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The rise of dangerousness in the Spanish criminal law (1870-1931).
The case of insane offenders: Medical experts vs. judges and criminal lawyers?*

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Abstract
Positivistic theories defended that criminals had no responsibility of their acts because they were notably determined by their inclinations. Such theories were received not only in social sciences, but also – and above all – in the medical sciences. This article describes how the criminal responsibility of insane offenders became controversial in the late nineteenth and early twentieth centuries in Spain due to the reception of the positivistic school in Europe. In doing so, doctrinal sources and scholarly controversies between medical experts and criminal lawyers are studied (1870-1931).

Keywords
The positivistic school of criminal law, dangerousness, insane offenders, criminal responsibility, lawyers, judges, medical doctors

1. Introduction

In 1889, the *Royal Academy of Moral and Political Sciences* witnessed a controversy between two prestigious lawyers and politicians, Laureano Figuerola Ballester, professor of Political Law and Economics, and Alejandro Groizard y Gómez de la Serna, a criminal prosecutor who eventually worked at the Supreme Court. Discussing how to deal with those who pretend to be insane to avoid the criminal responsibility of their acts, Figuerola stated as follows:

"In criminal matters, insanity ('*locura*') has two aspects: one when it is feigned, and the other when a person has really lost his mind: medical science does not admit that insanity can be simulated because there are means to make this point clear; the serious case is the one that occurs

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when the perpetrator was insane when committing the crime, and after some time he recovers his reason; so there are many crazy people serving sentences in our prisons."[1]

Groizard y Gómez de la Serna, who thoroughly disagreed with such a view, could not help it and stressed the inaccuracy of Figuerola's statement. The secretary of the Academy summed up Groizard's intervention with the following words:

"Mr. Groizard drew the attention of the Academy to the purpose of some distinctions that Mr. Figuerola made about insanity to put an end to certain currents of the anthropological school, which resolves legal problems by materialistic principles, being so that penal science must be inspired by spiritualist principles. *The old doctrine that doctors are nothing more than experts whether or not there is insanity is not inaccurate: in the legal order, there is nothing more than the word insanity to indicate the intellectual state of certain people, and if we admit the long and complicated classifications of the doctors, the magistrates would not know how to fulfill their duties; it is enough for the jurist to know if the accused knows that he has broken the moral and criminal law and if there is a will, even if it is fair to admit gradations*."[2]

They were both lawyers but looked at the insane offenders differently. Figuerola – who became president of the Board of directors of the Free Institution of Education (in Spanish, *Institución Libre de Enseñanza*) that was composed of Nicolás Salmerón, Joaquín Costa, and Francisco Giner de Los Ríos, among others –, felt more attracted by the new intellectual movements that approached science from a materialistic and empirical perspective. On the contrary, Groizard found more reasonable to accepts the new intellectual waves of social sciences inasmuch as they were not closed to – or incompatible with – the spiritual dimension of human beings. In short, human behavior could not be explained – in Groizard's view – with material forces that precluded the exercise of free will. Ultimately, the dichotomy between free will and determinism was at the core of the controversy – or disagreement – between Figuerola and Groizard.

This chapter describes how the criminal responsibility of insane offenders became controversial in the late nineteenth and early twentieth centuries in Spain due to the reception of the positivistic school in Europe. After this 'Introduction,' I'll briefly present the emergence of the principle of dangerousness that, according to the new currents of thought, was supposed to replace a criminal law based upon the principle of imputability. Then I'll focus on the criminal responsibility of insane offenders, exploring the issue from a medical and legal perspective. This will enable us to describe how medical doctors and lawyers – including both criminal lawyers and judges – analyze the problem. In doing so, some works of medical doctors and lawyers will be studied. The chapter will finish with some concluding considerations.

2. Imputability vs. dangerousness?

[1] Extract from the discussion at the Academia in the following sessions: 15 y 29 de Enero, 5 y 12 de Febrero de 1889, on the theme «*Medidas cuya adopción contribuiría a evitar que se finja la locura con el propósito de sustraerse á responsabilidades criminales ó que se suponga con el fin de privar á un individuo de su libertad y de la gestión de sus bienes*», *Memorias de la Real Academia de Ciencias Morales y Políticas*, tomo VII, 1893 (Separata), Madrid: Real Academia de Ciencias Morales y Políticas, pp. 447-451, p. 448.

