GLOSSAE
European Journal of Legal History

ISSN 2255-2707

Citation

Martin P. Schennach, “The insane offender in Austrian penal legislation and legal science around 1900”, *GLOSSAE. European Journal of Legal History* 20 (2023), pp. 95-124 (available at http://www.glossae.eu)

The insane offender in Austrian penal legislation and legal science around 1900

Martin P. Schennach
University of Innsbruck

ORCID ID: 0000-0003-4608-5700

Received: 04.03.2023
Accepted: 08.05.2023

Abstract
The contribution deals with the discussion about the insane offender in the Habsburg Monarchy from the 1860s – when work on a new codification of criminal law began – to the end of the First World War, when the reform plans finally failed. Different questions are addressed: After analyzing the legislative solutions for coping with insane offenders which were envisaged in the drafts, the paper will examine in more detail whether and how Austrian legal scholars commented on and discussed these plans. It will be shown to what extent international discussions and above all developments in the neighbouring German Empire were taken into account. In general, controversial points in the so-called "clash of schools" (*Schulenstreit*) between the "classical" and the "positivist" schools played a significant role in the scientific debate of insanity, for example the question of free human will or the purpose of punishment. The remarkable, philanthropic theses of Julius Vargha, which, however, met with rejection among his contemporaries, are dealt with separately.

Keywords
Habsburg monarchy, Austrian science of criminal law, Austria insane offender, penal code, 19th century, Julius Vargha. purpose of punishment, human free will

1. Introduction

1.1. Status of research

A few years ago, the author of these lines stated in a paper on the development of Austrian criminal law in the second half of the 19th century and the effects of the so-called "clash of schools" (*Schulenstreit*) on the Habsburg Monarchy that the state of research on the history of Austrian criminal law in the 19th century was still insufficient.[1] In principle, this finding has not changed, even though in the meantime some contributions – including academic

[1] Cf. Schennach, M. P., "Echoes of Karl Binding and Franz von Liszt? The Discussion between the 'Classical School' and the 'Positivist School' in Austria", *GLOSSAE* 17 (2020), pp. 324–258, here pp. 234–235.

qualification theses – have appeared on the history of criminal law in the 19th century.[2] Thus, the first glimmers of light are appearing on the horizon. However, especially the plans for a new codification of Austrian criminal law in this period are still insufficiently researched. Admittedly, these efforts did not lead to success until the end of the Habsburg Monarchy. However, from the sixties of the 19th century until immediately before the First World War, a number of drafts were prepared, partly by individuals on official orders, partly by commissions entrusted with drafting. These drafts and also some of the parliamentary preparatory works are available in print, although some of them have only been preserved in archives, as they were only intended for internal use.[3]

Legal historical research has consulted these printed drafts in particular for the analysis of the development of individual torts, especially in the context of academic qualification work, e.g., concerning the treatment of juvenile offenders, the penalisation of official offences or the question of the statute of limitations.[4] The archival material, on the other hand, has so far remained almost completely unnoticed. In general, we are only very superficially informed about the processes leading to the codification drafts and are still largely dependent on the reports of contemporaries for the reconstruction of the administrative framework of the debates. The intensive debates conducted by the scientific community at the time, which were mainly reflected in Austrian legal journals, have also not yet been evaluated.

1.2. Object of research

This article traces the discussion about the insane offender in the Habsburg Monarchy from the 1860s – when work on a new codification of criminal law began – to the end of the First World War, when the reform plans finally failed. Different questions are addressed:

In a first step, the aim is to show which legislative solutions for dealing with insane offenders were envisaged in the drafts. In a second step, it will be shown whether and how the scientific community commented on and discussed these plans. Of course, it would also have been interesting to examine whether and how this specific question was discussed in the commissions entrusted with the preparation of the drafts, but unfortunately the relevant archival

[2] Cf. Schennach, M. P. (ed.), *Strafrechtsgeschichte im „langen" 19. Jahrhundert. Forschungen und Perspektiven*, Wien: Verlag Österreich, 2020; Niedrist F. / Schennach, M. P., „Zwischen Konfirmation und Korrektur? Zur Strafrechtsjudikatur des Appelllationsgerichts Innsbruck und der Obersten Justizstelle im Vormärz", *230 Jahre Oberlandesgericht Innsbruck* (K. Schröder, ed.), Innsbruck: Wagner (Collection "Schlern-Schriften" 372), 2021, pp. 51–68; Schennach, M. P., "Der Strafrechtswissenschaftler Heinrich Lammasch und der „Schulenstreit" in der österreichischen Monarchie", *Zeitschrift für Neuere Rechtsgeschichte* 42 (2020), pp. 202–233.

[3] Cf. Schennach, M.P., "Österreichische Strafrechtsgeschichte im ‚langen' 19. Jahrhundert. Forschungsstand und Perspektiven", *Strafrechtsgeschichte im „langen" 19. Jahrhundert. Forschungen und Perspektiven* (M.P. Schennach, ed.), Wien: Verlag Österreich, 2020, pp. 1–36, here pp. 23–24 (with further literature hints).

[4] Cf. Neumair, M., "Jugendliche Straftäter in den österreichischen Strafgesetzen und Reformentwürfen von 1803 bis 1928", *Die Entwicklung der österreichisch-ungarischen Strafrechtskodifikation im XIX–XX. Jahrhundert* (Máthé, G. & W. Ogris, eds.), Budapest: UNIÓ, Zeitung- und Buchverleger-Handlungs-GmbH, 1996, pp. 143–177; Neumair, M., *Erziehung und Strafe. Rechtshistorische Untersuchung über Herkunft und Entstehung des österreichischen Jugendgerichtsgesetzes von 1928*, Diss. Univ. Wien, 1996; Brandstätter, W., *Die Entwicklung der Amtsdelikte unter besonderer Berücksichtigung der Reformversuche des Strafrechts*, Diss. Univ. Wien, 1995; Stutzenstein, S., "Straffrei durch Zeitablauf? Die österreichische Verjährungsskepsis im ‚langen' 19. Jahrhundert", *Strafrechtsgeschichte im „langen" 19. Jahrhundert. Forschungen und Perspektiven* (M. P. Schennach, ed.), Wien: Verlag Österreich, 2020, pp. 255–293; Schmetterer, Ch., "Die Untreue in den österreichischen Strafgesetz-Entwürfen von 1874 bis zum Ersten Weltkrieg", *Strafrechtsgeschichte im „langen" 19. Jahrhundert. Forschungen und Perspektiven* (M. P. Schennach, ed.), Wien: Verlag Österreich, 2020, pp. 177–202.

material could not be examined due to access restrictions to the Austrian State Archives during the corona pandemic 2021/22. In a third step, the question is asked in general, detached from concrete codification plans, whether the Austrian scientific community took a position on the problem of the insane offender. In doing so, it is also important to find out whether the discussions abroad and above all in the German Empire – with which there were close personal ties – were taken into account and continued in the Habsburg Monarchy.

2. The framework: the process of codification work

The Austrian penal code in force during the period under investigation dated from 1803, and although it had been republished and slightly modified in 1852,[5] it was largely considered outdated and its punishments were seen as too severe.[6]

The work on a new codification[7] began as early as 1861 and was initially entrusted to Anton von Hye, who had already been responsible for the revision in 1852. He presented a first draft in 1863, which was intensively debated and presented to the House of Representatives in 1867, but finally was not passed. After the enactment of the German Penal Code in 1871, the reform discussions in the following two decades were to a great extent influenced by the German model: In 1872, the Minister of Justice, Julius Glaser, set up a commission consisting of two university professors, Wilhelm Emil Wahlberg and Adolf Merkel, an official of the Ministry of Justice, August Khoß, and the President of the Higher Regional Court of Vienna, Josef Waser. They were given the task of revising and customising the German penal code to the Austrian legal system. The result was a draft presented in 1874, which was then fundamentally revised several times before 1893 but was never passed by the parliament. In 1897, a new working group was appointed by the Minister of Justice, chaired by Hugo Hoegel. The Viennese professors Heinrich Lammasch and Carl Stooss assisted him. Due to internal tensions, Stooss resigned from the commission in 1902. The draft presented in the same year "on the reform of the penal code in autumn 1902 by Section Councillor Dr. Hoegel after completion of the consultations with the university professors Dr. Lammasch and Dr. Stooß" was printed in 1903 to facilitate further consultations, but it is only preserved in the Austrian State Archives.[8] From 1903 onwards, Hoegel's draft was revised by Hoegel and Lammasch, with Theodor Rittler acting as secretary.[9] The work on the new version lasted until 1906. Stooss

[5] Cf. Olechowski, Th., "Zur Entstehung des österreichischen Strafgesetzes 1852", *Grundlagen der österreichischen Rechtskultur, Festschrift für Werner Ogris zum 75. Geburtstag* (Th. Olechowski, Ch. Neschwara & A. Lengauer, eds.), Wien / Köln / Weimar: Böhlau, 2010, pp. 319–341.

[6] Cf. Ogris, W., "Die Entwicklung von Gerichtsverfassung, Strafrecht und Strafprozeßrecht 1848–1918", *Die Entwicklung der österreichisch-ungarischen Strafrechtskodifikation im XIX–XX. Jahrhundert* (G. Máthé & W. Ogris, eds.), Budapest: UNIÓ, Zeitung- und Buchverleger-Handlungs-GmbH, 1996, pp. 55–74; Ogris, W., *Die Rechtsentwicklung in Österreich. 1848–1918*, Wien: Verlag der Österreichischen Akademie der Wissenschaften, 1975, pp. 556–562.

[7] For the following cf. Hoegel, H., *Geschichte des österreichischen Strafrechtes in Verbindung mit einer Erläuterung seiner grundsätzlichen Bestimmungen. Tome II: Die allgemeinen Schuldformen*, Wien: Manz, 1904, pp. 99–105; Stooss, C., *Lehrbuch des Österreichischen Strafrechts*, Wien / Leipzig: Deuticke, 2nd ed. 1913, pp. 47–48; Hiller, K., "Österreich", *Das Strafrecht der Staaten Europas* (F. von Liszt, ed.), Berlin: Otto Liebmann, 1894, pp. 114–161, here pp. 158–161; Supplement 90 to the stenographic minutes of the House of Lords, Session XXI, p. VI; Schmetterer, "Die Untreue in den österreichischen Strafgesetz-Entwürfen", p. 178.

[8] Cf. Austrian State Archives, General Administrative Archives (*Allgemeines Verwaltungsarchiv*), Ministry of Justice, Department of "Legal Affairs", box 1071.

[9] The minutes, beginning with the first meeting on 14 April 1903 have been preserved in Österreichisches Staatsarchiv, Allgemeines Verwaltungsarchiv, Justizministerium, Legislative Angelegenheiten, Karton 1071.

speaks of the "Hoegel draft"[10], which seems to be correct insofar as Hoegel was responsible for the editing. In terms of content, however, Lammasch and Hoegel now seem to have worked largely on an equal footing.[11] This was then submitted for review to a broader group of people, dominated by university professors (including Hans Gross, Ferdinand Lettner, Adolf Lenz, Alexander Löffler, Josef Rosenblatt, Franz Storch, Alois Zucker, Wenzeslaus Graf Gleispach), but also including practitioners such as the Chief Public Prosecutor of Graz, Alfred Amschl, or the President of the Supreme Court and former Minister of Justice, Ignaz von Ruber.[12] In addition, an *enquête* was conducted in May 1907.[13] Due to the lack of agreement between Lammasch and Hoegel "on a not insignificant number of issues", a new commission was set up, which also included Lammasch and Hoegel, but also the professors Groß, Lenz, Rosenblatt and Gleispach, the advocate Edmund Benedikt as well as the Ministerialrat in the Ministry of Justice Adolf Schober, which was later supplemented by Storch and the President of the Vienna Higher Regional Court.[14] Hoegel now saw himself as a conservative hardliner in a minority position and left the committee at the end of 1907, although he still accompanied the re-codification process with his publications.[15] A final draft was presented in 1909. It was introduced to the House of Lords in 1912 but was not passed before the outbreak of the First World War.

3. The insane offender in Austrian legislation and in the drafts for a new penal code

3.1. The normative framework

When penal law was codified in the Austrian hereditary lands – id est in the entire Austrian Monarchy with the exception of Hungary, Croatia and Transylvania – for the first time, the *Constitutio Criminalis Theresiana* naturally provided a regulation for – in modern terminology – insane offenders, since only persons “who have the use of their reason, or free will" were punishable. This was a principle that also influenced later codifications: "evil intent" was always required for punishability, which in turn presupposed "free will". If the latter was lacking due to mental infirmity, the perpetrator could not be punished. The *Constitutio Criminalis Theresiana* goes on to state in typical detail:[16]

[10] Stooss, C., “Selbstdarstellung”, *Die Rechtswissenschaft der Gegenwart in Selbstdarstellungen*, vol. 2 (H. Planitz, ed.), Leipzig: Meiner, 1925, pp. 205–235, here p. 227.

[11] This is indicated by the "Explanatory Notes on the Draft of an Austrian Criminal Code", appended to No. 90 of the Supplements to the Stenographic Minutes of the House of Lords, Session XXI, 1912, p. VI (translated from German by Martin P. Schennach): "In 1906, the two [Hoegel and Lammasch] submitted the result of their joint work, which Hoegel as editor had given form to, to the Ministry of Justice. Hofrat Lammasch submitted amendments to some of the provisions." Hoegel's statement (Hoegel, Gesamtreform, 1909, p. VII) also points in this direction (translated from German by Martin P. Schennach): Hoegel said that he had "continued the reform work in the field of criminal law at the request of the Prime Minister. Numerous consultations took place with Professor Lammasch, which resulted in new compromises between our views."

[12] The list of those involved can be found in the aforementioned Explanatory Notes to the Draft of an Austrian Criminal Code (Erläuternden Bemerkungen zum Entwurf eines österreichischen Strafgesetzbuches), pp. VI–VII.

[13] Cf. aforementioned Explanatory Notes to the Draft of an Austrian Criminal Code (Erläuternden Bemerkungen zum Entwurf eines österreichischen Strafgesetzbuches), p. VII.

[14] Cf. die Erläuternden Bemerkungen zum Entwurf eines österreichischen Strafgesetzbuches, p. VII.

