GLOSSAE
European Journal of Legal History

ISSN 2255-2707

Citation

Stefano Vinci, "Insanity and criminal justice in Italy at the end of the 19th century", *GLOSSAE. European Journal of Legal History* 20 (2023), pp. 28-44 (available at http://www.glossae.eu)

Insanity and criminal justice in Italy at the end of the 19th century

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Received: 12.01.2023
Accepted: 23.03.2023

Abstract
The Italian penal code of 1889 introduced the concept of "mental infirmity" to circumscribe the hypotheses of non-punishability linked to the lack of consciousness or freedom of one's acts at the time the criminal action was committed. The practical application of this rule required energetic intervention by the jurisprudence of legitimacy to circumscribe the exemption from punishment to the mere existence of pathological states and exclude it from passionate states.

Keywords
Zanardelli Code, insanity, italian case law

1. The drafting of Article 46 of the Criminal Code for the Kingdom of Italy in 1889

As is well known, the definition of imputability accepted in the first part of Article 46 of the *Criminal Code for the Kingdom of Italy* (better known as the *Zanardelli Code*), which came into force on 1 January 1890, was the result of a long doctrinal and parliamentary debate[1] . This troubled *iter*,[2] developed on the comparison of the formulas adopted in the Italian pre-unification codes, most of which had followed the French example of the *Code pénal* 1810 which, in Art. 64, excluded the existence of crimes and

[1] Nuvolone, P., "Giuseppe Zanardelli e il codice penale del 1889", *Giuseppe Zanardelli* (F. Chiarini ed.), Milano, FrancoAngeli, 1985, pp. 163-182; Fornari, U., Rosso, R., "Libertà morale, infermità di mente e forza irresistibile nella psichiatria italiana dell'Ottocento", *Criminologia e responsabilità morale*, (A. Ceretti, I. Merzagora, eds.), Padova, Cedam, 1990, pp. 47-90; Dezza, E., "Imputabilità e infermità mentale: la genesi dell'articolo 46 del codice Zanardelli", *Saggi di storia del diritto penale moderno*, Padova, Cedam, 1992, pp. 283-316; Santangelo Cordani, A., *Alla vigilia del Codice Zanardelli. Antonio Buccellati e la riforma penale nell'Italia postunitaria*, Milano, Giuffrè, 2008, pp. 88-125; Miletti, M.N., "La follia nel processo. Alienisti e procedura penale nell'Italia postunitaria", *Acta Histriae* 15 (2007), 1, pp. 321-346; Manna, A., "Imputabilità e prodromi delle misure di sicurezza nel codice penale del 1889", *Il codice penale per il Regno d'Italia (1889)* (S. Vinciguerra, ed.), Padova, Cedam, 2009, pp. LXIX-LXXIII; Musumeci, E., *Emozioni, crimine, giustizia tra Otto e Novecento*, Milano, FrancoAngeli, 2015, pp. 70-74; Chiletti, S., "*I mille volti della perizia. Sapere esperto, sapere profano nei processi per infanticidio a Firenze all'infanticidio a Firenze all'inizio del XX secolo"*, *Criminocorpus. Revue hypermédia. Histoire de la justice, des crimes et des peines*, Folie et justice de l'Antiquité à l'époque contemporaine, 2016.

[2] Observed Alimena, B., *I limiti e i modificatori dell'imputabilità*, vol. II, Torino, f.lli Bocca, 1896, p. 79: "Few formulas, in the history of our codification, have been as tormented and tormenting as this one".

offences in those cases in which the defendant had been in a state of dementia or had been dominated by irresistible force at the time of the criminal act: 'Il n'y a ni crime ni délit, lorsque le prévenu était en état de démence au temps de l'action, ou lorsqu'il a été contraint par une force à laquelle il n'a pu resister.'[3] This was an approach that responded to the conception of mental illness dominant at the time, whereby the sick person was not accountable for his acts because he was not susceptible to the will constituting responsibility.[4]

This formulation would be followed by the Duosicilian penal code of 1819[5] that added - compared to the translation of french Penal Code[6] - the word 'fury' to 'dementia': this was the result of jurisprudential elaboration[7] that distinguished the 'habitual illness that almost never heals' from a 'passing cause that sometimes heals.'[8] This formula would be further enriched in the Parma Code of 1820, which envisaged, in Article 62, the cases of 'absolute imbecility, madness, or morbid rage'[9] with a view to envisaging every state and degree of natural or pathological mental alteration, continuous or characterised by lucid intervals.[10] As for irresistible force, the Parma legislator also added the adjective 'external', in order to circumscribe the rule to exogenous impulses of physical or moral violence, excluding endogenous ones, such as the state of anger or the passions of the soul.[11] This formulation, identically replicated in the Estense penal code,[12] was also reproposed in the Sardinian criminal code of 1839 (as well as in that of 1859), which provided, in Article 99, for states of 'absolute imbecility, madness, or morbid fury', as well as irresistible force, as cases of exclusion of imputability, but without the use of the adjective 'external'.[13]

[3] *Code pénal. Édition conforme a l'édition originale du Bullettin des Lois*, Paris, 1811.

[4] Guiognard, L., "La genèse de l'article 64 du code pénal", *Criminocorpus. Histoire de la justice, des crimes et des peines. Dossier thèmatique: Folie et justice de l'Antiquité à l'époque contemporaine*, 2016.

[5] *Codice per lo Regno delle Due Sicilie. Parte Seconda. Leggi Penali*, Napoli, 1819. Art. 61: "There is no offence, when the person who committed it, was in a state of dementia or rage at the time the action was performed"; Art. 62: "There is no offence, when the person who committed it, was forced into it by a force he could not resist".

[6] *Codice penale tradotto d'ordine di sua maestà il Re delle Due Sicilie per uso de' suoi Stati*, Napoli, Fonderia Reale e Stamperia della Segreteria di Stato, 1813. Art. 64: "There is no misdemeanour, nor crime when the defendant was in a state of dementia at the time the action was committed, and when he was forced into it by a force he could not resist".

[7] Roberti, S., *Corso completo del diritto penale del Regno delle Due Sicilie secondo l'ordine delle leggi penali*, vol. II, Napoli, Stamperia e cartiera del Fibreno, 1833: "The abolished Penal Code of 1812 made no mention of *fury*, but nevertheless the jurisprudence of the Courts had with all foundation extended the provision of article 64 of that Code also to actions committed in *fury*".