[2] *Ibidem*, pp. 448-449; italics are mine.

The number of criminal offenses notably increased in the second half of the nineteenth century. That was an undeniable fact all over Europe. Langle, who in the twenties of the last century described the picture of criminal reality with some statistics, showed "a rise in the crime curve throughout the civilized world and, particularly, an increase in recidivism and early crime."[3] He reported the case of Spain as follows:

> "From 1859 to 1909 the number of criminal proceedings instituted has risen from 41.665 to 73.854. The proportion of homicides continues to be considerable, although lower than 50 years ago. Crimes against morals are twice as high today as they were twenty-five years ago. The participation of minors in general crime seems to be on the decline."[4]

These figures led criminal lawyers to ask themselves for the best way to cope with the increase in criminality. Was punishment the right tool to deal with such an increase of criminal offenses? The positivistic school criticized the theory of the classical one, arguing that the principle of dangerousness should replace the principle of responsibility,[5] particularly considering the advancement of sciences such as criminal anthropology, psychiatry, frenopathy and sociology, among others. For positivists, it was more relevant to protect society from dangerous people than to punish those who were really responsible for what they did. As Pedro Dorado Montero stressed, criminal law should turn out to be a "protective law from criminals,"[6] so it should protect society from insane offenders and other dangerous individuals. He claimed for a preventive – or precautionary – criminal law that pursued two goals: i) not to punish those who are not guilty for what they did (insane offenders), and ii) defend society from the dangerousness of some people (also including insane offenders).[7] This implied the replacement of punishments with security measures to achieve the innocuousness of those who constitute a threat to society. As will be seen, the question was whether such innocuousness could be imposed even before a crime was committed.

Although positivism was spread all over Europe and America,[8] such school experienced limits – as historiography has recently shown –[9] and the scope and intensity

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[3] Langle, E., *La Teoría de la Política Criminal*, Madrid: Editorial Reus (S.A.), 1927, p. 145, particularly pp. 146-152.

[4] Langle, *La Teoría de la Política Criminal*, pp. 148-149.

[5] Pifferi, M., "From responsibility to dangerousness? The failed promise of penal positivism", *The Limits of Criminological Positivism. The Movement for Criminal Law Reform in the West, 1870-1940* (M. Pifferi, ed.), Abingdon: Routledge, 2022, pp. 255-279.

[6] Dorado Montero, P., *El Derecho protector de los criminales*, Madrid: Librería General de Victoriano Suárez, 2 vols., 1916 (available at https://www.pensamientopenal.com.ar/miscelaneas/47549-derecho-protector-criminales-obra-clasica-pedro-dorado-montero); Franco-Chasán, José, *The Reception of Positivism in Spain: Pedro Dorado Montero*, Dordrecht-Heidelberg-London-New York, Springer (Series 'Studies in the History of Law and Justice') (forthcoming, 2023).

[7] For an extensive study of the criminal doctrine of Dorado Montero, see Franco-Chasán, *The Reception of Positivism in Spain: Pedro Dorado Montero*, already cited; see also José Franco-Chasán, "Pedro Dorado Montero: A Transitioning Figure", in Yves Cartuyvels & Aniceto Masferrer (coords.), Especial issue "The birth of criminal positivism in Europe and Latin America at the end of the 19th century: rise and resistances", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 353-395 (available at http://www.glossae.eu).

[8] On the matter, see Cartuyvels, Y., Masferrer, A., "An introduction to the birth of criminal positivism in Europe and Latin America at the end of the 19th century: rise and resistance", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 1-21 (available at http://www.glossae.eu).