[15] Cf. Hoegel, H., *Teilreformen auf dem Gebiete des österreichischen Strafrechtes (einschließlich des Preßrechtes)*, Hannover: Helwing, 1908; Hoegel, H., *Gesamtreform des österreichischen Strafrechtes (einschließlich des Pressrechtes)*, Leipzig: Engelmann, 1909.

[16] Cf. also Türkel, S., *Psychiatrisch-kriminalistische Probleme. I. Die psychiatrische Expertise. II. Über Zurechnung und Zurechnungsfähigkeit. III. Psychopathische Zustände als Strafausschließungsgründe im Strafrechte*, Leipzig / Wien: Deuticke, 1905, pp. 23–26.

"On the other hand, those who lack one [evil intent] or the other [free will] are incapable of committing a crime. Accordingly, what is done by unreasonable cattle, by senseless people, and by other people deprived of reason [...] is not considered a crime".[17]

A further specification is made in the definition of the reasons for mitigating punishment, where it is once again emphasized that no punishment may be imposed in the case of "complete insanity" – "i.e. in the case of madness and insanity etc."[18] An attempt is also made to take borderline cases into account, such as "great stupidity, foolishness and simplicity, which are not linked to a complete lack of reason".[19] In this situation, the judge was to impose a sentence adequate to the concrete mental condition of the offender. However, the judge was only allowed to impose no or only a milder sentence if the insanity or simple-mindedness was obvious. In case of doubt, sworn doctors were to make an assessment of the state of mind by visiting the person several times.

The fundamental determination of the impunity of the insane (in the terminology of the time therefore the "*Unsinnige*"), who is "completely deprived of the use of reason", was also reflected in the following codification of criminal law, the Criminal Law of Joseph II of 1787.[20] In the case of a perpetrator who was only temporarily "insane", it was to be determined whether he had committed the crime during a lucid moment.[21]

A regulation similar in wording is found in the subsequent codification of 1803:[22] The "insane" (*unsinnige*) person cannot be punished, weakness of mind, on the other hand, is considered a mitigating factor.[23] These provisions are also found word for word in the Penal Code of 1852,[24] which remained in force throughout our observation period and was only replaced in 1975 by a new penal code that met modern requirements. This also provides for a separate regulation for dealing with insane offenders. If they have committed an offence punishable by imprisonment of more than one year, they were and are to be sent to an "institution for mentally abnormal offenders" and are not to be released until their presumed harmlessness has been determined by an expert. This confinement is expressly not conceived as a punishment. Rather, the focus should be on medical treatment. In practice over the past decades, however, the so-called "safeguarding measures" (*Maßnahmenvollzug*) have proven to be extremely problematic, since under certain circumstances comparatively minor offences can lead to years of imprisonment and the boundaries between psychiatric treatment and imprisonment are blurred, especially since mentally impaired offenders, who are in principle capable of committing crimes, can also be placed in such institutions.[25]

[17] CCT, Book 1, Article 3, § 5.

[18] CCT, Book 1, Article 11, § 3.

[19] CCT, Book 1, Article 11, § 4.

[20] JStG, § 5, lit. a; cf. Türkel, *Psychiatrisch-kriminalistische Probleme*, pp. 27–30.

[21] JStG, § 5, lit. b.

[22] To the coming into being of these provisions cf. Türkel, *Psychiatrisch-kriminalistische Probleme*, pp. 30–35 and 40–49.

[23] Penal Code of 1803, Part 1, § 2, lit. a and b as well as § 39.

[24] Penal Code of 1852, Part 1, § 2, lit. a and b as well as § 39; cf. Türkel, *Psychiatrisch-kriminalistische Probleme*, pp. 37–38; Türkel, S., *Die Zurechnungsunfähigkeit. Die philosophischen, medizinischen und strafrechtlichen Probleme der Zurechnungsfähigkeit und ihre legislative Behandlung in den österreichischen Strafgesetzentwürfen (1852–1914)*, Leipzig / Wien: Deuticke 1915, p. 35; Lilienthal, K. v., "Österreich", *Vergleichende Darstellung des deutschen und ausländischen Strafrechts. Vorarbeiten zur deutschen Strafrechtsreform. Allgemeiner Teil, vol. V: Zurechnungsfähigkeit* (K. von Birkmeyer et al. eds.), Berlin 1906, pp. 56–60, here p. 56.

[25] Cf. Lengauer, S., "Historische Entwicklungslinien hin zum geltenden Recht zur Unterbringung psychisch kranker Rechtsbrecher", *Zeitschrift für Neuere Rechtsgeschichte* 44 (2022), pp. 99–117; Lengauer, S.,

The provisions in the Criminal Codes were flanked by provisions in the Criminal Procedure Codes, in which (as in the *Theresiana*) it was stipulated that the existence of a mental illness that precluded imputability was to be determined by medical experts.[26]

3.2. Handbooks and commentaries on the Austrian Criminal Code and their discussion of insane offenders

The relevant paragraphs of the Criminal Code of 1852 – like those of the codification of 1803 with the same wording – were interpreted by jurisprudence, which was reflected in condensed form in the standard handbooks and commentary literature.[27] Two forms of dealing with insanity can be distinguished here: One – which tends to be favoured by authors in the Vormärz period,[28] but can also be seen occasionally in the second half of the century – limits itself to a brief description of insanity and lists individual manifestations. An example of this approach is the handbook "Austrian Criminal Law" by Carl Stooss,[29] who, following the wording of the law, distinguishes the "lack of reason", the "periodic insanity" and the "disturbance of consciousness" as manifestations of insanity. As an example of the first group of cases, he cites – after a cursory definition of what is meant by sanity – general "diseases of the mind" as well as "idiocy" and "imbecility". Furthermore, he refers to the legal opinion of older commentators (Sebastian Jenull and Anton von Hye), who also cite "savagery" (*id est* growing up away from civilisation and human society) as a case of application, without making a statement of his own. They understand this to mean. Under the heading "periodic insanity", he mentions "individual mental illnesses" as well as expressis verbis "melancholy and mania", which could and would also occur "alternately". Only once does the author Stooss reveal a critical attitude, in that he rejects the frequently held view, which is also consistent with the wording of the law, according to which an offender who acts despite such an illness during a "lucidum intervallum" is still sane. Stooss justifies this with the fact that the disease continues to exist even during "lucida intervalla" (however, Stooss does not resolve the resulting contradiction as to why the law takes "periodic insanity" into account at all if the disease is a permanent one).

The commentaries of the second group of authors are not limited to a list and at most to a brief explanation of the so-called “reasons for exclusion of guilt” (*Schuldausschließungsgründe*), but embeds them more deeply in the current discussions and in the development of psychiatry.[30] Heinrich Lammasch, for example, follows this path in his

Die dogmatische Legitimation der strafrechtlichen Unterbringung geistig abnormer Rechtsbrecher. Eine kritische Würdigung der schuldungebundenen Reaktion auf ein anlassgebendes Handlungsunrecht, Wien: Verlag Österreich (Collection “Juristische Schriftenreihe” 291), 2021.

[26] Code of criminal procedure 1873, § 134; Code of criminal procedure 1853, § 95; Code of criminal procedure 1850, § 216; Code of criminal procedure 1803, Part 1, § 363; Cf. also Türkel, *Psychiatrisch-kriminalistische Probleme*, pp. 3–4.

[27] The views of selected authors can already be found in Türkel, *Psychiatrisch-kriminalistische Probleme*, pp. 49–65.

[28] Cf. Egger, F. Edler v., *Kurze Erklärung des Österreichischen Gesetzbuches über Verbrechen und schwere Polizey-Uebertretungen, vol. 1*, Wien / Triest: Geistinger, 1816, pp. 30–32. Cf. also Hupka, Ch., *Sätze über das peinliche Recht nach der Theresianischen Halsgerichtsordnung mit angehängten Abweichungen vom Karolinischen Rechte*, Wien: Gassler, 1784, p. 33.

[29] On the following (including the quotations) Stooss, *Lehrbuch*, pp. 82–83.

[30] Cf. for instance Janka, K., *Das österreichische Strafrecht*, Prag / Wien: Tempsky et al., 1894, pp. 78–87.

"Handbuch des österreichischen Strafrechts".[31] Before dealing specifically with insanity, he expresses his fundamental rejection of a deterministic view of the individual:[32] According to him, it is inaccurate and contradicts "the facts and general value judgements" to "immediately regard everyone [...] who does not control himself as mentally abnormal" and not sane; after all, man is characterized by the fact that he can also learn self-control (among other things due to his education) and does not have to give in to every urge that "promises him immediate advantage or pleasure". He then goes into the modern scientific terminology (the narrower "reasons for exclusion of guilt" (*Schuldausschließungsgründe*), which are directly related to sanity, and the broader "reasons for exclusion of punishment" (*Strafausschließungsgründe*)), which he contrasts with the (then already outdated) wording of the Penal Code of 1852, which speaks of the reasons that "exclude evil intent".[33] Furthermore, he points out that the concept of insanity originally underlying the codification has long been outdated by the development and progress of psychiatry[34] and must be reinterpreted against the background of modern knowledge. With reference to the state of medical knowledge and the role of the medical expert in determining mental illness, Lammasch refrains from enumerating the individual manifestations of insanity, as was regularly done in older literature, but uses the opportunity to decisively oppose the idea of a guilt-excluding "moral insanity", which consisted only in a "moral abnormality"[35] but could under no circumstances lead to insanity. He also rejects the concept of reduced sanity: "This so-called mental inferiority, whether it is based on an intellectual defect, on a lack of moral feeling or on reduced willpower, can only be considered as a reason for mitigating punishment [...]".[36]

3.3. The regulations in the codification drafts

In view of the fact how intensively and fiercely the treatment of the insane offender was discussed in the decades around 1900, also in the Habsburg Monarchy, the provisions contained in the codification drafts are very brief and continue to see the ability to recognise the wrongness of an act and to form a free will as a prerequisite for criminal liability. Safeguarding measures that, in the sense of the concept of "social defense", make it possible to lock away the offender who, although of unsound mind, is dangerous to society, are only included in the last drafts, which were presented and discussed from 1909 onwards.

With regard to the wording, Hye's first draft from the 1860s deviates considerably from the text of the Penal Code of 1852, but nevertheless, the ability to recognise wrongdoing and the free formation of will are still considered crucial.[37] However, the wording is more comprehensive in that it states that there is no culpability and thus no criminal liability if a criminal offense was committed "in a state in which the freedom to form one's will is

[31] Cf. Lammasch, H., *Grundriß des Strafrechts*, Leipzig: Duncker & Humblot (Collection "Grundriß des österreichischen Rechts" 2/4), 4th ed. 1911, pp. 24–26.

[32] The following quotations are taken from Lammasch, *Grundriß des Strafrechts*, p. 24.

[33] Lammasch, *Grundriß des Strafrechts*, pp. 24–25.

[34] This view was also held by Lilienthal, "Österreich", p. 57.

[35] Lammasch, *Grundriß des Strafrechts*, p. 25.

[36] Lammasch, *Grundriß des Strafrechts*, p. 26.

[37] For the following, see also Türkel, *Zurechnungsfähigkeit*, pp. 36–37.

excluded."[38] Furthermore, "weakness of mind" is considered a mitigating factor.[39] In his "Motiven-Darstellung", which was written for internal use only, the author Hye emphasizes that he did not want to enumerate the circumstances excluding liability in a lengthy and casuistic manner, but rather formulated the paragraph in such a way that it contained all the circumstances excluding liability "in a general sentence accessible to common understanding."[40]

From the seventies to the nineties, the relevant provisions remain identical, right down to the wording: from then on, they show the exemplary function and formative power of the German Criminal Code, which came into force in 1871 and whose wording is adopted only with minor, mainly editorial modifications by all drafts submitted up to 1893:[41]

"An act is not punishable if the person who committed it was at the time in a state of unconsciousness or pathological inhibition or disturbance of mental activity which made it impossible for him to freely determine his will or to understand the punishable nature of his act".[42]

The committee of the House of Representatives dealing with criminal law matters proposed a minor amendment in 1893, in that the "pathology" of the inhibition or disturbance of mental activity should no longer be the decisive factor, but any corresponding impairment should exclude the capacity to be punished.[43]

The draft submitted by the commission headed by Hugo Hoegel in 1906 deviated significantly from the wordings proposed at an earlier stage.[44] The text probably goes directly back to Hoegel and listed the permanent or temporary "mental infirmity, unconsciousness, deaf-muteness" as reasons for excluding sanity, but at the same time clarified, following contemporary discussions, that "pathological tendencies to commit the act" were not to be equated with insanity.[45]

---

[38] Hye's draft from 1863 was copied, but only for internal use and not for public or scientific discussion. It has only been preserved in the archives, for example in ÖSTA, AVA, Justizministerium, Legislative Angelegenheiten, Karton 1053; It does correspond in large parts and also with regard to the provisions on criminal liability with the draft submitted to the House of Representatives in 1867, cf. supplement 75 to the Stenographic Minutes of the House of Representatives, session V, 1867, § 13.

[39] Supplement 75 to the Stenographic Minutes of the House of Representatives, session V, 1867, § 64.

[40] Hye-Gluneck, A. v., *Motiven-Darstellung zu dem Entwurfe eines vollständigen neuen Strafgesetzes über Verbrechen und Vergehen für die im engeren Reichsrathe des österreichischen Kaiserstaates vertretenen Königreiche und Länder*, [Wien: Hof- und Staatsdruckerei, 1865], p. 16.

[41] Cf. Türkel, *Zurechnungsfähigkeit*, pp. 43–48; Lilienthal, "Österreich", here pp. 59–60; in detail: supplement 221 to the Stenographic Minutes of the House of Representatives, session VIII, 1874, § 56; supplement 704 to the Stenographic Minutes of the House of Representatives, session CVII, 1876, § 56; supplement 392 to the Stenographic Minutes of the House of Representatives, session IX, 1881, § 57; supplement 392 to the Stenographic Minutes of the House of Representatives, session IX, § 57; supplement 822 to the Stenographic Minutes of the House of Representatives, session X, 1889, § 56; supplement 210 to the Stenographic Minutes of the House of Representatives, session XI, 1891, § 57.