[8] Canofari, F., *Comentario sulla parte seconda del Codice per lo Regno delle Due Sicilie ossia sulle leggi penali*, vol. I, Napoli, tip. A. Trani, 1819, p. 161.

[9] *Codice penale per gli stati di Parma Piacenza e Guastalla*, Parma MDCCCXX. Art. 62: "Transgressions of the law shall not be subject to punishment if the defendant was in a state of absolute imbecility, madness, and morbid rage when he committed the deed; if he had not yet reached the age of ten; if an external and irresistible force drove him to the deed despite the dissent of his will".

[10] Dezza, *Imputabilità e infermità mentale*, p. 287.

[11] *Ibid.*

[12] *Codice criminale per gli stati estensi*, Modena, Eredi Soliani Tipografi Reali, 1855. Art. 55: "There is no crime §.1. If the accused was in a state of absolute imbecility, madness or morbid fury when he committed the action; §.2. If he was compelled by an external force which he could not resist".

[13] *Codice penale per gli Stati di S.M. il Re di Sardegna*, Torino, Stamperia Reale, 1839. Art. 99: "There is no offence if the accused was in a state of absolute imbecility, insanity or morbid rage when he committed the action, or if he was drawn into it by a force he could not resist".

The uniformity of these provisions, drawn up on the French model, found a breaking point only in the Tuscan code of 1853, where a different formula was adopted, which emphasised the concepts of conscience and freedom of the acts performed as broad criteria to include all possible cases of cognitive defects due to minority, drunkenness or mental weakness (renouncing the effort to list the different possible cases), and preferring to the concept of irresistible force that of lack of freedom in carrying out one's actions.[14] We read, in fact, in Article 34 of the *Penal Code for the Grand Duchy of Tuscany*: "Violations of the penal law are not imputable, when the person who committed them was not conscious of his acts, and freedom of choice."[15]

Towards this last example of expository and scientific clarity the Zanardelli Code would have been oriented during its long design phase[16] . With the aim of making the text as comprehensible as possible and facilitating its application by juries, Article 46 would have provided for the concept of 'infermity of mind' (infermità di mente) in order to bring madness back into the exclusive sphere of pathological situations and eliminated any reference to the 'dangerous and equivocal'[17] irresistible force: "A person who, at the time he committed the act, was in such a state of insanity (*infermità di mente*) as to deprive him of the consciousness or freedom of his acts shall not be punishable. The judge, however, if he deems the release of the acquitted defendant dangerous, orders him to be handed over to the competent authority for the measures of the law."[18]

This provision was welcomed in favourable terms by the followers of the Classical School,[19] as we read in one of the first annotated editions of the new penal code edited by Giulio Crivellari, Deputy General Attorney at the Turin Court of Appeal.[20] The annotator emphasised the effectiveness of the rule adopted compared to the previous codes,[21] as had been noted by Minister Giuseppe Zanardelli in the report accompanying the approval of the final text of the penal code. He emphasised the clarity of that formula, defined after a long series of projects and revisions by the parliamentary commissions[22], which was an improvement on the one contained in the Tuscan code, in that it provided that lack of conscience or freedom of one's own acts was not sufficient for non-imputability, but that such lack of conscience or freedom had to derive from insanity. Therefore, the solution

[14] See Dezza, *Imputabilità e infermità mentale*, pp. 291-292.

[15] *Codice penale pel Granducato di Toscana*, Firenze, Stamperia Granducale, 1853. Art. 34.

[16] See Dezza, *Imputabilità e infermità mentale*, pp. 293 ff.; Miletti, *La follia nel processo*, 323-324.

[17] Atti Parlamentari, Camera dei Deputati, Legislatura XVI, 2a sessione 1886, Documenti, disegni di legge e relazioni, *Progetto del Codice penale per il Regno d'Italia e disegno di legge che ne autorizza la pubblicazione presentato dal Ministro di Grazia e Giustizia e dei Culti (Zanardelli)*, Seduta del 22 novembre 1887, Vol. I, Relazione ministeriale (Libro Primo), Roma, Stamperia Reale, 1887, p. 163.

[18] *Codice Penale per il Regno d'Italia*, Roma, Stamperia Reale, 1889, art. 46.

[19] Dezza, *Imputabilità e infermità mentale*, pp. 281-282.

[20] See Rossi, F., "Crivellari, Giulio Cesare", *Dizionario Biografico dei Giuristi Italiani* (I. Birocchi, E. Cortese, A. Mattone, M.N. Miletti, eds.), vol. 1, Bologna, Il Mulino, 2013, pp. 613-614.

[21] The annotator indicated the similar articles contained in the previous pre-unification codes: art. 94 Sardinian code; art. 34 Tuscan code; art. 32 Parma code; art. 55 Estense code; arts. 61 and 62 Duosicilian code. He also referred to Art. 64 French Code and Art. 2 and 46 Austrian Code. *Ibid*., p. 30.

[22] A review of the formulas provided for in the various drafts of the Italian penal code before the Zanardelli Code and the observations made in the commissions can be found in Giachetti, C., *Dei reati e delle pene in generale secondo il codice penale italiano del 30 giugno 1889. Studio sulla scorta della dottrina, dei lavori preparatorii del codice e della giurisprudenza*, vol. II, Firenze, Bruscoli editore, 1889, pp. 96 ff. See also Lollini, S., "Della infermità di mente", *Rivista di diritto penale e sociologia criminale*, a. IV (1903), pp. 257-302, 264-267.

accepted by Article 46 excluded human passions and irresistible force independent of a morbid state of mind.[23]

1.1. Criticism from Positivist School

There was no lack of criticism from the exponents of the Positivist School. Cesare Lombroso, in the well-known book *Troppo presto. Appunti al nuovo progetto di codice penale*, published in 1888, said he was pleased that the irresistible force, "which was the cause of so much scandal and was so illogical, had disappeared from the legal phraseology."[24] The praise for this suppression was, however, dampened by criticism of the new formula of Article 46 of the Criminal Code, which was considered unscientific and unspecifiable in that it was still based on free will: this was the result of an attempt to achieve 'one of those conciliations that may be laudable in politics, but are impossible in science since it is impossible to be half spiritualist and half positivist'.[25]