[9] Pifferi, M., (ed.), *The limits of Criminological Positivism. The movement for Criminal Law Reform in the West, 1870-1940*, London, Routledge, 2021.

of its reception varied from one jurisdiction to another. In this vein, positivism did not have the same impact in Belgium[10] or Italy[11] as in Spain,[12] Portugal,[13] Russia[14] or Brazil.[15]

The clash between both schools – the positivist and the classical – was vivid – sometimes even fierce – took place in most parts of the Western world and lasted a relatively long period. In Spain, Mariano Ruíz-Funes, a well-known criminal lawyer, lamented, in 1931, that "[c]riminal law, clinging to these two directions [free will (classical school) and determinism (positivist one)], runs the risk of getting lost in an ineffective and sterile discussion. While such controversy occurs, crimes increase, and effective means of fighting are not adapted for or against them." Luis Jiménez de Asúa used 16 Similar words to make the same point: "…the discussion between free will and determinism is infertile for criminal law."[16] Although he found himself more in line with the positivist school, Jiménez de Asúa criticized both criminal law schools: the classical school because its "divorce from reality was notorious and was demonstrated by the growth of delinquency, caused by the forgetfulness of the author of the illegal act: the delinquent man,"[17] while "the positivist school lacked a sense of reality. It lacked critical

[10] For Belgium, see the most recent works by Cartuyvels, Y., "The influence of positivism in Belgium. An eclectic compromise between adhesion and resistance", *The limits of Criminological Positivism. The movement for Criminal Law Reform in the West, 1870-1940* (M. Pifferi, ed.), London, Routledge, 2021, 98-114; "Adolphe Prins and social defense in Belgium: the reform in the service of maintaining social order," in Yves Cartuyvels & Aniceto Masferrer (coords.), Special issue "The birth of criminal positivism in Europe and Latin America at the end of the 19th century: rise and resistances", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 177-210.

[11] Pifferi, M., "The Theory of Social Defence and the Italian Positive School of Criminal Law," in Yves Cartuyvels & Aniceto Masferrer (coords.), Special issue "The birth of criminal positivism in Europe and Latin America at the end of the 19th century: rise and resistances", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 22-46 (available at http://www.glossae.eu); Vinci, S., "Bernardino Alimena and Emanuele Carnevale: The third school of criminal law searching for a compromise," in Yves Cartuyvels & Aniceto Masferrer (coords.), Special issue "The birth of criminal positivism in Europe and Latin America at the end of the 19th century: rise and resistances", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 47-82 (available at http://www.glossae.eu).

[12] For Spain, see Masferrer, A., "The reception of the positivist School in the Spanish criminal law doctrine (1885-1899)", in Yves Cartuyvels & Aniceto Masferrer (coords.), Especial issue "The birth of criminal positivism in Europe and Latin America at the end of the 19th century: rise and resistances", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 303-352 (available at http://www.glossae.eu).

[13] Caeiro, P., Lacerda da Costa Pinto, F. de, "A frantic mayfly at the turn of the century: The positivist movement and Portuguese criminal law," in Yves Cartuyvels & Aniceto Masferrer (coords.), special issue "The birth of criminal positivism in Europe and Latin America at the end of the 19th century: rise and resistances", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 396-439 (available at http://www.glossae.eu).

[14] Filatova, M., Alekseeva, T., "Reception of social defense in the RSFSR and the USSR", in Yves Cartuyvels & Aniceto Masferrer (coords.), special issue "The birth of criminal positivism in Europe and Latin America at the end of the 19th century: rise and resistances", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 440-468 (available at http://www.glossae.eu).

[15] Sontag, R., "The Italian Scuola Positiva in Brazil between the nineteenth and twentieth centuries: the problematic issue of "influence," in Yves Cartuyvels & Aniceto Masferrer (coords.), special issue "The birth of criminal positivism in Europe and Latin America at the end of the 19th century: rise and resistances", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 486-516 (available at http://www.glossae.eu).

[16] Jiménez de Asúa, L., *El estado peligroso del delincuente y sus consecuencias ante el Derecho penal moderno* (conferencia pronunciada en la *Real Academia de Jurisprudencia y Legislación*, en la sesión del 27 de febrero de 1920), Madrid: Editorial Reus (S.A.), 1920, p. 16.