[42] Cf. the German Imperial Penal Code of 1871, § 51: „Eine strafbare Handlung ist nicht vorhanden, wenn der Thäter zur Zeit der Begehung der Handlung sich in einem Zustande von Bewusstlosigkeit oder krankhafter Störung der Geistesthätigkeit befand, durch welchen seine freie Willensbestimmung ausgeschlossen war." ("A criminal offence is not given if the perpetrator was in a state of unconsciousness or pathological disturbance of mental activity at the time when committing the offence, which precluded his free determination of his will"quotation translated from German by MPS).

[43] Supplement 709 to the Stenographic Minutes of the House of Representatives, session XI, 1893, § 57.

[44] Cf. Türkel, *Unzurechnungsfähigkeit*, pp. 48–52.

[45] Hoegel, *Gesamtreform des österreichischen Strafrechtes*, p. 2 (§ 5).

The requirement of "pathology" of the disorder was also upheld in the final draft introduced for parliamentary consideration in the House of Lords in 1912. Here the corresponding provision appears under the heading "sanity" and states: "Whoever at the time of the offense, by reason of mental disorder, infirmity of mind or disturbance of consciousness, does not possess the capacity to see the wrong of his act or to act in accordance with that insight, is not liable to punishment."[46] The proposal introduced into the parliamentary process in 1909 had already been very similar, although it had still used the concept of (free) will, which was controversial in the scientific community[47]:

"A person is not liable to punishment if, at the time of the act, he did not have the capacity to realise the wrong of his act or to determine his will in accordance with this realisation because of mental disturbance, mental weakness or impaired consciousness".

Security measures, which were an essential part of the reform proposals of the positivist school, are regulated almost in the same wording in the two drafts of 1909 and 1912 under the heading "security measures". First (§ 36) the accommodation of the "insane" (in 1909 also of the "drunkard") is dealt with, then (§ 37) that of the "diminished responsibility", and finally (§ 38) that of the habitual criminal who is a danger to the public. The placement always requires one or more offences: In the constellations of sections 36 and 37, this is the commission of an offence that is punishable by a prison sentence of more than six months. In addition, the offender must be classified as "dangerous to the public": according to this, his lifestyle and the nature of his offence must indicate that he is to be regarded as "particularly dangerous to morals or to the security of the person or property". An habitual offender who is "dangerous to the community" must have previously committed two more serious offences and must have reoffended within the last five years since his release from prison. In addition to the danger to the community, there must be a negative prognosis for the future, according to which he will probably continue to commit criminal acts.

Admittedly: If only the development of the normative framework and the drafts submitted during the period under investigation are considered, an incomplete picture would emerge. Although these provisions naturally reflect the development of criminal law science in the decades since the middle of the 19th century, they only give a rudimentary idea of the intensity of the discussions that were taking place at the same time in the criminal law scientific community.

4. The discussion on the insane offender in the Austrian scientific community

4.1. General remarks

The discussion on the insane offender took place in two different but closely interwoven contexts: First, the considerations were reflected in the statements on the codification drafts, which were commented on and criticised by numerous criminal law scholars. But even apart from this legal-political dimension, a rather intensive preoccupation with the figure of the insane offender in the decades around 1900 can be observed in the Austrian Monarchy. One must always bear in mind that this was not a purely Austrian discussion, but rather one with a strong European dimension. In particular, a close connection with the scientific community in the German Empire can be seen. On the one hand, this can be attributed to the high cross-border

[46] Supplement 90 to the Stenographic Minutes of the House of Representatives, session XXI, 1912, § 3.

[47] Cf. *Vorentwurf zu einem österreichischen Strafgesetzbuch und zu dem Einführungsgesetze September 1909*, Wien: K.k. Hof- und Staatsdruckerei, 1909, § 7.

mobility of individual researchers, some of whom, such as August Finger or Franz Exner, began their careers in Austria and continued them in Germany – this also applies to Franz von Liszt, the leading exponent of the "positivist school" – or, on the other hand, they took the opposite path, such as Karl Hiller. The Swiss Karl Stooss, who had presented a draft for a Swiss codification of criminal law, was appointed to the University of Vienna in 1896. The decisive factor for the Ministry of Science was the consideration that Stooss could usefully contribute his experience to the Austrian codification process. From this point of view alone, we are not dealing with strictly separated scientific spheres but with a closely interwoven scientific community. Of course, this is also reflected in the publication activities: Austrian authors published in German journals and also took note of their contents, and the same is true in reverse. Admittedly, it was not until 1910 that the Austrian Monarchy had a journal specialising in criminal law, the "Österreichische Zeitschrift für Strafrechtswissenschaft", which was expressly dedicated to intensifying the academic exchange between German and Austrian criminal law scholars. Some disputes – also concerning our topic – were fought out across borders: Franz von Liszt's treatise on insanity, which was based on a lecture at the international psychology congress and which, significantly, had appeared in the "Zeitschrift für die Gesamte Strafrechtswissenschaft" founded by Liszt himself.[48] The Austrian Lammasch responded to this contribution in a Swiss journal;[49] in this way, Lammasch evoked a further reaction from his opponent Liszt, [50] to which he in turn wrote a reply (this time in a German journal).[51] The dispute was thus carried out by an Austrian professor and a professor who was also from Austria but working in Germany in an international, Swiss and German journal – nothing can better illustrate the close interconnection of the Austrian, Swiss and German scientific communities in the field of criminal law than this dispute.

At the same time, it must be remembered that the scientific discourse on insanity and its causes was not an exclusively criminological one. Rather, the medical discipline of psychiatry, which was establishing itself in the 19th century, and its development were comprehensively taken into account and its exponents were included in the discussion. This openness towards the young medical discipline was of course also due to the concept of the "positivist" school of a "whole science of criminal law", which preached overcoming the restriction or even focus on legal dogmatics and called for opening up criminal law science to other disciplines important for understanding and combating deviance, such as anthropology, medicine or sociology. Well-known psychiatrists contributed not only through publications, but also through lectures and contributions to discussions – for example at events of the Austrian branch of the International Union of Criminal Law – or commented on the codification drafts. In addition to individuals and the medical faculty of the University of Vienna,[52] associations of psychiatric professionals also expressed their points of view through memoranda, and specialist congresses dealt with, for example, the medical problem of diagnosing insanity or the placement of mentally ill

[48] Liszt, F. v., "Die strafrechtliche Zurechnungsfähigkeit. Vortrag, gehalten am 4. August 1896 auf dem 3. Internationalen Psychologien-Kongreß", *Zeitschrift für die gesamte Strafrechtswissenschaft* 17 (1897), pp. 70–84.

[49] Cf. Lammasch, H., "Rezension zu: Karl Binding: Grundriss des gemeinen deutschen Strafrechts. 5. Aufl. Leipzig 1897", *Schweizerische Zeitschrift für Strafrecht* 10 (1897), pp. 244–245; Schennach, M. P., "Der Strafrechtswissenschaftler Heinrich Lammasch und der „Schulenstreit" in der österreichischen Monarchie", *Zeitschrift für Neuere Rechtsgeschichte* 42 (2020), pp. 202–233, here p. 221.

[50] Liszt, F. v., "Die strafrechtliche Zurechnungsfähigkeit", *Zeitschrift für die gesamte Strafrechtswissenschaft* 18 (1898), pp. 70–83.

[51] Lammasch, H., "Offener Brief an Professor von Liszt, Halle a. d. S.", *Deutsche Juristenzeitung* 3 (1898), pp. 92–94.

[52] For an expert opinion from 1867 see e.g. Türkel, *Zurechnungsfähigkeit*, p. 38.

offenders.[53] These contributions were well received by the legal profession and perceived as an enriching addition to the legal discourse. Disputes about the demarcation between medical-psychiatric and legal competence in the Austrian monarchy can at best be identified in rudimentary form: Despite all the difficulties and borderline cases criticised by the medical profession, it was undisputed and in accordance with the regulations in the codes of criminal procedure that the diagnosis was to be made by doctors, but that the determination of insanity based on this was made by the courts and thus the lawyers.[54]

4.2. The positions of the "positivist" and the "classical" school

4.2.1. The "classical" school

The view of the representatives of the "classical" school, which was also reflected in the Austrian criminal law in force at the time, was unambiguous and looked back on a tradition of reasoning in the field of criminal law: the individual guilt of the offender is required for punishment. However, this presupposes the offender's ability to understand and recognise the culpability of his actions. If this is not given, the perpetrator is not capable of guilt, therefore insane, and therefore cannot be punished. The causes of the lack of culpability did not necessarily have to be pathological mental disorders, but could also be based on the child's age or on the deliberate induction of a state of intoxication, e.g. through alcohol consumption. With regard to the subject of this article, only pathological mental reasons for insanity are dealt with here. These were categorised according to the state of medical science – as has already been shown in the commentaries on the Austrian criminal law codifications – whereby this categorisation was further developed in the course of the 19th century due to the development of psychiatry. A distinction is made between, on the one hand, fundamental permanent conditions that, like dementia or intellectual retardation, are incurable and preclude sanity for the entire lifetime of the affected person, and, on the other hand, mental states and conditions that, like mania, lead only to a temporary loss of sanity. According to the argumentation, these individuals would have insight into the culpability of their actions in their "lucida intervalla" and could be punished accordingly. Following this point of view, it had to be assessed by medical experts whether the requirements for insanity actually were given at the time of the offence. This also corresponded to the provisions of the Penal Code of 1852. The latter also considered, as already stated, a mental weakness as a reason for mitigating the sentence. Manifestations of this retarded intellectual development, which did not seem appropriate to speak of insanity, were subsumed in German and equally in Austrian research under the term "reduced sanity". This phenomenon had already been highly disputed since the middle of the century, independently of the discussions between the "classical" and the "positivist" schools.[55]

That the insane offender was not to be punished also corresponded to the purpose of the sentence according to the representatives of the “classical” school: this purpose consists in imposing retaliation on the culprit. The sanction should be proportional to the culpability of the

[53] See e.g. the statement of the Viennese "Conference of Psychiatrists" (*“Irrenärztetagung”*) in 1907 on the planned amendment of the penal code at Türkel, *Unzurechnungsfähigkeit*, pp. 52–57.

[54] Cf. Türkel, *Psychiatrisch-kriminalistische Probleme*, pp. 6–10; Türkel, *Unzurechnungsfähigkeit*, pp. 75–76; Blumenstock, L., “Gerichtsärztliche Bemerkungen über den Entwurf des neuen Strafgesetzes”, *Wiener Medizinische Presse* 16 (1875), pp. 308–311 and 332–334.

[55] References to the older literature can be found e.g. in Berner, A. F., *Lehrbuch des Deutschen Strafrechtes*, Leipzig: Tauchnitz, 12th ed. 1882, p. 123, fn. 2.; Gottschalk, A. (ed.), *Materialien zur Lehre von der verminderten Zurechnungsfähigkeit*, Berlin: Guttentag (Collection “Mitteilungen der Internationalen Kriminalistischen Vereinigung, Beilage” 11), 1904.

offender. Therefore, if someone cannot be held responsible for his actions, a punishment is neither necessary nor appropriate, especially since no improvement of the offender can be achieved.

4.2.2. The "positivist" school

The point of view of the "positivist" school was different, although it was not a fixed doctrine, but more fluid and subject to developments – which can be demonstrated in particular in the case of Franz von Liszt himself.[56] In particular, the question of the insane offender is much more strongly linked to the fundamental problem of the purpose of punishment, to a deterministic view of the nature of human beings and, beyond that, to the safeguarding measures and the function of criminal law as an instrument of "social defence". In principle, the categories of "sanity" and "insanity" are retained, and despite the criticism of the assumption of a "diminished sanity", this is also retained.

With regard to the purpose of punishment, the positivist school emphasises the special preventive aspect: According to this approach, a sentence must be appropriate to the personality of the offender and should in particular take into account the possibility of correcting him and educating him to become a productive member of society again. If, however, this is not possible – for instance because he is unable to control his actions due to illness or lack of reason – a punishment is not adequate. Nevertheless, he must be “neutralized” – like the habitual criminal who is incapable of improvement – in order to protect society from him. Therefore, security measures must be applied to him, which in effect also result in permanent incarceration – although it is conceded that ideally he should also be given medical treatment and care while in custody.

This is also connected to the view of Liszt's followers on human free will, which they tended to deny and contrasted with scientific and social determinism. This deterministic view saw deviance not as the result of a conscious choice between good and evil, but as conditioned by predisposition, social conditions and upbringing, and thus to a certain extent as inevitable. In the end, this approach led to a blurring, even an abolition of the boundary between insane offenders and offenders who were liable but not capable of correction: In the interest of society, they were all to be permanently segregated and incarcerated without distinction. The difference between punishment and security measures thus became obsolete for Liszt in his famous speech to the international psychologists' congress in Munich in 1897. There, he conceded that the hitherto common distinction between "asylum" and prison was becoming obsolete and that by retaining it for a certain transitional period such a temporary solution should take the antiquated opinion of the public into account. A year later, he clarified this once again in his response to the vociferous criticism, which had also been voiced by some Austrians: Every day, in everyday life, people would make value judgements about their fellow human beings, "which were not based on merit and guilt"[57]. In Liszt's view, such an daily-life judgement is done "just as much towards the child as towards the adult, towards the mentally ill as towards the mentally healthy".[58]

Liszt came to the conclusion:

[56] Struck-Berghäuser, A. Th., *Franz von Liszt und seine Gegner. Die Auswirkungen des „Schulenstreits“ auf das heutige Sanktionen- und Strafvollzugsrecht*, Baden-Baden: Nomos (Collection “Kieler Rechtswissenschaftliche Abhandlungen”, N. F. 73), 2020, pp. 141–143 and 384–397.

[57] Liszt, “Die strafrechtliche Zurechnungsfähigkeit”, 1898, p. 239.

[58] Liszt, “Die strafrechtliche Zurechnungsfähigkeit”, 1898, p. 237.

"Thus the concept [...] of culpability as a distinguishing feature dividing people into two classes is no longer applicable: for we attribute to every human being the result of his or her actions that are significant for social coexistence."[59]

4.3. The Austrian participants

The circle of Austrian scholars in the field of criminal law who contributed to the discussion on the closely related topics of insane offender, insanity and security measures was basically quite large: hardly any representative of the guild did not at least ephemerally comment on these questions. In addition, representatives of other disciplines, especially of psychiatric science (but also, for example, pedagogy[60]), became involved in the controversies of the time. Among the doctors, the psychiatrist Richard von Krafft-Ebing, who worked in Graz and Vienna, should be mentioned in particular. Although he is still known today for his "Psychopathologia sexualis" and his research into homosexuality,[61] he also produced a standard work on "judicial psychopathology" and was intensively involved in the interdisciplinary discussion on sanity.[62] His disciple Julius Wagner-Jauregg was actively involved in the process of re-codifying criminal law. [63]

However, the number of legal scholars who dealt more intensively with the problems surrounding the insane offender was more manageable. Above all, Hugo Hoegel,[64] Heinrich

[59] Liszt, "Die strafrechtliche Zurechnungsfähigkeit", 1898, pp. 237–238.