In fact, the state of deficiency or alteration of the mind envisaged by the Code did not apply "at all to a quantity of alienated, monomaniacal, e.g. paranoid, and so-called moral madmen, and to many epileptics who may have perfectly intact minds, at least in appearance, but whose volition and especially affectivity are altered"[26]. The concept of free will was thus preserved, as 'suppressed at the door' it had re-entered 'through the window with the *possibility of* operating otherwise, which is then by another word an irresistible force.'[27] In conclusion, the text of the rule was worded in a 'vain and equivocal' manner insofar as the use of the word 'mind' - which according to Minister Zanardelli should have also included the will and moral sense[28] - represented a fatal error of expression that would have led to unjust sentences aimed at not recognising as alienated those who, although having altered affectivity, showed lucid intelligence.[29] Similarly, the

[23] As regards the second part of Article 46, Zanardelli noted that all reference to criminal asylums had been removed as proposed by the parliamentary committees. The choice of indicating "the competent authority" as the addressee of the offender's surrender was in response to the need to use an open formula, which would be better defined by the provisions for the implementation of the Code. *Relazione a S.M. il Re del Ministro Guardasigilli (Zanardelli) nell'udienza del 30 giugno 1889 per l'approvazione del testo definitivo del codice penale*, Roma, Stamperia Reale Ripamonti, 1889, pp. 40-41.

[24] Lombroso, C., *Troppo presto. Appunti al nuovo progetto di codice penale*, Torino, f.lli Bocca, 1888, p. 11.

[25] *Ibid*., p. 60. Lombroso referred to the old penal codes based on free will ("it is better to be like the old spiritualist codes in everything") which were ill-suited to the positivist idea that everybody is considered to be influenced by determinism, in which the free will never exists. In fact, the author pointed out: "The hypothesis of the soul, of free will, is certainly very unscientific, not very precise, but it is no less a state of mind that deprives man of the possibility of doing otherwise".

[26] *Ibid*.

[27] *Ibid*.

[28] Lombroso criticised the statement by Minister Zanardelli, who in his report of 22 November 1887 had argued that the word "mind" should also mean the will and moral sense. *Ibid*., p. 61. See Camera dei Deputati, Atti parlamentari, legislatura XVI, 2a sessione 1886, documenti, disegni di legge e relazioni, *Progetto del Codice penale per il Regno d'Italia e disegno di legge che ne autorizza la pubblicazione presentato dal Ministro di Grazia e Giustizia e dei Culti (Zanardelli)*, vol. I, Relazione Ministeriale (Libro primo), Rome, Stamperia Reale, 1887, p. 165: "The word *mind* then is to be understood in its widest sense, so as to include all the psychic faculties of man, innate and acquired, simple and compound, from memory to conscience, from intelligence to will, from reasoning to moral sense".

[29] Lombroso, *Troppo presto*, p. 61. According to the author, an expression should have been chosen that would not give rise to misunderstandings: "It is clear, therefore, that one should say intelligence, affectivity and volition".

non-explicit exclusion of the influence of the passions from the text of the rule would have led defence lawyers to argue the existence of the exemption in cases of anger, jealousy, revenge and fanaticism.[30]

Equally severe was the opinion expressed by Enrico Ferri, who, from the pages of the review *Nuova Antologia di scienze, lettere ed arti* of August 1889, considered the 'imputability formula' accepted in Article 46 to be not very innovative, as it was still based on the "consciousness and freedom of one's own acts", using words almost identical to those of the Tuscan Code of 1853, disregarding the progress made by psychology and anthropology in the last forty years.[31]

In response to this censure, Giovan Battista Impallomeni - one of the main drafters of the new code together with Lucchini[32] - intervened. In the first volume of *Il codice penale italiano illustrato. Parte generale*, published in Florence in 1891, he highlighted the originality of the formula adopted in Article 46 of the Penal Code, which included all forms of mental alienation in the concept of insanity. According to the Author, in fact, it had been a mistake to censure the formula of the first part of Article 46 of the new code, as that had reproduced the formulation of the lack of conscience and freedom of choice of the Tuscan code. In saying this, one had not taken into account the great difference that exists in the Code when it does not declare conscience and freedom excluded except for insanity, whereas the Tuscan code left the judge with the dangerous arbitrariness of determining those psychological conditions of the agent, which were worth, according to the same, excluding liability. He added that it had not been emphasised that the new Code used the word mind to mean not only intelligence but also sensibility and will, and that therefore Article 46 provides for infirmity that excludes intelligence, moral sensibility and will: all forms of mental alienation indiscriminately.[33]

1.2. A milestone for the penal system

Despite the criticism, this new formula constituted an important milestone for the penal system of the time that, in the elaboration of successive projects since 1868, had provided, alongside the provisions that analytically defined the causes of exclusion or diminution of imputability, such as insanity, drunkenness, self-defence, age, deafness, those more or less generic formulas - inspired by Art. 34 of the Tuscan Code - such as the "consciousness of one's acts" or the "consciousness of having committed the offence", or the "force that cannot be resisted."[34]

The observations made in the parliamentary commissions on these formulations highlighted numerous criticisms on the use of the term *madness*, which was considered

[30] *Ibid*.

[31] Ferri, E., "Intorno al nuovo codice penale", *Nuova Antologia di scienze, lettere ed arti*, vol. XXII, Serie III, fasc. XVI (16 August 1889), p. 673.

[32] See Sbriccoli, M., "Il diritto penale liberale. La "Rivista penale" di Luigi Lucchini 1874-1900", *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 16 (1987), pp. 135 and 146; Pace Gravina, G., "Giovan Battista Impallomeni o del coraggio del giurista (con un appendice di Antonio Cappuccio: per una bibliografia di Giovan Battista Impallomeni)", *Studi in onore di Antonino Metro* (C. Russo Ruggeri, ed.), t. IV, Milano, Giuffrè, 2010, pp. 443-453.

[33] Impallomeni, G.B., *Il codice penale italiano illustrato. Parte generale*, vol. I, Firenze, Civelli, 1891, p. 194.

