cause to live or let die of the industrial revolution, to now end up in a let live and die of the current stage of the technological revolution. The police agencies take advantage of the growing conflictivity to exert greater autonomous power, freeing themselves from controls and finally, manifesting a tendency to monopolize all of the wrongdoing in the illicit market. When faced with any attempt at control, they intimidate by using the threat of ungovernability against the weakened national political powers, which, for their part, are besieged by the demagoguery of the operators outside of the system with their extremist authoritarian ideology. In this emergency, the operators of political agencies of the status quo, faced with the threat of those outside of the system, take measures with communicative effects that demonstrate their firm resolve of containing the conflictivity, generally ceding power to the police agents. Meanwhile, the progressive political operators, generally accused of being soft on crime, go about showing the opposite by ceding even more power to the police agencies.

57. In summary, the technological revolution of the XX century opens up the path to a new stage of worldwide power (globalizations), in which traditionally criminalized behavior tends to be monopolized by the economic power and by the national police agencies themselves. The economic power tends assume exclusive control over criminality in the transnational market, while criminality in the local market (traffic in unlawful objects, persons and services) tends to be concentrated in the police agencies who confront the political powers that are weakened and in a process of permanently ceding their attributions\(^7\). This process of decadence in political power, which only succeeds in spasms of ceding its own power, is incapable of adopting any discourse that is rational or appears to be so. The sociological discourse, including the etiological one, is functionally inadequate, because it lays bare the incoherence of the political powers weakened by their impotence in regulating economic power and in controlling the increasing autonomization of the corporations. Even less can they assume a coherent discourse when they engage in appealing to short-range solutions and communicative effects, which reduce their power even more. Thus, one cannot speak in our days of a hegemonic discourse with such a hierarchy, other than the appeal to erratic and disconcerting remnants of speeches from the past, separated from any context and generally deformed. There is no hegemonic criminological discourse, favored and assumed by the political power, because there is no configurating political power, but only deteriorated political powers dealing with halting their fall. The suicide of political powers cannot assume any coherent discourse as hegemonic, because it does not have hegemonic power. For its part, the economic power does not need a similar discourse, because it is being exercised for the first time without any mediation by the political power. In the era of technological revolution, up till now the important thing for political power has not been to assume an academically coherent discourse, but to issue discourses tailored to media communications that have a tranquillizing (normalizing) effect, even though in practice they produce paradoxical effects. A political power that cannot reduce the violence that its impotence generates, only succeeds in issuing incoherent discourses, provided that – by means of simplistic social communications – they have normalizing results. More than a discourse, it requires a libretto for its show, because it itself and the state itself end up assuming the character of a show.

58. The path of criminology has passed through these Hegemonies and reached the unpredictable transition of the present, in a process where the corporations, beginning with the industrial revolution, have been increasingly appealing to the mediation of another social actor, as its importance
increased: the agencies of social communications. At this moment the devaluated political power appeals to those agencies, which have assumed a central importance, given that the political power – incapable of providing real solutions – makes efforts to communicate false solutions that will mask its permanent renunciation of power. The struggle is waged on the communications stage, through which a virtual reality is constructed, which each day is more separated from the facts. It is not possible to conceive of a ny discourse that will be functional for this form of renouncing power, because the discourses have always been functional for exercising power and not renouncing it. All of that explains the reason why we speak of a moment of unpredictable transition, because it seems to be excessively unstable and its projection into the future in these conditions is not viable for a prolonged period.

59. The critical review of all of these discourses and their relations with power, when they were hegemonic – and before and after that – and their relations with broader power, with their corresponding cultural context, in their case, with the agencies of social communications, is the task of theoretical criminology, from which should be extracted the elements necessary for reducing the violence of the conflict generated around the issue of crime. This first vision of the path followed by criminology, comes close to what is often called a definition, but without imposing it as an arbitrary act, but by advancing in demonstrating it. The question of what criminology is can only be responded by journeying along its curious accumulation of perspectives and discourses, of hegemony and falls, of struggles between corporations and the fickleness of broader social power, until reaching its current crisis, which is not the crisis of criminology, but that of the power that divides up hegemonies.

AUTHOR’S NOTES

1 A supremely illustrative view can be found in: Jorge de Figueiredo Dias and Manuel da Costa Andrade, Criminologia: o Homem Delinquette e a Sociedade Criminogêna. Coimbra, Coimbra Editora, 1984
2 That characteristic explains it very well: Alessandro Barata, Criminologia Crítica e Crítica del Diritto Penale, Bologna, Cedam, 1982.
3 See: Claus Roxin, Problemas Básicos of criminal law, Madrid, Reus, 1976
5 A quite complete overview of contemporary Criminology may be found in: Roger Hopkins Burke, An Introduction to Criminological Theory, Cullompton, Willan Publishing, 2003.
6 Allen Steinberg, The Transformation of Criminal Justice, North Carolina, University of North Carolina, 1989