[60] Cf. for example Höfler, A., *Sieben Thesen zu Professor Dr. Franz von Liszts Vortrag „Die strafrechtliche Zurechnungsfähigkeit". Mit einem Sonder-Abdruck aus des Verfassers „Psychologie": Willensfreiheit und Zurechnung*, Wien / Prag: Tempsky, 1897.

[61] Cf. Heinrich, A., *Am Anfang war die Perversion. Richard von Krafft-Ebing, Psychiater und Pionier der modernen Sexualkunde*, Wien / Graz / Klagenfurt: Styria premium, 2011; Oosterhuis, H., *Stepchildren of nature. Krafft-Ebing, Psychiatry, and the making of sexual Identity*, Chicago / London: University of Chicago Press, 2000.

[62] Cf. Krafft-Ebing, R. v., *Lehrbuch der gerichtlichen Psychopathologie mit Berücksichtigung der Gesetzgebung von Österreich, Deutschland und Frankreich*, Stuttgart: Enke, 1875.

[63] Cf. for exampel his 1907 statement on proposed amendments to the criminal code in Türkel, *Unzurechnungsfähigkeit*, pp. 57–67.

[64] Cf. Hoegel, *Gesamtreform des österreichischen Strafrechtes*; Hoegel, *Teilreformen auf dem Gebiete des österreichischen Strafrechtes*; Hoegel, H., *Straffälligkeit und Strafzumessung*, Wien: Perles, 1897; Hoegel, H., *Die Einteilung der Verbrecher in Klassen*, Leipzig: Engelmann (Collection "Kritische Beiträge zur Strafrechtsreform" 2), 1908; Hoegel, H., "Bemerkungen zum Strafgesetzentwurfe", *Juristische Blätter* 11 (1882), pp. 543–545, 603–604 and 618–619; Hoegel, H., "Die Strafrechtsreform", *Juristische Blätter* 25 (1896), pp. 601–602 and 613–614.

Lammasch,[65] Carl Stooss,[66] Alois Zucker,[67] Karl Janka,[68] Alexander Löffler[69] und Julius Vargha[70] are to be mentioned. This is to be expected in the case of Hoegel, Lammasch and Stooss, as they had participated the codification process. They used the publications to make their points of view known to a wider public. This is particularly true of Hoegel, who after leaving the Codification Commission in 1907 published two major works on criminal law reform.[71] However, the active involvement of the others in the reform of criminal law is also evident, as Zucker and Löffler had reviewed the draft presented by Hoegel and Lammasch in 1906 on behalf of the Ministry of Justice.[72] Some others like Hans Gross,[73] Franz Exner,[74] Franz

[65] Cf. Lammasch, H., *Handlung und Erfolg. Ein Beitrag zur Lehre vom Causalzusammenhange. Separatabdruck aus der Zeitschrift für das Privat- und öffentliche Recht der Gegenwart 9 (1882)*, Wien: Hölder, 1882; Lammasch, H., "Über Zwecke und Mittel der Strafe", *Zeitschrift für die gesamte Strafrechtswissenschaft* 9 (1889), pp. 423–451; Lammasch, H., "Studien zum Strafgesetzentwurfe", *Allgemeine österreichische Gerichtszeitung* 42 (1891), pp 377–378, 385–390, 393–396, 401–403 and 409–412; Lammasch, H., "Die Aufgaben der Strafrechtspflege", *Zeitschrift für die gesamte Strafrechtswissenschaft* 15 (1895), pp. 633–658; Lammasch, H., "Vorschläge zur Revision des Strafgesetzentwurfes", *Allgemeine Österreichische Gerichtszeitung* 45 (1894), pp. 345–347, 353–356, 361–364, 369–372 and 377–380; Lammasch, "Ziele der Strafrechtsreform in Österreich", *Allgemeine österreichische Gerichts-Zeitung* 55 (1904), pp. 303–307; Lammasch, "Offener Brief".

[66] Cf. in addition to his monographs, esp. Stooss, C., *Der Geist der modernen Strafgesetzgebung. Vorlesung gehalten am 19. Oktober 1896 zum Antritt der ordentlichen Professur für österreichisches Strafrecht und Strafprozessrecht an der Universität Wien*, Wien: Manz, 1896; Stooss, C., "Die Sichernden Maßnahmen gegen Gemeingefährliche im österreichischen Strafgesetzentwurf", *Österreichische Zeitschrift für Strafrecht* 1 (1910), pp. 25–92.

[67] Cf. Zucker, A., "Über den ursächlichen Zusammenhang zwischen Delikt und Strafe", *Der Gerichtssaal* 44 (1891), pp. 424–445; Zucker, A., "Einige criminalistische Zeit- und Streitfragen der Gegenwart", *Der Gerichtssaal* 44 (1891), pp. 1–108; Zucker, A., "Die neuen Bestimmungen des österreichischen Strafgesetzentwurfes", *Der Gerichtssaal* 46 (1892), pp. 27–70; Zucker, A., *Einige dringende Reformen der Strafrechtspflege. Mit besonderer Rücksicht auf die Verhältnisse in Oesterreich*, Leipzig / Wien: Deuticke, 1896; Zucker, A., *Über Schuld und Strafe jugendlicher Verbrecher*, Stuttgart: Enke, 1899; Zucker, A., *Über Kriminalität, Rückfall und Strafgrund. Nähere Ausführungen eines im Oktober 1905 im böhmischen Juristenverein zu Prag gehaltenen Vortrages*, Wien: Deuticke, 1907.

[68] Cf. esp. Janka, K., *Die Grundlagen der Strafschuld. Vortrag gehalten in der Plenar-Versammlung der juristischen Gesellschaft in Wien am 30. Jänner 1885*, Wien: Manz, 1885.

[69] Cf. Löffler, A., "Der Begriff der Verantwortlichkeit", *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 6 (1897), pp. 387–398; Löffler, A., "Gutachten über die Frage: Die Sicherungsmaßregeln nach den Vorentwürfen zu einem deutschen und zu einem österreichischen Strafgesetze", *Verhandlungen des Einunddreißigsten Deutschen Juristentages*, vol. 2 (Gutachten), Berlin: Guttentag, 1912, pp. 766–804.

[70] Cf. Vargha, J., *Die Abschaffung der Strafknechtschaft. Studien zur Strafrechtsreform, 2 Theile*, Graz: Leuschner & Lubensky, 1896.

[71] Cf. Hoegel, *Teilreformen auf dem Gebiete des österreichischen Strafrechtes*; Hoegel, *Gesamtreform des österreichischen Strafrechtes*.

[72] Cf. *Vorentwurf zu einem österreichischen Strafgesetzbuch*, pp. III–IV.

[73] Cf. Gross, H., "Neunundzwanzig Thesen zum künftigen Strafgesetzentwurfe", in: *Gesammelte Kriminalistische Aufsätze*, vol. 1 (H. Gross), Leipzig: Vogel, 1902, pp. 46–57.

[74] Cf. Exner, F., "Das Prinzip der Schuldhaftung im österreichischen und deutschen Strafgesetzentwurf", *Österreichische Zeitschrift für Strafrecht* 1 (1910), pp. 405–428.

von Liszt,[75] August Mířička,[76] Max Weiser,[77] Wenzelslaus Gleispach[78] and František Storch[79] contributed to the discussion at least by publishing statements on the Austrian drafts and here especially on the safeguarding measures (whereby Gleispach, Gross and Storch had also evaluated the draft by Hoegel and Lammasch in 1906).[80]

It is appropriate to position the legal scholars appearing in the Austrian debates in the "clash of schools", as this must have implications for their views on the insane offender, the question of insanity, the treatment of insane offenders and the securing measures. If one leaves aside the two scholars who lived in the German Empire, Franz von Liszt and Franz Exner – whose affiliation with the "positivist" school is obvious anyway – one will come to the conclusion that such unambiguous attributions are not so easy: The majority of Austrian legal scholars did not take an expressis verbis position for one side or the other, but adopted an eclectic approach: It was possible to take up certain ideas of the "positivist" school, but to adopt conservative positions on other issues. Prime examples of such moderate positions "in-between" are Heinrich Lammasch and Carl Stooss: Lammasch was convinced that the focus of traditional criminal law scholarship on legal dogmatics was fatal and hindered the understanding of criminal phenomena and how to combat them.[81] He resolutely called for an open perspective on deviant behaviour, open to the insights of other disciplines, and praised Liszt and the International Union of Criminal Law as "saviours from the danger of intellectual fossilization."[82] However, his Catholic character made him strictly reject the naturalistic-deterministic view of man, and the blurring of the distinction between insane and habitual criminals propagated by Liszt ultimately led to the break between Lammasch and Liszt.

The approach of Carl Stooss, which has already been adequately described by historical research, proves to be similarly eclectic to that of Lammasch.[83]

---

[75] Cf. Liszt, F. v., "Die 'Sichernden Maßnahmen' in den drei Vorentwürfen", *Österreichische Zeitschrift für Strafrecht* 1 (1910), pp. 3–24.

[76] Mířička, A., "Zur Frage der Strafrechtsreform", *Juristische Blätter* 46 (1917), pp. 181–184; Mířička, A., *Die Formen der Strafschuld und ihre gesetzliche Regelung*, Tübingen: Mohr Siebeck, 1908.

[77] Cf. Weiser, M., "Modernes aus dem Strafgesetzentwurfe", *Allgemeine österreichische Gerichts-Zeitung* 63 (1912), pp. 66–69.

[78] Cf. Gleispach, W., "Der österreichische Strafgesetzentwurf und das Schuldproblem", *Österreichische Zeitschrift für Strafrecht* 2 (1911), pp. 209–249; Gleispach, W., "Der österreichische Strafrechtsentwurf", *Allgemeine österreichische Gerichts-Zeitung* 60 (1909), pp. 337–339, 345–348, 364–366, 385–387, 393–397 and *Allgemeine österreichische Gerichts-Zeitung* 61 (1910), pp. 11–15, 17–18, 65–68 and 73–80.

[79] Cf. Storch, Fr., "Die Bemessung der Strafe in den österreichischen Strafgesetzentwürfen", *Österreichische Zeitschrift für Strafrecht* 4 (1913), pp. 1–44.

[80] Cf. *Vorentwurf zu einem österreichischen Strafgesetzbuch*, pp. III–IV.

[81] Cf. Schennach, "Der Strafrechtswissenschaftler Heinrich Lammasch und der „Schulenstreit".

[82] Lammasch, "Offener Brief", p. 92.

[83] Cf. Koch, A., "Binding vs. v. Liszt – Klassische und moderne Strafrechtsschule", *Der Strafgedanke in seiner historischen Entwicklung. Ringvorlesung zur Strafrechtsgeschichte und Strafrechtsphilosophie* (E. Hilgendorf & J. Weitzel, eds.), Berlin: Duncker & Humblot (Collection "Schriften zum Strafrecht" 189), pp. 127–145, here p. 143; Schäfer, F. L., "Carl Stooss (1849–1934) – Eine Geschichte der Strafrechtskodifikation", *Ad fontes! Werner Schubert zum 75. Geburtstag* (F. L. Schäfer, M. Schmoeckel & Th. Vormbaum, eds.), Berlin: Lit (Collection "Rechtsgeschichte und Rechtsgeschehen" 20), 2015, pp. 33–76, here pp. 71–73; Moos, R., "Carl Stooss in Österreich", *Schweizerische Zeitschrift für Strafrecht* 105 (1988), pp. 35–79; Kaenel, P., *Die kriminalpolitische Konzeption von Carl Stooss im Rahmen der geschichtlichen Entwicklung von Kriminalpolitik und Straftheorien*, Bern: Stämpfli (Collection "Abhandlungen zum schweizerischen Recht", N. F. 466), 1981, pp. 85–86, 91–92, 98, 100, 102–103, 106, 111–112 and 115–116 (on the differences between Stooss and von Liszt); Gschwend, L., "Carl Stooss (1849–1934) – Originell-kreativer Kodifikator und geschickter Kompilator des schweizerischen Strafrechts – Reflexionen zu seinem 60. Todestag", *Schweizerische Zeitschrift für Strafrecht* 112 (1994), pp. 26–56, here p. 53.

Even Hans Gross,[84] who was regularly counted by contemporaries among the Austrian supporters of the "positivist" school and served for many years as president of the Austrian branch of the International Union of Criminal Law,[85] proves on closer examination to be quite balanced in his views and by no means an unconditional supporter of the new direction.