[34] *Progetto del Codice penale per il Regno d'Italia*, p. 160.

non-technical, with the risk of exempting from punishment those who found themselves in any alteration of mind attributable to it; on the expression *consciousness of committing an offence* which, if separated from the morbid cause, could have led to dangerous interpretations; on the concept of *irresistible force*, which was considered dangerously abstract.[35] These remarks led to the reformulation of the article, restricting it exclusively to situations of a pathological nature that could affect imputability. This led to the text of the 1887 draft, which was borrowed from the most recent foreign codes[36] and on which the final version of the Italian Penal Code was to be based: "Is is not punishable the one who at the time he committed the act was in such a state of deficiency or morbid alteration of mind as to deprive himself of the consciousness of his acts or the possibility of acting otherwise. However, the judge may order him to be admitted to a criminal or common asylum to remain there until the competent authority deems it necessary."[37]

The first part of this formula used the concept of punishability, considered more concrete than the 'abstract and doctrinaire' imputability;[38] the term *deficiency* to encompass all states of non-development, imperfect development and inaction of mental faculties, even transitory ones, as in the case of somnambulism; the expression *morbid alteration* to embrace any mental pathology, permanent or accidental, general or partial; the word *mind* understood in the sense of encompassing all man's psychic faculties, "innate and acquired, simple and compound, from memory to conscience, from intelligence to will, from reasoning to moral sense."[39] The second part of the article, relating to the possible admission of offenders to criminal asylums in particularly serious cases, represented an absolute novelty for Italian projects, responding to the needs of social security and general prevention.[40]

This structure of the provision would constitute the basic framework that, with the appropriate corrections suggested by Chamber and Senate Commissions, would lead to the final formulation of Article 46, through a refinement of the terms, so that it would be endowed with greater precision and safer execution.[41] As can be read in the first part of the *Report of the Special Commission of the Senate*, edited by Enrico Pessina, the proposal was to eliminate the vague and imprecise phrases "deficiency of the mind" and "morbid

[35] *Ibid*., p. 161. On the debate on irresistible force during the elaboration of the Criminal Code, see Musumeci, *Emozioni, crimine, giustizia,* pp. 48-60.

[36] *Progetto del Codice penale per il Regno d'Italia*, footnote 1: "Thus the Dutch code expresses the morbid state of mind with the words: *incomplete development or morbid disturbance of the intelligence* (art. 37); the Germanic code says: *deprivation of knowledge or state of morbid alteration of the mental faculties* (§51); the Hungarian code: *state of unconsciousness or disturbance of the intellectual faculties* (art. 76); for the Zurich Code, punishability is excluded *if the defendant's faculties of mind ... were disturbed in such a way that he did not possess the ability to determine himself freely, or of discernment necessary to know the punishability of the fact* (§44); the Austrian draft of 1881 adopts the expressions *state of unconsciousness or deficient development or disturbance of the intellectual faculties (*§57); and the Russian draft of 1881: *insufficiency of the intellectual faculties or morbid disturbance of the activity of the spirit or state of unconsciousness* (art. 36)".

[37] *Ibid.*, p. 164. Cf. Giachetti, *Dei reati e delle pene,* p. 128.

[38] This amendment was inspired by foreign examples and in particular by the Dutch code (Art. 37, 40 and 43). Other codes used similar expressions based on the concept of non-punishability, such as the Germanic code (§51-54: eine strafbare Handlung ist nicht vorhanden); the French code of 1810 (arts. 64 and 327: il n'y a ni crime ni délit) and the Belgian code of 1867 (arts. 70-71: il n'y a pas d'infraction). *Progetto del Codice penale per il Regno di'Italia,* p. 166 footnote 1.

[39] *Ibid*., p. 166.

[40] *Ibid*.

[41] An effective summary of the observations raised in the parliamentary committees can be found in Giachetti, *Dei reati e delle pene*¸ pp. 129-141.

alteration of the mind" and to introduce the concept of "infirmity of mind" as a category in which to envisage all cases and all figures of the unhealthy mind.[42] The proposed formula was, therefore, to consider as not punishable "one who at the time of the action or omission was, due to permanent or temporary insanity, in such a state as not to have the consciousness or freedom of his acts."[43] With reference then to the special measure contained in the second part of the rule, both Commissions decided to eliminate the jurisdictional power that the draft attributed to the penal judge to send to the criminal asylum a defendant acquitted by reason of insanity.[44] However, in order not to deprive the judge of any prudential power to prevent possible 'atrocious acts of a maniac', he was allowed to hand over the acquitted defendant to the 'administrative' authority for measures within his competence.[45]

The Final Review Commission agreed with the proposals made by the Senatorial Commission. In the final version, Zanardelli removed only the words "permanent or transitory" after "insanity", as they were considered unnecessary as the insanity had to exist "at the time" of the offence. Finally, with regard to the second part of the article, the proposal to delete the references to asylums was accepted, while retaining the possibility of handing the acquitted person over to the administrative authority, which was replaced by "the competent authority" which, pending a special law on asylums, would be designated by the provisions for the execution of the Code.[46]

2. Insanity in early Supreme Court jurisprudence

The formula definitively accepted in the Zanardelli Code was intended to include all the morbid mental perturbations and all the causes preventing the exercise of the mental faculties such as to render man completely inept or unfit to understand, to will, and to act.[47] The phrase "infirmity of mind" represented a clear, explicit and complete expression, which included only that state of non-imputability consisting in the absolute lack of consciousness or freedom of one's own acts dependent on insanity.[48]

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[42] *Relazione della Commissione speciale del Senato*, Rome, Forzani e C., 1888, p. 60.

[43] *Ibid*.

[44] The reasons for this opinion were condensed into the following dilemma: "Either admission to the asylum is a penalty, and the judge cannot pronounce it when he declares that the defendant is not punishable, because at the time he committed the act he was devoid of intelligence; or it is not a penalty, and the criminal judge cannot restrict personal liberty with it". *Ibid.*, p. 61.

[45] *Ibid.*

[46] *Ibid*., p. 41. Zanardelli concluded: "In this way, the substance of the providential provision is preserved, and the inconvenience of returning to freedom men who could be a serious danger to social security is avoided". The same concept was expressed by Lucchini, L., *Elementi di procedura penale*, Firenze, 1895, pp. 390-391, who held that this provision responded to the simple concept of not exposing the members of society and the insane defendant to the dangers dependent on the abnormal state of his mental faculties, combined with tendencies of a criminal nature.

[47] Giachetti, *Dei reati e delle pene,* p. 142. See also Magri, F., *I motivi del nuovo codice penale*, Città di Castello, Tip. S. Lapi, 1895, p. 285.

[48] *Ibid*., p. 144. See also E. Pessina, *Il nuovo codice penale italiano con le disposizioni transitorie e di coordinamento e brevi note dilucidative,* Milano, Hoepli, 1890, p. 87, who observed that this formula had cut off from the roots several purely scholastic discussions. A wide-ranging doctrinal debate would develop on the subject among exponents of the various penal currents. See, among others: Alimena, *I limiti e i modificatori*, pp. 79-98; Crivellari, G., *Il codice penale per il Regno d'Italia interpretato sulla scorta della dottrina, delle fonti, della legislazione comparata e della giurisprudenza.* Vol. III, Roma, Unione Tipografico Editrice, 1892, pp. 415-425; Ferri, "Intorno al nuovo codice penale", pp. 657-686; Id., *Sociologia criminale. Terza edizione completamente rifatta dei nuovi orizzonti del diritto e della procedura*

Early case law tested the difficulty of applying this rule, which resulted precisely from the broadening of the concept of insanity under the new code compared to previous formulations. In fact, in the first legitimacy judgments issued after the entry into force of the new penal code, there was an effort to define the concept of infirmity included in Article 46, which was circumscribed to mental illness and excluded states of passion. See in this regard Judgement No. 640 of 20 April 1891 issued by the first criminal section of the Rome Court of Cassation (the only body of legitimacy with jurisdiction over all criminal affairs in the Kingdom),[49] according to which: "there is an infirmity of mind, which is exempting circumstance of the offence, and it is that whereby the empire of the mental faculties has ceased, so that conscience and moral freedom, which are the factors of criminal liability, have disappeared in the agent."[50] Likewise the judgment of 18 May 1891 that excluded the application of Article 46 to those who acted in the heat of passion.[51] These repetitions responded to the need to correct the erroneous pronouncements of Courts and Courts of Appeal, who continued to recognise the aforementioned exemption on the basis of states of passion or irresistible forces, as happened in the case of Elisa Mascagni, who was acquitted of the charge of threatening to kill by the Urban Praetor of Bologna on 10 June 1891, on the grounds that she was in a 'morbid state of mind' caused by the abandonment of her and her young son by her lover, who was about to marry another woman.[52] This judgement was published in the journal *La Scuola Positiva* and commented on in enthusiastic terms by Giulio Fioretti, who considered it to be of 'extraordinary importance' in that it showed that the irresistible force, which had been sought to be banished from the code, had not in fact produced any change in practice.[53]

Among the first interpretative problems, faced by the Supreme Court, was the refusal of the presiding judge of the Assize Court to propose to the jurors the exemption of insanity, despite the obligation under Article 494 of the Code of Criminal Procedure to submit to the jury exempting or diminishing circumstances proposed by the defence[54].

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penale, Torino, f.lli Bocca, 1892, pp. 473-540; Garofalo, R., *Criminologia. Studio sul delitto e sulla teoria della repressione. Seconda edizione interamente riordinata e rifatta dall'autore*, Torino, f.lli Bocca, 1891, pp. 99-108; Impallomeni, *Il codice penale italiano illustrato. Parte generale*, vol. I, pp. 189-219; Majno, L., *Commento al codice penale italiano*, vol. I, Verona, Tedeschi, 1890, pp. 99-106; Salemi Pace, B., *La coscienza nei pazzi e l'art. 46 del nuovo codice penale*. *Prelezione al corso di psichiatria forense dettato nel 1889-90*, Palermo, Bizzarrilli, 1890.

Law No. 5825 of 6 December 1888 had in fact deferred to the Cassation Court in Rome the cognizance of all criminal affairs of the Kingdom (*Gazzetta Ufficiale* No. 289 of 10 December 1888).

[49] Law No. 5825 of 6 December 1888 had in fact deferred to the Cassation Court in Rome the cognizance of all criminal affairs of the Kingdom (G.U. No. 289 of 10 December 1888).

[50] Cass. pen., Sect. I, no. 640 of 20 April 1891, in *La Corte Suprema di Roma. Raccolta periodica completa di tutte le sentenze civili e penali della Corte di Cassazione di Roma*, a. XVI, Roma, 1891, pp. 279-281.

[51] Cass. Pen, 18 May 1891, in Conte Milano, G., *Giurisprudenza sul codice penale del Regno d'Italia. Anni 1890, 1891 e 1892. 1st appendix to the Italian penal code annotated*, Napoli, Pietrocola, 1893, p. 14.

[52] Pretura Urbana di Bologna, Judgement of 10 June 1891, *Il Foro Penale. Rivista critica di diritto e giurisprudenza penale e di discipline carcerarie*, a. I (15 July 1891 - 30 June 1892) vol. I, pp. 47-48.

[53] *Massimario critico della giurisprudenza penale*, n. 54, in *La Scuola Positiva nella giurisprudenza civile e penale e nella vita sociale*, a. I, n. 8 (31 agosto 1891), pp. 362-364, a. I, no. 8 (31 August 1891), pp. 362-364. In response to Fioretti see A. Fiocca, *Sulla forza irresistibile*, in *Il Foro Penale. Rivista critica di diritto e giurisprudenza penale e di discipline carcerarie*, a. I (15 July 1891 - 30 June 1892), vol. I, pp. 277-286.

[54] On the debate concerning the maintenance or abolition of popular juries see Storti Storchi, C., "Giuria penale ed errore giudiziario: questioni e proposte di riforma alle soglie della promulgazione del

According to the Supreme Court (appellant Zuccaro, 9 March 1892), this obligation did not exist when the fact deduced by the defence was not contemplated by the law as excusing or excluding imputability. This hypothesis did not apply in this case, since it was behaviour resulting from "deep emotion produced by anger" that could not fall within the cases provided for in Article 46 of the criminal code. Therefore, the presiding judge not only could, but had to refuse to put the question to the jury "both because it would be useless to question the jurors on facts that have no bearing on the provisions of the criminal law, and because it must be avoided that the jurors may fall into error."[55]

On this premise, the Supreme Court clarified the content of Article 46, specifying that "in the current Code all the facts have been precisely designated, for which an action, which without their concurrence would be criminal, is not punishable, and irresistible force is not among them."[56] With this new formula, in fact, the intention of legislator was to "categorically" exclude the possibility that human passions could be taken into account and that irresistible force independent of a morbid state of mind could be used. This clarification made it possible to affirm that the appellant's argument corresponded to the irresistible force, proscribed by the new Code. Therefore, it was not possible to put the question to the jury under Article 494 of the Code of Criminal Procedure - which was said to have been violated in the appeal - because irresistible force was no longer a fact that, under the law, excluded imputability.