The same applies to a legal scholar who has received at best only marginal attention in previous research, but who is of outstanding importance for our topic: Siegfried Türkel.[86] Although he was not a disciple of Hans Gross, he was also a proponent of a disciplinary opening of criminal law with his pronounced interest in criminology and his extensive relevant publication activity. He was working at the Vienna Institute of Criminal Law only for a very short time, so that even from this point of view it is difficult to assign him to a school. Above all, Türkel was a practitioner: He was a barrister, a police lawyer, but above all, from 1924, head of the Criminological Institute of the Vienna Provincial Police Directorate. In particular, at the beginning of his professional activity, he had dealt intensively and with the inclusion of medical discourses with insanity and with the handling of mentally ill offenders.[87]

In the Austrian Monarchy, Julius Vargha was the legal scholar most inspired by the theses of the "positivist" school, although he developed them further independently and quite unconventionally.[88] In view of the rapid rise of the natural sciences during his lifetime, he was convinced of a fundamental conflict between "the old metaphysical and the new natural scientific *Weltanschauung*."[89] In the field of criminal law, he opposed the "ethical, progressive, natural scientific school of criminal law" to a legal science which still adhered to "medieval ideas", to "metaphysical dogmata",[90] and was influenced by "primitive moral and religious

[84] Cf. Becker, P., "Zwischen Tradition und Neubeginn: Hans Gross und die Kriminologie und Kriminalistik der Jahrhundertwende", *Die Gesetze des Vaters. 4. Internationaler Otto Gross Kongress. Robert-Stolz-Museum Karl-Franzens-Universität Graz. 24.–26. Oktober 2003* (A. Götz von Olenhusen & G. Heuer, eds.), Marburg a. d. Lahn: LiteraturWissenschaft.de, 2005, pp. 290–309; Bock, M., "Hans Gross und Julius Vargha – Die Anfänge wissenschaftlicher Kriminalistik und Kriminalpolitik", *Rechts-, Sozial- und Wirtschaftswissenschaften aus Graz. Zwischen empirischer Analyse und normativer Handlungsanweisung: wissenschaftsgeschichtliche Befunde aus drei Jahrhunderten* (K. Acham, ed.), Wien / Köln / Weimar: Böhlau, 2011, pp. 329–342; Bachhiesl, Ch. / Kocher, G. / Mühlbacher, Th. (eds.), *Hans Gross – ein „Vater" der Kriminalwissenschaft. Zur 100. Wiederkehr seines Todestages*, Wien: Lit (Collection "Austria: Forschung und Wissenschaft interdisziplinär" 12), 2015; Bachhiesl, Ch., *Zwischen Indizienparadigma und Pseudowissenschaft. Wissenschaftshistorische Überlegungen zum epistemischen Status kriminalwissenschaftlicher Forschung*, Wien / Berlin: Lit (Collection "Austria: Forschung und Wissenschaft interdisziplinär" 9), 2012, pp. 35–203.

[85] Bachhiesl, *Zwischen Indizienparadigma und Pseudowissenschaft*, pp. 172–173.

[86] Türkel is briefly mentioned in Staudigl-Ciechowicz, K., "Zur Entstehung der Wiener Kriminologie und Kriminalistik in der 1. Republik", *Journal on European History of Law* 2/1 (2011), pp. 29–35, here pp. 33 and 35; Sabitzer, W., "Siegfried Türkel. Kriminalist und Wissenschaftler", *Die Wiener Polizei. Magazin der Landespolizeidirektion Wien* 2020/1, pp. 38–40.

[87] Türkel, S., *Irrenwesen und Strafrechtspflege. Ein Vortrag über einige Capitel aus der Forensischen Psychiatrie, dem Straf- und Strafproceßrecht. Gehalten im Jänner 1900 im Socialwissenschaftlichen Bildungsverein in Wien*, Wien: Manz 1900; Türkel, S., *Die kriminellen Geisteskranken. Ein Beitrag zur Geschichte der Irrenrechts- und Strafrechtsreform in Österreich (1850–1904)*, Wien: Perles, 1905; Türkel, *Psychiatrisch-kriminalistische Probleme*; Türkel, S., *Die Reform des österreichischen Irrenrechtes. 1. Die Geschichte der österreichischen Irrenrechtsreform. 2. Amtliche und nicht amtliche Materialien zu einem auszuarbeitenden Entwurfe eines österreichischen Irrengesetzes. Historisch und systematisch bearbeitet*, Wien: Deuticke, 1907.

[88] For his biography cf. Bock, "Hans Gross und Julius Vargha", pp. 337–338; Probst, K., *Geschichte der Rechtswissenschaftlichen Fakultät der Universität Graz, part 3: Strafrecht – Strafprozessrecht – Kriminologie*, Graz: Akademische Druck- und Verlagsanstalt (Collection "Publikationen aus dem Archiv der Universität Graz" 9/3), 1987, pp. 23–27 and 29–30.

[89] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 5.

[90] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 7.

doctrines."[91] And despite this rigid rejection of traditional criminal jurisprudence by Vargha, he was far too original in his thinking to be easily classed as belonging to the "positivist" school itself.[92] Vargha, whose career had not been straightforward and had only earned him a professorship in Graz comparatively late in life, was an outsider in the scientific community – above all Vargha was a philanthropist and humanist, as will be shown.

5. Points of controversy

5.1. Insanity

5.1.1. Definition

Even if, on the occasion of the plans for a new codification, it was emphasised that the Code of 1852 (like its predecessor) was based on a "completely outdated conception"[93] of insanity, this should not obscure the fact that the development on a normative level, terminologically and in terms of content, took into account the progress of medical science in the second half of the 19th century, but did not mean a fundamental break. It is generally assumed, firstly, that there is a phenomenon such as insanity; secondly, that this is due to a (mental) illness or to a weakness of mind, innate or acquired; this is done, as has already been demonstrated on the basis of the commentaries on the Austrian Penal Code, in the first decades still very schematically and strikingly by referring to madness, stupidity or frenzy. In the course of the second half of the 19th century, there was a differentiation and refinement.[94] This is vividly expressed in a note by Wenzelslaus Gleispach on the 1909 draft. Here he states that the redactors had chosen a "mixed method" of "biological and psychological characteristics"[95] to diagnose insanity: it is linked both to concrete physical deficits and to the effects on the psyche – the inability to realise the unworthiness of the act. It was also the *communis opinio* that the imposition of a punishment corresponding to individual guilt was impossible in the case of insane persons.

What differed was the deeper, fundamental justification of insanity and, closely related to this, the question of drawing the line between "sane" (and thus punishable) and "insane" (and thus not punishable) offenders.

5.1.2. The background: (un)free will and the purpose of punishment

The majority of criminal law scholars in Austria proved to be supporters of the thesis that ultimately the lack of free will resulting from the state of illness was decisive for the lack

[91] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 15.

[92] Cf. Probst, K., "Die moderne Kriminologie und Julius Vargha", *Monatsschrift für Kriminologie und Strafrechtsreform* 59 (1976), pp. 335–351; Schennach, "Echoes of Karl Binding and Franz von Liszt?".

[93] Cf. Gleispach, "Der österreichische Strafrechtsentwurf", p. 346.

[94] Greve, Y., "Richter und Sachverständige. Der Kompetenzstreit über die Beurteilung der Unzurechnungsfähigkeit im Strafprozeß des 19. Jahrhunderts", *Kriminalität und abweichendes Verhalten. Deutschland im 18. und 19. Jahrhundert* (H. Berding, D. Klippel & G. Lottes, eds.), Göttingen: Vandenhoeck & Ruprecht, 1999, pp. 69–104, in particular pp. 75–80.

[95] Both quotations according to Gleispach, "Der österreichische Strafgesetzentwurf und das Schuldproblem", p. 221; Gleispach, "Der österreichische Strafrechtsentwurf", p. 346.

of criminal liability of the persons concerned. [96] This tended to correspond to the position of the "classical" school, as expressed concisely by Karl Janka: If one sees retribution as the essential purpose of punishment, then it is clear: "Such punishment must cling to free will".[97] The classical school of thought was essentially built on the premise of human free will, which allowed people to choose between good and evil and to decide freely. In the words of Julius Vargha: "The speculative-philosophical method of criminal law, based on a metaphysical foundation, conceived of crime as the result of freely willed and chosen human 'wickedness' and therefore believed that by ruthlessly beating down and dishonouring the criminal – which was intended to mark the moral indignation at his shameful conduct as sharply as possible – it was possible to react against both crime and criminal in a highly reasonable and just manner."[98] Liszt's followers tended to oppose this attitude with a scientific and social determinism, which did not see deviance as the result of a conscious decision between good and evil, but rather as a result of social conditions, disposition and upbringing, and thus to a certain extent as unavoidable. Let us emphasize again Julius Vargha's say: According to him, "criminology conducted according to the natural scientific method", "by recognising crimes as the necessary consequences of biological and sociological factors, [...] at the same time revealed the social grievances in which the latter are rooted".[99]

Almost all Austrian scholars in the field of criminal law agree on the existence of free will and see it as a precondition for the punishment of deliquents.[100] For conservative legal scholars such as Hugo Hoegel, this was in any case a matter of course. But even sympathisers of the reform movement remained definitely negative on this point (with two exceptions). August Miřička, for instance, who had been a professor at the Czech University since 1907 and was open to the "positivist" school, rejected these deterministic ideas.[101] The same can be said for Lammasch, who – as already mentioned – took Liszt's equation of insane persons with habitual criminals incapable of reform as an occasion for a decisive break with his colleague. The latter had "seriously endangered the ethical [sic] foundations of criminal law by striving to base it on the dogma of determinism."[102] As counter-evidence, Lammasch points to the possibility given to everyone by critical introspection: one's own experience would sufficiently falsify for everyone "the theory of determinism, which is incomprehensible to anyone who listens to his inner self."[103] [104] Liszt's disciple Alexander Löffler also distanced himself from this view of his teacher and spoke out against the equal treatment of insane people with habitual criminals.[105]

Such a view is closely linked to the purpose of punishment. Not all of those mentioned share the same theses on what purpose the punishment should actually serve. There are firm

[96] Cf. Türkel, *Zurechnungsfähigkeit*, pp. 13–34; the viewpoints of Austrian jurists (esp. Lammasch, Löffler, Janka, Finger, Gleispach) are addressed ibid. pp. 14–15, 21–22, 24 and 29.

[97] Janka, *Grundlagen der Strafschuld*, p. 39.

[98] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 32.

[99] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 71.

[100] One exception is probably Janka, *Grundlagen der Strafschuld*.

[101] Cf. Miřička, *Die Formen der Strafschuld*, pp. 1–10.

[102] The wording can be found in Lammasch's report for the professorial college of the Viennese Faculty of Law and Political Science of February 1896, in which he also mentions Listz as a possible candidate for the vacant professorship (cf. the edition by Oberkofler, G. / Rabofsky, E., *Heinrich Lammasch (1853–1920). Notizen zur akademischen Laufbahn des großen österreichischen Völker- und Strafrechtsgelehrte*, Innsbruck: Wagner, 1993, p. 67). This quotation already brings up Moos, "Carl Stooss in Österreich", p. 42; the reproach of destroying the "ethical foundations of criminal law" is already expressed in Lammasch, "Offener Brief", p. 92.

[103] Lammasch, H., "Criminalpolitische Studien", *Der Gerichtsaal* 44 (1891), pp. 147–248, here p. 158.

[104] Briefly mentioned at Türkel, *Zurechnungsfähigkeit*, pp. 14–15.

[105] Löffler, "Der Begriff der Verantwortlichkeit".

supporters of retributive punishment such as Hoegel, but also representatives of criminal theory who place special and general prevention or the correction and education of the delinquent in the foreground. They are united in the assessment that only those can be punished who were able to recognise the wrongfulness of their act in the first place and behave in accordance with the norm. Such a view of punishment and its purpose must, as Karl Janka put it, "cling to free will."[106] He himself, however, clearly deviated from the communis opinio, even though he did not share the view of the "positivist" school. He summarised their point of view as follows: "The distinction from the point of view of liability is rejected, the mentally ill and the mentally healthy, criminals born and criminals who have become criminals are placed on an equal footing with regard to responsibility [...]". As a consequence punishment has increasingly become a safeguarding measure that must protect society from dangerous subjects – regardless of their mental state. The emphasis is thus on the special preventive purpose: to render the offender harmless. However, Janka firmly rejects this view and emphasises that every offender must also be punished, regardless of whether he is culpable or not – and this with a view to the general preventive effect, the deterrence of the general public: Therefore, "everyone who has committed a crime, regardless of his dangerousness, regardless of whether he is capable of deterrence or correction or in need of it, or not, must take this evil upon himself. He owes it to society to bear it."[107] Nevertheless, he allows further security measures against dangerous offenders. For Janka, the question of free will is therefore irrelevant.[108]

5.1.3. The generalisation of insanity by Julius Vargha

Basically, there was only one Austrian criminal law scholar who generally denied humans free will and considered them determined by their dispositions and environment. Already in the introduction to his groundbreaking work published in 1896, "The abolition of penal servitude. Studies on the Reform of Criminal Law", he states that "human freedom of the will is today only a hypothesis that has become violently unstable, but it is by no means a generally accepted axiom."[109] He emphatically calls for "overcoming the delusion of free will"[110] and the retributive punishment inevitably associated with it. For if, like the "classical" school and the practice of criminal law stated, one understood "crime as the result of freely willed and chosen human 'wickedness'", one believed "by ruthlessly striking at the criminal and dishonouring him [...] at the same time to react against both crime and criminal in a most reasonable and just manner"[111]. In this way, one simultaneously staged one's own "moral outrage over his shameful behaviour"[112]. The convict was demonstratively made "the object of deliberate torture" in the penal system, the "most lawless of all slaves", the "penal slave"[113] – and those who would torture him would also feel morally entitled and obliged to do so. Vargha, on the other hand, believes that ultimately all criminals are insane and therefore should not be punished. For whatever reason, a criminal is incapable of resisting the urge to commit crime. He is therefore a "weakling who certainly does not deserve torture, because he cannot help being a weakling, mostly on a pathological basis."[114] What Vargha has in mind – whether for the insane or not – is the concept of "patronising punishment", which is effectively not

[106] Janka, *Grundlagen der Strafschuld*, p. 39.
[107] Janka, *Grundlagen der Strafschuld*, p. 56.
[108] Briefly mentioned also at Türkel, *Zurechnungsfähigkeit*, pp. 21–22.
[109] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 10.
[110] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 10.
[111] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 32.
[112] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 32.
[113] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 77.
[114] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 43.

punishment in the traditional sense. It is a matter of "abolishing all penal servitude and retributive punishment and replacing it with a new form of punishment that respects human dignity, even in convicts, thanks to which the violators of the penal law should no longer be deliberately dishonoured.[115] Vargha makes no secret of the fact that society must be protected from delinquents and that "the extremly dangerous perpetrator must be rendered harmless."[116] But human dignity must also be preserved in criminals and they must not be deliberately tortured and martyred, which was not only unavoidable in the penal system of the time, but even intended. This is precisely what Vargha wants to see ended. All criminals, regardless of their state of mind, should be "subject to the state's right of protection, assistance, supervision and paternalism."[117] It is also irrelevant whether an offender is not in need of improvement (this also applies to the mentally ill) or (like dangerous habitual criminals) is not capable of improvement, since all must be treated equally. All this requires a fundamental reform of the penal system.

On the surface, Vargha's remarks show a great affinity with Liszt's ideas. In his aforementioned lecture to the Munich Psychology Congress, which provoked a critical reaction, he first raised the question of the demarcation between sanity and insanity. He presented and rejected the three most common demarcation criteria:[118] the thesis of human freedom of will is only a philosophical speculation, but not a suitable basis for the criminal law system; the thesis of intellectual insight into the wrongfulness of the act is insufficient, since a person may very well be able to distinguish between "good" and "evil", but is incapable of acting accordingly, for example "because the feeling or the will has degenerated pathologically."[119] The thesis of the "normal" susceptibility to the motives of one's own actions (and thus to the evil of the threats of punishment) raises the question of what is "normal". According to this thesis, the incorrigible habitual criminal would in any case be insane, since he obviously would not be deterred by the threat of punishment like an average person. Liszt therefore concludes: "The distinction between the preventive punishment of incorrigible criminals and the detention of dangerous lunatics is not only essentially impracticable, it must also be rejected in principle."[120] Only consideration for public opinion, which was not yet ready for such a step of equating a lunatic asylum with a penitentiary, would require that an organisational separation be maintained for the time being. At least he concedes at the end that in these asylums the idea of punishment is secondary to "benevolent leniency" and "caring care."[121] This sounds quite different before, when he lists the similarities between the detention of the mentally ill and the preventive punishment of habitual criminals: continuous supervision, a strict daily routine, "strict discipline, compulsion to work"[122] – not to mention incarceration. In this he was in line with many medical experts, including the prominent Austrian psychiatrist Julius Wagner-Jauregg.[123] This is precisely where the decisive difference lies: both Vargha and Liszt want to abolish the strict separation of the mentally ill and other offenders and reject the distinctive feature of "sanity". Liszt's safeguarding measures are, however – and this shimmers through again and again in his terminology – strongly repressive. His focus is on the protection of society; the

[115] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 14.

[116] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 17.

[117] Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 27.

[118] The following according to Liszt, "Die strafrechtliche Zurechnungsfähigkeit", 1897, pp. 74–78.

[119] Liszt, "Die strafrechtliche Zurechnungsfähigkeit", 1897, p. 74.

[120] Liszt, "Die strafrechtliche Zurechnungsfähigkeit", 1897, p. 82.

[121] Liszt, "Die strafrechtliche Zurechnungsfähigkeit", 1897, p. 84.

[122] Liszt, "Die strafrechtliche Zurechnungsfähigkeit", 1897, p. 81.

[123] Cf. Ledebur, S., "Die österreichische Irrenrechts- und Strafrechtsreformbewegung und die Anfänge eines eugenischen Diskurses in der Psychiatrie um 1900", *Eugenik in Österreich. Biopolitische Strukturen von 1900–1945* (G. Baader, V. Hofer & Th. Mayer, eds.), Wien: Czernin, 2007, pp. 208–235, here p. 225.

offender, on the other hand, is an object of confinement. For Vargha, the idea of humanity is in the foreground: according to him, every person in prison must be treated with respect and their dignity must be preserved.[124]

5.2. The problems of diminished sanity and moral insanity

Vargha rejected the separation of sane and insane per se; for him, therefore, the concept of "diminished sanity" had no meaning. Admittedly, this did not isolate him among Austrian legal scholars to the same extent as his consistent generalisation of insanity. Others also held the opinion that there could be no such thing as a "person of diminished sanity".[125] This, of course, does not change the fact that not only the Austrian codification of criminal law, but also all drafts basically adhered to the idea of diminished sanity and classified it as a reason for mitigation. The majority of legal scholars in the Austrian monarchy also agreed that diminished sanity meant a transitional stage between the complete incapacity of insight into the wrongfulness of the act and the ability to act accordingly on the one hand, and the mental clarity of the average person and his capacity for self-control on the other, emphasising the fluidity of these states, which could not always be precisely delimited.[126] At the proceedings of the 10th International Assembly of the International Union of Criminal Law, Liszt made a precise categorisation of offenders of diminished criminal liability into four groups, including the "feeble-minded", the neurotics – which he also understood to include hysterics and epileptics – , the alcoholics and addicts, and the "perverts" (including homosexuals).[127] This categorisation was not particularly original, but was based on the systematisation in Krafft-Ebing's "Handbook of Judicial Psychopathology".[128]

Admittedly, individual legal scholars criticised the fact that diminished sanity was legally considered a reason to mitigate punishment, some expressing the view that such a perpetrator could only be ameliorated by a punishment that was all the more severe.[129] A conservative like Hugo Hoegel also feared that some perpetrators could escape severe punishment by feigning mental deficits.[130]

In contrast, "moral insanity" is hardly discussed in Austrian criminal law,[131] even though it was treated in detail by Krafft-Ebing in his cited textbook following the teachings of Bénédict Augustin Morel, James Cowles Prichard and Henry Maudsley.[132] In the case of this "psychic degeneration on an organic basis"[133], the perpetrator is aware of the punishability of an act, but

[124] Cf. z. B. Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, pp. 3–4, 14 and 17.

[125] The different opinions on the question of "diminished sanity" are presented by Türkel, *Die kriminellen Geisteskranken*, pp. 50–54.

[126] Very sceptical Hoegel, *Einteilung der Verbrecher*, pp. 173–176.

[127] Cf. for instance Stooss, *Lehrbuch*, pp. 84–85; Türkel, *Die kriminellen Geisteskranken*, p. 51; Gleispach, "Der österreichische Strafrechtsentwurf", p. 347.

[128] Cf. Krafft-Ebing, *Lehrbuch*.

[129] Cf. Gleispach, "Der österreichische Strafrechtsentwurf", p. 347.

[130] Hoegel, *Gesamtreform des österreichischen Strafrechtes*, p. 309.

[131] A certain exception is Hoegel, *Einteilung der Verbrecher*, pp. 157–166, who firmly rejects moral insanity.

[132] Krafft-Ebing, *Lehrbuch*, pp. 155–170; for Morel's and Maudsley's theories cf. for instance Freitag, S., *Kriminologie in der Zivilgesellschaft. Wissenschaftsdiskurse und die britische Öffentlichkeit, 1830–1945*, München: Oldenbourg (Collection "Deutsches Historisches Institut London: Veröffentlichungen des Deutschen Historischen Instituts London" 73), 2014, pp. 123–127 and 136–143.

[133] Krafft-Ebing, *Lehrbuch*, pp. 156.

lacks freedom of will and the ability to resist the "sensual egoistic impulses."[134] Krafft-Ebing considers this group of offenders to be insane, but concedes that a distinction between "morally insane" and habitual offenders is not possible according to the current state of science. In the Hoegel-Lammasch draft, "moral insanity" is taken into account insofar as its presence explicitly does not exclude sanity and therefore punishment.[135] This did not change the jurisprudence of the Supreme Court,[136] which regarded diminished sanity as a mitigating factor. In its opinion, "mental inferiority (so-called diminished responsibility) of the perpetrator, regardless of whether it is based on a defect of intelligence, moral feeling or willpower of the same, is not sufficient" as a reason for exclusion from punishment; it "can only be considered as a reason for mitigation of punishment".

The Austrian legal scholars also generally limit themselves – much like it is found in the Hoegel-Lammasch draft – to rejecting "moral insanity" as a reason for insanity – if they mention it at all.[137] The Supreme Court also only briefly dealt with this question in order to reject the plea of moral insanity using the example of homosexuals, since the intellectual capacity to understand the punishability of his act was given.[138] This reasoning of the Supreme Court, developed mainly in response to the defence strategy of homosexual defendants, was based on the wording of the law book: according to § 2 of the Penal Code of 1852, the offender must be "completely" deprived of his reason in order to be considered insane; therefore, no person could be insane only partially, e.g. in the area of sexual life.[139] A more detailed discussion of "moral insanity" can only be found in the work of Wilhelm Wahlberg, who deals with the phenomenon on the occasion of a concrete murder case.[140] He shares Krafft-Ebing's assessment that the mere insight into the punishability of the act is not sufficient. The ability to be held accountable "also requires an average moral maturity and resistance to terrible temptations as an essential prerequisite. This is not the case with the morally insane". However, Wahlberg also concludes that the current state of science does not allow a precise separation of "actual mental illness" from "mere moral unworthiness."[141] In general, it is self-evident that the "morally insane" must also be permanently locked away because of their dangerousness.[142]

5.3. The consequences of insanity

[134] Krafft-Ebing, *Lehrbuch*, pp. 153.

[135] Cf. Türkel, *Unzurechnungsfähigkeit*, pp. 52 ("Pathological tendencies to commit the offence are not in themselves" a reason to assume insanity; quotation translated from German by MPS).

[136] Both quotations according to Entscheidungen des k.k. Obersten Gerichts- als Kassationshofes, veröffentlicht von der k.k. Generalprokuratur. N. F., vol. VII, Wien 1906, nr. 3039, pp. 104–108 (both quotations on p. 104).

[137] Cf. Löffler, A., "Der Begriff der Verantwortlichkeit", p. 396; Türkel, *Die kriminellen Geisteskranken*, pp. 18 and 27; Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, pp. 380–382.

[138] Cf. Türkel, *Psychiatrisch-kriminalistische Probleme*, pp. 66–68.

[139] Cf. Entscheidungen des k.k. Obersten Gerichts- als Kassationshofes, veröffentlicht von der k.k. Generalprokuratur. N. F., vol. V, Wien. 1904, nr. 2840, pp. 236–240; ibid., vol. VII, Wien 1906, nr. 3031, pp. 81–83; ibid., nr. 3066, pp. 179–182; ibid., vol. X, Wien 1909, nr. 3458, pp. 244–245; Lilienthal, "Österreich", p. 57; Türkel, *Psychiatrisch-kriminalistische Probleme*, pp. 10–20.

[140] Cf. Wahlberg, W. E. v., "Criminalpsychologische Bemerkungen über den moralischen Irrsinn, moral insanity, mit besonderer Rücksicht auf den Raubmörder Hackler", *Gesammelte kleinere Schriften und Bruchstücke über Strafrecht, Strafprocess, Gefängniskunde, Literatur und Dogmengeschichte der Rechtslehre in Oesterreich*, vol. 2 (W. E. v. Wahlberg), Wien: Hölder, 1877, pp. 211–230.

[141] Wahlberg, "Criminalpsychologische Bemerkungen", pp. 215 and 221–222.

[142] Wahlberg, "Criminalpsychologische Bemerkungen", pp. 229–230.

According to Wahlberg, the "morally insane" should be locked away in an "asylum for the mentally ill."[143] With this proposal, he was entirely in line with Austrian criminal law, which advocated accommodation for the insane as well as for the less sane in cases of persistent dangerousness. This was also planned under certain conditions in the drafts of 1909 and 1910.

The problem of the care and custody of the "dangerously mentally ill" demonstrates in a special way the overlapping of medical-psychiatric and legal discourse. As early as 1884, the Ministry of Justice had dealt with the question of the incarceration of mentally ill offenders and obtained opinions from the Länder.[144] In the following years, the efforts intensified, especially from the medical side, including prominent psychiatrists such as Wagner-Jauregg.[145] The Supreme Sanitary Council issued relevant memoranda in 1885/87 and 1899,[146] and the medical faculty had also made proposals in a faculty report in 1897.[147] In 1911, the "Conference of Austrian Psychiatrists" discussed the "Question of the Placement of Insane Criminals in Austria".[148] There was a broad consensus among legal and medical experts that mentally ill or mentally handicapped offenders should not be cared for in prisons, but also not in conventional "asylums". There was almost unanimous call for the establishment of separate asylums for the mentally ill offenders who are dangerous to the public.[149] As early as the 1880s, the Association of Viennese Psychiatrists had suggested that this category of prisoners should at least be housed in their own psychiatric annexes to the prisons,[150] and such annexed departments were still propagated in the following decades as a temporary alternative to separate sanatoriums.

The medical director of the asylum Gugging, Josef Krayatsch, had already pointed out in 1890 the practice that had been common until then – for which there was no legal basis – and described it as unsatisfactory in every respect:[151] As a rule, the public prosecutor does not bring charges against a perpetrator who has been found to be insane, or else the court, because of its own concerns, has obtained a medical report and thereupon dropped the case. "Now, in order to somehow bring the case to a conclusion, the accused is transferred to the care of an insane asylum either for observation or on the advice of the specialists." In addition, as Krayatsch points out, there are those convicts who become mentally ill while in custody. These inmates would understandably have to be housed in the escape-proof parts of the psychiatric hospitals, where they would come into contact with psychotics and other sick people. This not only led to protests from the non-offending inmates and their families, but in view of the behaviour of the

[143] Wahlberg, "Criminalpsychologische Bemerkungen", p. 229.

[144] Cf. Türkel, *Die kriminellen Geisteskranken*, pp. 10–11; Rixen, P., *Die Gemeingefährlichen Geisteskranken im Strafrecht, im Strafvollzuge und in der Irrenpflege. Ein Beitrag zur Reform der Strafgesetzgebung des Strafvollzuges und der Irrenfürsorge*, Berlin: Springer (Collection "Monographien aus dem Gesamtgebiete der Neurologie und Psychiatrie" 24), 1921, p. 49.

[145] Cf. in detail Ledebur, "Die österreichische Irren- und Strafrechtsreformbewegung", pp. 223–228.

[146] Cf. Türkel, *Reform des österreichischen Irrenrechtes*, pp. 43–49 and 58–62.

[147] Cf. Türkel, *Die kriminellen Geisteskranken*, pp. 28–30; Harrer, G., "Die freiheitsentziehenden vorbeugenden Maßnahmen im österreichischen Recht", *Aktuelle Kernfragen in der Psychiatrie* (F. Böcker & W. Weig, eds.), Berlin et al.: Springer, 1988, pp. 427–432, here p. 427.

[148] Cf. Rixen, *Die gemeingefährlichen Geisteskranken*, pp. 49–50; Psychiatrisch-neurologische Wochenschrift 1911/12, Nr. 34 und 35; Harrer, "Die freiheitsentziehenden vorbeugenden Maßnahmen", p. 427.

[149] Cf. for instance Lammasch, "Ziele der Strafrechtsreform", p. 304; Lammasch, "Vorschläge zur Revision", p. 355; Harrer, "Die freiheitsentziehenden vorbeugenden Maßnahmen", p. 427.

[150] Cf. Jahrbücher für Psychiatrie, Vol. VII, pp. 312–314.