2.1. Comment by Classical School

This new thesis promoted by the Supreme Court - which was based on the pathological nature of the insanity provided for by Article 46 - was the subject of in-depth comment by the editors of *Rivista penale* directed by Luigi Lucchini, who, in a long note, pointed out how the judgement was in line with an address already expressed by some judges, including Giuseppe Falcone, Deputy General Attorney of Palermo, who - in an article entitled *Sentimento passionato e responsabilità penale*[57] - had affirmed the uselessness of submitting to jurors questions not recognised as exempting circumstances by law, if not "to torture their conscience and extract a verdict, which could never be said to conform to truth and justice"[58].

This orientation - strongly opposed by the exponents of the Positivist School - was confirmed by two further rulings issued respectively on 15 July 1892 (appellant Caldano) and 1 September 1892 (appellant Lozuppone). In the first, the appellants complained that the Courts had erroneously rejected the defence's request to raise issues of insanity based on moral and economic conditioning that would have affected the defendant's mind in such a way as to deprive or diminish his conscience or the freedom of his acts.[59]

codice di procedura penale italiano del 1913", *Studi in ricordo di Gian Domenico Pisapia,* 3, *Criminologia*, Milano, Giuffrè, 2000, pp. 639-710.

[55] Cass. Pen., Section I, 9 March 1892, *Rivista penale di dottrina, legislazione e giurisprudenza*, series III, disp. 85 (April 1892), pp. 478-483.

[56] *Ibid*., p. 482.

[57] Falcone, G., "Sentimento appassionato e responsabilità penale", *Corriere di Palermo*, 20 April 1892. See also Id., *La giuria in Italia*, Palermo, 1891. According to the author, passion, unless it was pathologically based, could never be equated with insanity.

[58] Cass. Pen., section I, 9 March 1892, p. 480, footnote 4-5.

[59] Cass. Pen., section I, 15 July 1892, *Rivista penale di dottrina, legislazione e giurisprudenza*, series III, disp. 88 (July 1892), pp. 244-246.

According to the judges of the Supreme Court, the judgment of appeal did not deserve to be censured, since the facts put forward by the lawyer were not intended to ascertain a pathological mental state in him, such as to exclude or diminish imputability, or, in any case, did not constitute for the law the exempting or diminishing element referred to in Article 46, but aimed, with studied locution, to revive the irresistible force that was intended to be excluded by the new Code.[60] To further clarify the rule, the judgment specified that the legislator's intention to exclude from the new code 'the exemption arising from the force of passion was inferred from the studies and discussions that preceded the 'laborious compilation' of Articles 46 and 47 of the penal code by which it was decided that the lack of conscience or freedom of the defendant's acts should be the effect, not of the impetus of passion, but of an infirmity of mind corresponding to a physical-moral state of the defendant.[61]

The importance of the issue - the discussion of which had been launched in the pages of *Rivista penale* - induced the magistrate Pietro Verber, Deputy General Attorney at the Rome Court of Cassation, to devote in 1892 a critical essay on the limit of the Assize Court's powers in raising questions to jurors,[62] written following the judgement on the case Caldani, in which he considered that the solution given by the Court of Cassation in Lozuppone case was "the only admissible and the only correct one."[63]

In confirming this principle, which circumscribed Article 46 to cases of mental illness and excluded states of passion (as confirmed again by the Supreme Court in its judgment of 9 March 1892, *Ric. Savona*), [64] Verber pointed out how the law had given no criteria for recognising insanity, disengaging itself from every school and every doctrinal claim and refusing to specify the historical classifications of insanities such as dementia, mania, madness, imbecility or morbid rage: "The law has relied on the criteria of science, and has abandoned the field."[65] This statement, which referred the identification of mental illnesses[66] to the 'changing' medico-legal elaborations, refuted the thesis expressed by Francesco Arabia in *Principi di diritto penale* published in 1891, who, after stating that the infirmity referred to in Art. 46 should be understood as a pathological cause, maintained that the defendant, who had invoked the application of Article 46, had the right and the duty to specify which infirmity or physiological anomaly he believed himself to be suffering from, and thus to put the question in concrete terms.[67]

[60] *Ibid*., p. 245. The Court concluded by confirming the orientation already expressed in the Zuccaro judgment.

[61] *Ibid.*

[62] Verber's essay was cited by the editors of *Rivista penale* in comment to Lozuppone judgment, ibid. p. 348.

[63] P. Verber, *Saggio critico intorno al limite dei poteri della Corte di Assise nello elevare le questioni ai giurati*, Roma, Bertero, 1892, p. 4 footnote 1. Lozuppone judgement was quoted in a footnote to the *Foreword*, as it was issued while the essay was being printed.

[64] Cass. Pen., Judgment of 9 March 1892, *La Cassazione Unica.* In this judgment, the Court, referring to Minister Zanardelli's report, stated that Article 46 was conceived in such terms as to eliminate the danger that the provisions of the law might be extended beyond their just boundaries, so as not to attribute an exempting effect to human passions and to put a definitive end to the abuse of irresistible force".

[65] Verber, *Critical Essay*, p. 31.

[66] *Ibid.*.

[67] Arabia, F.S., *I principi di diritto penale applicate al codice italiano*, Napoli, Tip. Regia Università, 1891, p. 118. See Manduca, F., "La infermità di mente e il nuovo diritto penale nazionale", *Il Foro Penale. Rivista critica di diritto e giurisprudenza penale e di discipline carcerarie*, a. I (15 July 1891 - 30 June 1892), vol. I, pp. 197-203, who stated that "criminal irresponsibility, total or partial, is confined to the purely pathological state. Physiological, psychological, psychical states are totally excluded; only the infirm mind has been held by the legislature to exclude in totality or partiality criminal imputability".

2.2. Effort of positivist lawyers to extend the boundaries of art. 46 CP

This vagueness in defining the criteria for identifying mental illness allowed positivists to attempt to extend the boundaries of insanity under Article 46 of the criminal code, on the basis of the lamented unpreparedness of judges and jurors to the knowledge of medical science, pointing out how the verdict was often 'a lottery' insofar as it was detached from the judgement of psychiatric experts.[68] In the Courts, therefore, positivist lawyers went to great lengths to provide the assize juries with medico-legal arguments to support the non-punishability of their clients, even in cases of mild pathologies accompanied by states of passion, thus attempting to recover the irresistible force that the new code had proscribed.