[151] Cf. to the following including the citations Krayatsch, J., "Zur Frage der Unterbringung geisteskranker Verbrecher", *Wiener klinische Wochenschrift* 1890, pp. 270–271; quite similarly other contemporary comments, cf. Ledebur, "Die österreichische Irren- und Strafrechtsreformbewegung", p. 225.

insane offenders, posed a myriad of problems in everyday life – basically, "the director of such an insane asylum should be granted the powers of a prison director."[152]

After the codification drafts from 1909 onwards had stipulated preventive custody for the dangerously mentally ill throughout, an amendment to the Code of Criminal Procedure was also intended to regulate by law the establishment, organisation and treatment of the inmates in the now envisaged "institutions for the criminally insane". Here it was specified that the medical director had to be a specialist in psychiatry and that supervision would be exercised by the chief public prosecutor and by a permanent commission. The focus was to be on healing, and the permissible means of discipline (such as reprimand) were also precisely regulated.[153]

These planned psychiatric hospitals for mentally ill offenders were not built. In fact, concerns had already been raised after the draft was presented that these good intentions could probably not be realised in view of the costs involved.[154] Until the end of the monarchy, mentally impaired prisoners were regularly interned in conventional psychiatric institutions. Only in the Lower Austrian asylums of Ybbs and Gugging were there separate wards for mentally ill prisoners; the separate accommodation of the violent insanes in the Vienna asylum "Am Steinhof", on the other hand, was not limited to "mentally ill criminals."[155]

The first psychiatric institution in the Habsburg Monarchy was established by Emperor Joseph II in 1784 in the form of the so-called "Narrenturm" in Vienna, even though it can be shown that mentally ill were already housed and cared for in hospitals in previous decades.[156] As innovative as the separate treatment of the mentally ill was at the time of the founding of the "Narrenturm", the living conditions for the patients confined to solitary cells remained characterised by hardship and cruelty. After another psychiatric institution was founded in Hall in Tyrol in 1830, establishments followed in the second half of the 19th century in almost all provinces of the Austrian Monarchy (e.g. Vienna 1853, Linz 1867, Graz 1873, Klagenfurt 1877, Salzburg 1898).[157]

6. Conclusion

The insane offender is a theoretical and practical challenge discussed quite intensively in the Austrian scientific community around 1900, also in view of the plans for a new codification of criminal law. It is surprising that fundamental differences cannot actually be identified, that most Austrian legal scholars tend towards rather conservative positions – which of course does not exclude that some approve of security measures. But the position that there

[152] Krayatsch, J., "Zur Frage der Unterbringung", p. 271.

[153] Rixen, *Die gemeingefährlichen Geisteskranken*, pp. 51–52.

[154] Madlé von Lenzbrugg, A., "Die Stellung des Strafgesetzentwurfes zu den Strafrechtsschulen", *Allgemeine österreichische Gerichts-Zeitung* 66 (1915), pp. 418–422, here p. 421.

[155] Rixen, *Die gemeingefährlichen Geisteskranken*, pp. 50.

[156] Cf. for instance Watzka, C., "Vom Armenhaus zur Landesnervenklinik Sigmund Freud. Zur Geschichte psychisch Kranker und des gesellschaftlichen Umgangs mit ihnen in der steirischen Landeshauptstadt vom 16. bis zum 21. Jahrhundert", *Historisches Jahrbuch der Stadt Graz* 36 (2006), pp. 295–337, here pp. 300–304 and 309–310; Watzka, C., *Arme, Kranke, Verrückte. Hospitäler und Krankenhäuser in der Steiermark vom 16. bis zum 18. Jahrhundert und ihre Bedeutung für den Umgang mit psychisch Kranken*, Graz: Steiermärkisches Landesarchiv (Collection "Veröffentlichungen des Steiermärkischen Landesarchivs" 36), 2007.

[157] Cf. Gabriel, E. / Gamper, M. (eds.), *Psychiatrische Institutionen in Österreich um 1900*, Wien: Verlagshaus der Ärzte, 2009; Watzka, C., "Psychiatrische Anstalten in Österreich 1780–1850. Eine Übersicht aus wissenschaftsgeschichtlicher und soziologischer Perspektive", *Österreich in Geschichte und Literatur* 53 (2009), pp. 356–372.

is no difference between the insane and the sane offender and that all should be treated equally is only found in the work of Julius Vargha. And he is far too individual and idiosyncratic to be called a follower of Liszt, despite all his sympathies for the positivist school. He is above all a philanthropist!

Bibliographical References

Bachhiesl, Ch., *Zwischen Indizienparadigma und Pseudowissenschaft. Wissenschaftshistorische Überlegungen zum epistemischen Status kriminalwissenschaftlicher Forschung*, Wien / Berlin: Lit (Collection "Austria: Forschung und Wissenschaft interdisziplinär" 9), 2012.

Bachhiesl, Ch., Kocher, G., Mühlbacher, Th. (eds.), *Hans Gross – ein „Vater" der Kriminalwissenschaft. Zur 100. Wiederkehr seines Todestages,* Wien: Lit (Collection "Austria: Forschung und Wissenschaft interdisziplinär" 12), 2015.

Becker, P., "Zwischen Tradition und Neubeginn: Hans Gross und die Kriminologie und Kriminalistik der Jahrhundertwende", *Die Gesetze des Vaters. 4. Internationaler Otto Gross Kongress. Robert-Stolz-Museum Karl-Franzens-Universität Graz. 24.–26. Oktober 2003* (A. Götz von Olenhusen & G. Heuer, eds.), Marburg a. d. Lahn: LiteraturWissenschaft.de, 2005, pp. 290–309.

Berner, A.F., *Lehrbuch des Deutschen Strafrechtes,* Leipzig: Tauchnitz, 12th ed. 1882.

Blumenstock, L., "Gerichtsärztliche Bemerkungen über den Entwurf des neuen Strafgesetzes", *Wiener Medizinische Presse* 16 (1875), pp. 308–311, 332–334.

Bock, M., "Hans Gross und Julius Vargha – Die Anfänge wissenschaftlicher Kriminalistik und Kriminalpolitik", *Rechts-, Sozial- und Wirtschaftswissenschaften aus Graz. Zwischen empirischer Analyse und normativer Handlungsanweisung: wissenschaftsgeschichtliche Befunde aus drei Jahrhunderten* (K. Acham, ed.), Wien / Köln / Weimar: Böhlau, 2011, pp. 329–342.

Brandstätter, W., *Die Entwicklung der Amtsdelikte unter besonderer Berücksichtigung der Reformversuche des Strafrechts*, Diss. Univ. Wien, 1995.

Egger, F. Edler v., *Kurze Erklärung des Österreichischen Gesetzbuches über Verbrechen und schwere Polizey-Uebertretungen, vol. 1*, Wien / Triest: Geistinger, 1816.

Exner, F., "Das Prinzip der Schuldhaftung im österreichischen und deutschen Strafgesetzentwurf", *Österreichische Zeitschrift für Strafrecht* 1 (1910), pp. 405–428.

Freitag, S., *Kriminologie in der Zivilgesellschaft. Wissenschaftsdiskurse und die britische Öffentlichkeit, 1830–1945,* München: Oldenbourg (Collection "Deutsches Historisches Institut London: Veröffentlichungen des Deutschen Historischen Instituts London" 73), 2014.

Gabriel, E. / Gamper, M. (eds.), *Psychiatrische Institutionen in Österreich um 1900,* Wien: Verlagshaus der Ärzte, 2009.

Gleispach, W.:

– "Der österreichische Strafrechtsentwurf", *Allgemeine österreichische Gerichts-Zeitung* 60 (1909), pp. 337–339, 345–348, 364–366, 385–387, 393–397 and *Allgemeine österreichische Gerichts-Zeitung* 61 (1910), pp. 11–15, 17–18, 65–68, 73–80.

– "Der österreichische Strafgesetzentwurf und das Schuldproblem", *Österreichische Zeitschrift für Strafrecht* 2 (1911), pp. 209–249.

Gottschalk, A. (ed.), *Materialien zur Lehre von der verminderten Zurechnungsfähigkeit*, Berlin: Guttentag (Collection "Mitteilungen der Internationalen Kriminalistischen Vereinigung, Beilage" 11), 1904.

Greve, Y., "Richter und Sachverständige. Der Kompetenzstreit über die Beurteilung der Unzurechnungsfähigkeit im Strafprozeß des 19. Jahrhunderts", *Kriminalität und abweichendes Verhalten. Deutschland im 18. und 19. Jahrhundert* (H. Berding, D. Klippel & G. Lottes, eds.), Göttingen: Vandenhoeck & Ruprecht, 1999, pp. 69–104.

Gross, H., "Neunundzwanzig Thesen zum künftigen Strafgesetzentwurfe", in: Gesammelte Kriminalistische Aufsätze, vol. 1 (H. Gross), Leipzig: Vogel, 1902, pp. 46–57.

Gschwend, L., "Carl Stooss (1849–1934) – Originell-kreativer Kodifikator und geschickter Kompilator des schweizerischen Strafrechts – Reflexionen zu seinem 60. Todestag", *Schweizerische Zeitschrift für Strafrecht* 112 (1994), pp. 26–56.

Harrer, G., "Die freiheitsentziehenden vorbeugenden Maßnahmen im österreichischen Recht", *Aktuelle Kernfragen in der Psychiatrie* (F. Böcker & W. Weig, eds.), Berlin et al.: Springer 1988, pp. 427–432.

Heinrich A., *Am Anfang war die Perversion. Richard von Krafft-Ebing, Psychiater und Pionier der modernen Sexualkunde,* Wien / Graz / Klagenfurt: Styria premium, 2011.

Hiller, K., "Österreich", *Das Strafrecht der Staaten Europas* (F. von Liszt, ed.), Berlin: Otto Liebmann, 1894, pp. 114–161.

Hoegel, H.:
- "Bemerkungen zum Strafgesetzentwurfe", *Juristische Blätter* 11 (1882), pp. 543–545, 603–604, 618–619.
- "Die Strafrechtsreform", *Juristische Blätter* 25 (1896), pp. 601–602, 613–614.
- *Straffälligkeit und Strafzumessung*, Wien: Perles, 1897.
- *Geschichte des österreichischen Strafrechtes in Verbindung mit einer Erläuterung seiner grundsätzlichen Bestimmungen. Tome II: Die allgemeinen Schuldformen*, Wien: Manz, 1904, pp. 99–105.
- *Die Einteilung der Verbrecher in Klassen,* Leipzig: Engelmann (Collection "Kritische Beiträge zur Strafrechtsreform" 2), 1908.
- *Teilreformen auf dem Gebiete des österreichischen Strafrechtes (einschließlich des Preßrechtes)*, Hannover: Helwing, 1908.
- *Gesamtreform des österreichischen Strafrechtes (einschließlich des Pressrechtes)*. Leipzig: Engelmann, 1909.

Höfler, A., *Sieben Thesen zu Professor Dr. Franz von Liszts Vortrag „Die strafrechtliche Zurechnungsfähigkeit". Mit einem Sonder-Abdruck aus des Verfassers „Psychologie": Willensfreiheit und Zurechnung*, Wien / Prag: Tempsky, 1897.

Hupka, Ch., *Sätze über das peinliche Recht nach der Theresianischen Halsgerichtsordnung mit angehängten Abweichungen vom Karolinischen Rechte*, Wien: Gassler, 1784.

Janka, K.:
- *Die Grundlagen der Strafschuld. Vortrag gehalten in der Plenar-Versammlung der juristischen Gesellschaft in Wien am 30. Jänner 1885*, Wien: Manz, 1885.
- *Das österreichische Strafrecht*, Prag / Wien: Tempsky et al., 1894.

Kaenel, P., *Die kriminalpolitische Konzeption von Carl Stooss im Rahmen der geschichtlichen Entwicklung von Kriminalpolitik und Straftheorien*, Bern: Stämpfli (Collectin "Abhandlungen zum schweizerischen Recht", N. F. 466), 1981.

Koch, A., "Binding vs. v. Liszt – Klassische und moderne Strafrechtsschule", *Der Strafgedanke in seiner historischen Entwicklung. Ringvorlesung zur Strafrechtsgeschichte und Strafrechtsphilosophie* (E. Hilgendorf & J. Weitzel, eds.), Berlin: Duncker & Humblot (Collection "Schriften zum Strafrecht" 189), pp. 127–145.

Krafft-Ebing, R. v., *Lehrbuch der gerichtlichen Psychopathologie mit Berücksichtigung der Gesetzgebung von Österreich, Deutschland und Frankreich*, Stuttgart: Enke, 1875.

Krayatsch, J., "Zur Frage der Unterbringung geisteskranker Verbrecher", *Wiener klinische Wochenschrift* 1890, pp. 270–271.

Lammasch, H.:
- *Handlung und Erfolg. Ein Beitrag zur Lehre vom Causalzusammenhange. Separatabdruck aus der Zeitschrift für das Privat- und öffentliche Recht der Gegenwart 9 (1882)*, Wien: Hölder, 1882.
- "Über Zwecke und Mittel der Strafe", *Zeitschrift für die gesamte Strafrechtswissenschaft* 9 (1889), pp. 423–451.
- "Criminalpolitische Studien", *Der Gerichtsaal* 44 (1891), pp. 147–248.
- "Studien zum Strafgesetzentwurfe", *Allgemeine österreichische Gerichtszeitung* 42 (1891), pp 377–378, 385–390, 393–396, 401–403, 409–412.
- "Vorschläge zur Revision des Strafgesetzentwurfes", *Allgemeine Österreichische Gerichtszeitung* 45 (1894), pp. 345–347, 353–356, 361–364, 369–372, 377–380.
- "Die Aufgaben der Strafrechtspflege", *Zeitschrift für die gesamte Strafrechtswissenschaft* 15 (1895), pp. 633–658.
- "Rezension zu: Karl Binding: Grundriss des gemeinen deutschen Strafrechts. 5. Aufl. Leipzig 1897", *Schweizerische Zeitschrift für Strafrecht* 10 (1897), pp. 244–245.

– "Offener Brief an Professor von Liszt, Halle a. d. S.", *Deutsche Juristenzeitung* 3 (1898), pp. 92–94.
– "Ziele der Strafrechtsreform in Österreich", *Allgemeine österreichische Gerichts-Zeitung* 55 (1904), pp. 303–307.
– *Grundriß des Strafrechts*, Leipzig: Duncker & Humblot (Collection "Grundriß des österreichischen Rechts" 2/4), 4th ed. 1911.