See the case of the lawyer Alessandro Ansaldi who in May 1894 obtained the acquittal of the defendant Meucci Francesca, accused of attempted premeditated murder against her lover who had abandoned her after getting her pregnant.[69] Fearing that the Court might refuse to raise the question of insanity under Article 46, the defence lawyer applied for the appointment of a psychiatric expert to ascertain Meucci's psychiatric condition. The Court considered that the woman's insanity was doubtful on the basis of the evidence gathered by the prosecution and granted the request, appointing two experts. The experts demonstrated the presence of the defendant's mental defects, consisting of hereditary neurosis with a tendency towards epilepsy, which led to the exclusion of any criminal liability. They, in fact, admitted that the woman had retained a certain discernment and awareness of the act she had committed, but doubted that she had been able, with an effort of attention, to measure its enormity, considering that, at the time of the aggression, the woman was dominated by the passion aroused by the pain of the illegitimate pregnancy and aggravated by the insults of prostitution that had been uttered against her by her ex-boyfriend. These elements - according to the experts - had led her to a high degree of tension due to the hereditary neurosis from which the defendant was originally affected. On the basis of these findings, the lawyer argued that, according to science, Meucci, although not insane or alienated, was habitually in a state of very unstable psychic equilibrium that made her unaware of what she was doing. These considerations convinced the jurors to acquit the defendant, declaring that, at the time of the act, she was in such a state of insanity as to deprive her of the consciousness and freedom of her acts.[70]

Another example is the acquittal of a man, accused of fratricide, by the Court of Brescia in March 1894. The defence argument was that the gunshot was fired by mistake - with the sole intent to threaten - by a mentally unstable man, moved by resentment towards his sister who, by opposing his marriage, had excluded him from managing the

[68] "Massimario critico di Procedura penale", *La Scuola Positiva nella giurisprudenza penale*, a. VII, no. 1 (Jan. 1897), p. 239. On the freedom and sovereignty of the judgement of the magistrate with respect to the evaluations expressed by the experts on insanity, read the motivation of the sentence of 11 March 1903 (Appellant Colmago), ibid. c. 964, whose rapporteur was Luigi Lucchini, who specified that no one had ever seriously dared to sustain that the judging magistrate should or could "abdicate the sovereignty of his own appreciations and judgements before the appreciations and judgements of the experts, called upon to enlighten the judge, but not to deprive him of his power, since he must be the expert of the experts, and sole arbiter in every question submitted to his examination and for which the law does not make express exception".

[69] Ansaldi, A., "*Un'altra giusta assoluzione per forza irresistibile*", *La Scuola Positiva nella giurisprudenza penale*, a. IV, no. 1 (15 Jan 1894), pp. 377-383.

[70] *Ibid.*

family business. In the course of the public hearing, a technical expertise by a gunsmith was carried out, which showed that the safety bar of the revolver could have lifted during the violent drawing of the weapon from the pocket and that the shot could not have been fired without a strong trigger pull. Enrico Ferri, lawyer of the defendant, supported his client's irresponsibility by means of anamnestic data showing a certain degree of chronic alcoholism, which would have determined the possibility that the revolver shot had gone off due to the convulsive and automatic pressure of the man's hand, who had been reduced to the extremes of despair and pain, so much so that he had lost consciousness of his actions at that moment "due to a real and transitory mental illness."[71]

These jurisprudential breaches won by the positivists prompted the Supreme Court to intervene to confirm its own direction and correct these openings that distorted the meaning of Article 46. See in this sense the judgment of 29 April 1896 (appellant Agosta) in which the Supreme Court specified that the new codictic formulation did not take account of human passions and excluded irresistible force independent of a pathological state.[72]

This pronouncement was criticised by the positivist lawyer Demetrio Gramantieri, who pointed out that in resolving the 'immensely serious and difficult' question of the meaning to be given to the words 'infirmity of mind', the Court of Cassation had erred in holding that 'health' and 'disease' were two radically distinct principles of the living organism. Instead, he argued that there were only differences of degree between these two modes of being: 'exaggeration, disproportion, disharmony of normal phenomena, constitute the sickly state; and *infirmity* is not to be confused with disease'.[73] This annotation gave rise to a more in-depth study by the same author on the subject of *L'infermità di mente nell'art. 46 del Codice Penale*, in which he criticised the orientation expressed by the Court of Cassation in this and other judgments in which the application of the exemption circumstance was limited to truly pathological mental conditions and excluded any incidence determined by sensual passion, jealousy, love, hysterical excess determined by anger, pain or delirious idea of a shame suffered or by a critical condition that had upset or weakened the mind.[74] Recalling Jacob Moleschott's materialistic theories (according to which intellectual forces depended exclusively on chemical changes), Gramantieri maintained that the influence of organic perturbations and violent passions in the shaking of the cerebral faculties could not be excluded.[75] In fact, he considered a mistake too serious to affirm that there could be no infirmity where there was no appreciable lesion of the cerebral substance, considering that madness manifested itself as an 'unknown' modification of the state of the brain and a disorder in the normal direction of its fibres. Indeed, the cause of such a mental alteration could be not only

[71] Paroli, *Un fratricida* assolto, pp. 224-225: "Ferri openly invoked the aid of psychiatry and criminal anthropology in the administration of criminal justice, referring to the eloquent examples of Passanante and the soldier Magri, drawing in and moving the public".

[72] Cass. Pen., I sez., Judgement of 29 April 1896 (Appellant Agosta Carmelo), *La Cassazione Unica*, a. VIII, vol. VII (1896), cc. 862-863.

[73] *La Cassazione Unica*, a. VIII, vol. VII (1896), c. 863 footnote 1.

[74] Gramantieri, D., "L'infermità di mente nell'art. 46 del Codice Penale", ibid., cc. 881-883: "If I am not mistaken, the jurisprudence of the Supreme Court is therefore erroneous, both when it excludes in an absolute sense that the impetus of the affections can in some special case be included in art. 46; and when it gives the President of the Assizes the arbitrary right to always refuse, in that hypothesis, to formulate the relative question".

[75] Ibid, c. 882.

physical, but also moral due to the effect of deep emotions or great pain that could make one pass instantly "from reason to madness, and from madness to reason".[76]

3. To conclude: the address of the Supreme Court

These positivist interpretations did not find support in the jurisprudence of the Supreme Court of Cassation which, in the years to come, was rigid in maintaining constant the orientation already expressed and aimed at affirming the existence of the cause of criminal irresponsibility only in the case of a real mental pathological state, with the exclusion of human passions.[77] See in this sense the judgment of 18 November 1902 (appellant Pasca) which excluded the occurrence of the insane exemption in the absence of any mental pathological state of the defendant, who was instead dominated by a guilty love passion and not by illness.[78]

On the basis of these considerations, the Court of Cassation rejected the proposed appeal on the grounds that, according to the law and constant jurisprudence, it should now be considered *jus receptum* that "in the absence of a true pathological state of mind, one cannot speak of infirmity or semi-infermity of mind that cannot be legally substituted by a merely passionate state."[79] While not explicitly denying the progress of anthropological science, the judges of Supreme Court concluded by stating that the morally insane person was always responsible for his acts and that, in the state of doctrine and jurisprudence, he could not be considered to be in such a state of insanity as to diminish or exclude his responsibility, all the more so when this so-called *moral insanity* stemmed from a "reprehensible passion."[80]

This orientation was confirmed by other pronouncements of Supreme Court,[81] which were still perpetuated at the dawn of the new century, with a view to reaffirming that the application of the exemption of insanity depended on the presence of a pathological impulse[82] and not on those passions in which irresistible force was hidden.[83] Silvio Lollini, in a specific study published in 1903 in *Rivista di diritto penale e*

[76] Ibid, c. 883.

[77] See Cass. Pen., Judgment of 27 November 1897 (Appellant Biagi), *La Cassazione Unica*, a. 1898, vol. IX, pp. 357-359.

[78] Cass. Pen., Judgment of 18 November 1902 (Appellant Pasca Raymondo), *La Cassazione Unica*, a. CLXXXVI, vol. XIV (1902), part Seventh cc. 179-182.

[79] Ibid., c. 181.

[80] *Ibid*., c. 182.

[81] Ex plurimis see Cass. Pen., Judgment of 9 January 1903 (Appellant Giordano Apostoli and Giasello Mariantonia), ibid., c. 698: "Agitation and disturbance of the mind cannot be confused with a pathologically abnormal state of the mental faculties"; Cass. Pen., Judgment of 18 September 1906 (Appellant Abis Serra), *Bollettino ufficiale del Ministero di grazia e giustizia e dei culti*, vol. 28 (1907), p. 47: "The excuses for total or partial infirmity of mind must not consist in a simple passionate moral affection of the accused, thus reproducing the diminishing factor of irresistible force excluded by our Code, but must instead respond to a real physical illness and relative pathological vice of the subject".

[82] Interesting is the Judgment of 1 July 1902 (Appellant Del Prato), *La giustizia penale. Rivista critica settimanale di dottrina, giurisprudenza, legislazione*, vol. VIII (1902), c. 1047 in which it was affirmed that although the words "for pathological cause" had not been used by the legislator, they corresponded perfectly with his intention to exclude imputability to cases of real infirmity of mind or disorder of the mental faculties. It therefore did not lead to nullity to have added the words "by reason of illness" or "by reason of drunkenness" in the question submitted to the jurors.

[83] Cfr. Impallomeni, G.B., *Istituzioni di diritto penale*. *Opera postuma curata da Vincenzo Lanza*, Unione Tipografico Editrice Torinese, Torino, 1908, p. 272.

sociologia criminale, reviewed the most recent pronouncements on the subject, highlighting the constant jurisprudential direction aimed at sustaining that "in order to take place the exemption it is necessary that the lack or diminution of conscience and freedom, derives [...] from an impulse of a *pathological* order, precisely to prevent the labelling as mental infirmity, those passions in which the ancient irresistible force is hidden."[84] In 1909 Filippo Grispigni, in a note commenting on a counter-current ordinance of the President of the Court of Assizes of Spoleto[85] (in which he had put to the jurors the question of the insane exemption even in the absence of sufficient circumstances to admit it), confirmed the "concordant and by now fifteen-year jurisprudence» of the Supreme Court that had established the prohibition of raising the question of insanity where it concealed the irresistible force.[86] In line with the positivist orientation, the author considered this ordinance worthy of praise, to which he acknowledged the merit of "not having blindly followed" the Supreme Court, which for fifteen years now, has been twisting the word and the spirit of Article 494 of the Code of Criminal Procedure for the sole purpose of saving from bankruptcy one of the most obvious and daily reconfirmed absurdities of the Criminal Code: the abolition of irresistible force as exemption circumstance.[87]

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[84] Lollini, *Della infermità di mente*, p. 291. See the judgements cited on pp. 292-295. See also the jurisprudence cited by De Rubeis, R., "Infermità di mente", *Digesto italiano*, vol. XIII, p. I, Torino, Utet, 1904, pp. 726-773 (769-770).

[85] Corte d'Assise di Spoleto, "Ordinanza del Presidente (Martinelli) nella c. contro il dott. Vincenzo Blasi", 5 August 1909, *La Scuola Positiva nella dottrina e nella giurisprudenza penale*, a. XIX no. 1 (1909), pp. 528-529.

[86] Grispigni, F., "L'obbligo del Presidente di porre la quistione della infermità di mente a richiesta della difesa", *La Scuola Positiva nella dottrina e nella giurisprudenza penale*, a. XIX n. 1 (1909), pp. 528-532.

[87] *Ibid.*, p. 532. The author reported that this constant direction of the Court of Cassation had been subjected to only two exceptions with the judgments of 12 June 1893 (Appellant Romeo) and 7 July 1893 (Appellant Polvani), which were superseded by subsequent rulings. Those sentences were applauded by Ferri, E., "Due sentenze decisive della Cassazione circa gli art. 494 p.p. e 46 c.p.", *La Scuola Positiva nella giurisprudenza penale*, a. III no. 12 (30 June 1893), pp. 569-570: "The Court of Cassation, in a sculptural judgment, rapporteur Spera, acknowledged that defence lawyers sometimes exaggerate in asking for an exemption or excuse of insanity even without a basis in fact; but it also acknowledged that presidents often exaggerate in the opposite sense, making themselves, before the jurors, judges of the fact, judging whether or not in the case in question the exemption or excuse is based on the trial results".

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