Ledebur, S., "Die österreichische Irrenrechts- und Strafrechtsreformbewegung und die Anfänge eines eugenischen Diskurses in der Psychiatrie um 1900", *Eugenik in Österreich. Biopolitische Strukturen von 1900–1945* (G. Baader, V. Hofer & Th. Mayer, eds.), Wien: Czernin, 2007, pp. 208–235.

Lengauer, S.:
– *Die dogmatische Legitimation der strafrechtlichen Unterbringung geistig abnormer Rechtsbrecher. Eine kritische Würdigung der schuldungebundenen Reaktion auf ein anlassgebendes Handlungsunrecht*, Wien: Verlag Österreich (Collection "Juristische Schriftenreihe" 291), 2021.
– "Historische Entwicklungslinien hin zum geltenden Recht zur Unterbringung psychisch kranker Rechtsbrecher", *Zeitschrift für Neuere Rechtsgeschichte* 44 (2022), pp. 99–117.

Lilienthal, K. v., "Österreich", *Vergleichende Darstellung des deutschen und ausländischen Strafrechts. Vorarbeiten zur deutschen Strafrechtsreform. Allgemeiner Teil, vol. V: Zurechnungsfähigkeit* (K. von Birkmeyer et al. eds.), Berlin 1906, pp. 56–60.

Liszt, F. v.:
– "Die strafrechtliche Zurechnungsfähigkeit. Vortrag, gehalten am 4. August 1896 auf dem III. Internationalen Psychologien-Kongreß", *Zeitschrift für die gesamte Strafrechtswissenschaft* 17 (1897), pp. 70–84.
– "Die strafrechtliche Zurechnungsfähigkeit", *Zeitschrift für die gesamte Strafrechtswissenschaft* 18 (1898), pp. 70–83.
– "Die 'Sichernden Maßnahmen' in den drei Vorentwürfen", *Österreichische Zeitschrift für Strafrecht* 1 (1910), pp. 3–24.

Löffler, A.:
– "Der Begriff der Verantwortlichkeit", *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 6 (1897), pp. 387–398.
– "Gutachten über die Frage: Die Sicherungsmaßregeln nach den Vorentwürfen zu einem deutschen und zu einem österreichischen Strafgesetze", *Verhandlungen des Einunddreißigsten Deutschen Juristentages,* vol. 2 (Gutachten), Berlin: Guttentag, 1912, pp. 766–804.

Madlé von Lenzbrugg, A., "Die Stellung des Strafgesetzentwurfes zu den Strafrechtsschulen", *Allgemeine österreichische Gerichts-Zeitung* 66 (1915), pp. 418–422.

Miřička, A.:
– *Die Formen der Strafschuld und ihre gesetzliche Regelung*, Tübingen: Mohr Siebeck, 1908.
– "Zur Frage der Strafrechtsreform", *Juristische Blätter* 46 (1917), pp. 181–184.

Moos, R., "Carl Stooss in Österreich", *Schweizerische Zeitschrift für Strafrecht* 105 (1988), pp. 35–79.

Neumair, M.:
– *Erziehung und Strafe. Rechtshistorische Untersuchung über Herkunft und Entstehung des österreichischen Jugendgerichtsgesetzes von 1928*, Diss. Univ. Wien, 1996.
– "Jugendliche Straftäter in den österreichischen Strafgesetzen und Reformentwürfen von 1803 bis 1928", *Die Entwicklung der österreichisch-ungarischen Strafrechtskodifikation im XIX–XX. Jahrhundert* (Máthé, G. & W. Ogris, eds.), Budapest: UNIÓ, Zeitung- und Buchverleger-Handlungs-GmbH, 1996, pp. 143–177.

Niedrist F. / Schennach, M. P.:
– "Zwischen Konfirmation und Korrektur? Zur Strafrechtsjudikatur des Appelllationsgerichts Innsbruck und der Obersten Justizstelle im Vormärz", *230 Jahre Oberlandesgericht Innsbruck* (K. Schröder, ed.), Innsbruck: Wagner (Collection "Schlern-Schriften" 372), 2021, pp. 51–68.

Oberkofler, G. / Rabofsky, E., *Heinrich Lammasch (1853–1920). Notizen zur akademischen Laufbahn des großen österreichischen Völker- und Strafrechtsgelehrte*, Innsbruck: Wagner, 1993.

Ogris, W.:
- *Die Rechtsentwicklung in Österreich. 1848–1918,* Wien: Verlag der Österreichischen Akademie der Wissenschaften, 1975, pp. 556–562.
- "Die Entwicklung von Gerichtsverfassung, Strafrecht und Strafprozeßrecht 1848–1918", *Die Entwicklung der österreichisch-ungarischen Strafrechtskodifikation im XIX–XX. Jahrhundert* (G. Máthé & W. Ogris, eds.), Budapest: UNIÓ, Zeitung- und Buchverleger-Handlungs-GmbH, 1996, pp. 55–74.

Olechowski, Th., "Zur Entstehung des österreichischen Strafgesetzes 1852", *Grundlagen der österreichischen Rechtskultur, Festschrift für Werner Ogris zum 75. Geburtstag* (Th. Olechowski, Ch. Neschwara & A. Lengauer, eds.), Wien / Köln / Weimar: Böhlau, 2010, pp. 319–341.

Oosterhuis, H., *Stepchildren of nature. Krafft-Ebing, Psychiatry, and the making of sexual Identity*, Chicago / London: University of Chicago Press, 2000.

Probst, K.:
- "Die moderne Kriminologie und Julius Vargha", *Monatsschrift für Kriminologie und Strafrechtsreform* 59 (1976), pp. 335–351.
- *Geschichte der Rechtswissenschaftlichen Fakultät der Universität Graz, part 3: Strafrecht – Strafprozessrecht – Kriminologie*, Graz: Akademische Druck- und Verlagsanstalt (Collection "Publikationen aus dem Archiv der Universität Graz" 9/3), 1987.

Rixen, P., *Die gemeingefährlichen Geisteskranken im Strafrecht, im Strafvollzuge und in der Irrenpflege. Ein Beitrag zur Reform der Strafgesetzgebung des Strafvollzuges und der Irrenfürsorge*, Berlin: Springer (Collection "Monographien aus dem Gesamtgebiete der Neurologie und Psychiatrie" 24), 1921.

Sabitzer, W., "Siegfried Türkel. Kriminalist und Wissenschaftler", *Die Wiener Polizei. Magazin der Landespolizeidirektion Wien* 2020/1, pp. 38–40.

Schäfer, F. L., "Carl Stooss (1849–1934) – Eine Geschichte der Strafrechtskodifikation", *Ad fontes! Werner Schubert zum 75. Geburtstag* (F. L. Schäfer, M. Schmoeckel & Th. Vormbaum, eds.), Berlin: Lit (Collection "Rechtsgeschichte und Rechtsgeschehen" 20), 2015, pp. 33–76.

Schennach, M. P .:
- "Echoes of Karl Binding and Franz von Liszt? The Discussion between the 'Classical School' and the 'Positivist School' in Austria", *GLOSSAE* 17 (2020), pp. 324–258.
- „Österreichische Strafrechtsgeschichte im „langen" 19. Jahrhundert. Forschungsstand und Perspektiven", *Strafrechtsgeschichte im „langen" 19. Jahrhundert. Forschungen und Perspektiven* (M. P. Schennach, ed.), Wien: Verlag Österreich, 2020, pp. 1–36.
- *Strafrechtsgeschichte im „langen" 19. Jahrhundert. Forschungen und Perspektiven* (ed.), Wien 2020.
- "Der Strafrechtswissenschaftler Heinrich Lammasch und der „Schulenstreit" in der österreichischen Monarchie", *Zeitschrift für Neuere Rechtsgeschichte* 42 (2020), pp. 202–233.

Schmetterer, Ch., "Die Untreue in den österreichischen Strafgesetz-Entwürfen von 1874 bis zum Ersten Weltkrieg", *Strafrechtsgeschichte im „langen" 19. Jahrhundert. Forschungen und Perspektiven* (M. P. Schennach, ed.), Wien: Verlag Österreich, 2020, pp. 177–202.

Staudigl-Ciechowicz, K., "Zur Entstehung der Wiener Kriminologie und Kriminalistik in der 1. Republik", *Journal on European History of Law* 2/1 (2011), pp. 29–35.

Stooss, C.:
- *Der Geist der modernen Strafgesetzgebung. Vorlesung gehalten am 19. Oktober 1896 zum Antritt der ordentlichen Professur für österreichisches Strafrecht und Strafprozessrecht an der Universität Wien*, Wien: Manz, 1896.
- "Die Sichernden Maßnahmen gegen Gemeingefährliche im österreichischen Strafgesetzentwurf", *Österreichische Zeitschrift für Strafrecht* 1 (1910), pp. 25–92.
- Lehrbuch des Österreichischen Strafrechts, Wien / Leipzig: Deuticke, 2nd ed. 1913.
- "Selbstdarstellung", *Die Rechtswissenschaft der Gegenwart in Selbstdarstellungen*, vol. 2 (H. Planitz, ed.), Leipzig: Meiner, 1925, pp. 205–235.

Storch, Fr., "Die Bemessung der Strafe in den österreichischen Strafgesetzentwürfen", *Österreichische Zeitschrift für Strafrecht* 4 (1913), pp. 1–44.

Struck-Berghäuser, *A. Th., Franz von Liszt und seine Gegner. Die Auswirkungen des „Schulenstreits" auf das heutige Sanktionen- und Strafvollzugsrecht*, Baden-Baden: Nomos (Collection "Kieler Rechtswissenschaftliche Abhandlungen", N. F. 73), 2020.

Stutzenstein, S., "Straffrei durch Zeitablauf? Die österreichische Verjährungsskepsis im ‚langen' 19. Jahrhundert", *Strafrechtsgeschichte im „langen" 19. Jahrhundert. Forschungen und Perspektiven* (M. P. Schennach, ed.), Wien: Verlag Österreich, 2020, pp. 255–293.

Türkel, S.:

- *Irrenwesen und Strafrechtspflege. Ein Vortrag über einige Capitel aus der Forensischen Psychiatrie, dem Straf- und Strafproceßrecht. Gehalten im Jänner 1900 im Socialwissenschaftlichen Bildungsverein in Wien*, Wien: Manz 1900.
- *Die kriminellen Geisteskranken. Ein Beitrag zur Geschichte der Irrenrechts- und Strafrechtsreform in Österreich (1850–1904)*, Wien: Perles, 1905.
- *Psychiatrisch-kriminalistische Probleme. I. Die psychiatrische Expertise. II. Über Zurechnung und Zurechnungsfähigkeit. III. Psychopathische Zustände als Strafausschließungsgründe im Strafrechte*, Leipzig / Wien: Deuticke, 1905.
- *Die Reform des österreichischen Irrenrechtes. 1. Die Geschichte der österreichischen Irrenrechtsreform. 2. Amtliche und nicht amtliche Materialien zu einem auszuarbeitenden Entwurfe eines österreichischen Irrengesetzes. Historisch und systematisch bearbeitet*, Wien: Deuticke, 1907.
- *Die Zurechnungsunfähigkeit. Die philosophischen, medizinischen und strafrechtlichen Probleme der Zurechnungsfähigkeit und ihre legislative Behandlung in den österreichischen Strafgesetzentwürfen (1852–1914)*, Leipzig / Wien: Deuticke 1915.

Vargha, J., *Die Abschaffung der Strafknechtschaft. Studien zur Strafrechtsreform, 2 Theile*, Graz: Leuschner & Lubensky, 1896.

Vorentwurf zu einem österreichischen Strafgesetzbuch und zu dem Einführungsgesetze September 1909, Wien: K.k. Hof- und Staatsdruckerei, 1909.

Wahlberg, W. E. v., "Criminalpsychologische Bemerkungen über den moralischen Irrsinn, moral insanity, mit besonderer Rücksicht auf den Raubmörder Hackler", *Gesammelte kleinere Schriften und Bruchstücke über Strafrecht, Strafprocess, Gefängniskunde, Literatur und Dogmengeschichte der Rechtslehre in Oesterreich*, vol. 2 (W. E. v. Wahlberg), Wien: Hölder, 1877, pp. 211–230.

Watzka, C.:

- "Vom Armenhaus zur Landesnervenklinik Sigmund Freud. Zur Geschichte psychisch Kranker und des gesellschaftlichen Umgangs mit ihnen in der steirischen Landeshauptstadt vom 16. bis zum 21. Jahrhundert", *Historisches Jahrbuch der Stadt Graz* 36 (2006), pp. 295–337.
- *Arme, Kranke, Verrückte. Hospitäler und Krankenhäuser in der Steiermark vom 16. bis zum 18. Jahrhundert und ihre Bedeutung für den Umgang mit psychisch Kranken*, Graz: Steiermärkisches Landesarchiv (Collection "Veröffentlichungen des Steiermärkischen Landesarchivs" 36), 2007.
- "Psychiatrische Anstalten in Österreich 1780–1850. Eine Übersicht aus wissenschaftsgeschichtlicher und soziologischer Perspektive", *Österreich in Geschichte und Literatur* 53 (2009), pp. 356–372.

Weiser, M., "Modernes aus dem Strafgesetzentwurfe", *Allgemeine österreichische Gerichts-Zeitung* 63 (1912), pp. 66–69.

Zucker, A.:

- "Einige criminalistische Zeit- und Streitfragen der Gegenwart", *Der Gerichtssaal* 44 (1891), pp. 1–108.
- "Über den ursächlichen Zusammenhang zwischen Delikt und Strafe", *Der Gerichtssaal* 44 (1891), p. 424–445.
- "Die neuen Bestimmungen des österreichischen Strafgesetzentwurfes", *Der Gerichtssaal* 46 (1892), pp. 27–70.
- *Einige dringende Reformen der Strafrechtspflege. Mit besonderer Rücksicht auf die Verhältnisse in Oesterreich*, Leipzig / Wien: Deuticke, 1896.
- *Über Schuld und Strafe jugendlicher Verbrecher*, Stuttgart: Enke, 1899.
- *Über Kriminalität, Rückfall und Strafgrund. Nähere Ausführungen eines im Oktober 1905 im böhmischen Juristenverein zu Prag gehaltenen Vortrages*, Wien: Deuticke, 1907.