[17] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 6.

sense and effective adaptability."[18] In 1941, Ferrer Sama kept on lamenting the useless discussion between the defenders of both schools. In an article entitled "The so-called crisis of criminal law and its causes," he summed up the controversy with the following words:

"The phenomenon of the bitter struggle of the two schools called classical and positive, which consumes all the efforts of the criminal lawyers of the last century and the beginning of the current one, is nothing but the manifestation of the philosophical character of the different doctrines under discussion. The problems that are the subject of controversy have as their starting point the very delicate philosophical question of free will or determinism; accepting or denying the free determination of human actions had to depend on the admission of moral responsibility or the denial of it, substituting it for mere social responsibility."[19]

Later on, he explained a bit more about the root of the differences between both schools:

"For the positivists, the bio-psychological analysis was the basis of the appreciation of the so-called social responsibility; For us, the study of the subject of the crime has as its object the appreciation of his imputability as a presupposition of legal responsibility. On the other hand, the affirmation of the positivists that the truly abnormal man cannot enter the sphere of criminal law will be (...) anything but normal."[20]

3. The criminal responsibility of insane offenders

The fierce criticism of the positivist school against the classical one, claiming for the replacement of the principle of responsibility by the criterium of dangerousness notably affected the notion and function of punishment in many senses. In this vein, punishments should be preventive or cautionary (rather than retributive, mainly if crimes were not the result of free will); they should be proportionate to the particular characteristics of the delinquent, not to the specific crime committed (as the classical school maintained); for some people who were dangerous and might constitute a threat to society, it was found more adequate to impose security measures than punishments.

These tendencies affected the criminal status of insane offenders. As Dorado Montero argued in his "protective law from criminals," in a preventive (rather than retributive) criminal law, insane offenders would never be punished. Still, security measures would be imposed on those who were dangerous.[21] In addition, although ascertaining whether an insane offender was or not responsible for the crime he/she committed was supposed to be decided by judges, they needed the cooperation of medical doctors who wrote a report after a careful examination of the delinquent who declared to be insane. As we saw at the beginning of the chapter, it was not rare to find delinquents who pretended to be insane to avoid a criminal conviction.[22]

[18] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 8.

[19] Ferrer Sama, A., *La llamada crisis del Derecho penal y sus causas*, Murcia: Anales de la Universidad de Murcia, 1943, pp. 5-6.

[20] Ferrer Sama, *La llamada crisis del Derecho penal y sus causas*, pp. 8-9.

[21] See footnote nr. 7.

[22] See footnotes nr. 1-2.

Positivism spread more in natural and medical sciences than criminal law. Criminal law was criticized for being more attached to philosophy than to sciences, applying an empirical method, as positivists did. In this line of thought, some medical doctors attempted to study the issue of moral freedom or free will just from a medical perspective (neither philosophical nor legal), trying to distinguish the acts of those who are insane (and hence, irresponsible) and those who acted passionately (and therefore, responsibly).[23]

The controversy between those who approach the study of reality from an exclusive materialistic or spiritual perspective emerged first in the natural sciences. Later on, it affected all scientific disciplines, including the humanities and social sciences, the law in general and criminal law in particular. Some psychiatrists and frenopaths maintained radical ideas about those who committed crimes. In their view, no delinquent was responsible for the crime committed because his/her mental or physical constitution left him/her no room to behave freely. Such ideas could not be accepted by judges who regarded them as unbearable for the administration of justice. Positivistic opinions uttered division among criminal lawyers or amongst medical doctors, psychiatrists, and frenopaths, but also made the cooperation between those medical doctors (in charge of examining and reporting about the mental state of the accused) and judges (who were responsible for applying the criminal code provisions dealing with insane offenders) quite difficult.

3.1. Medical science domain

Some medical doctors have been selected to describe how positivism affected the way they perceived their task of cooperation with judges in reporting the mental health of delinquents. In doing so, I will use some of their works and lectures dating back to the second half of the nineteenth century.

3.1.1. José Esquerdo

Giving a formal lecture at the Ateneo of Madrid in 1878, José Esquerdo stated:

"…I'd never be untrue. The whole of humanity will not justify the prevarication of a doctor with its salvation! To say that we encourage criminals! (...). Those who drag more than a weak understanding of crime are those who think to terrify him with the inconceivable disproportion of punishment; those that raise the imposing appearance of the scaffold, which has the strength and vertiginous action of great currents, the attraction of deep abysses."[24]

[23] Mata, P., *De la libertad moral ó libre albedrío. Cuestiones fisio-psicológicas sobre este tema y otros relativos al mismo. Con aplicación á la distinción fundamental de los actos de los locos y los de los apasionados ó personas responsables*, Madrid: Carlos Bailly-Bailliere, 1868; it is an extensive work that responds to several speeches given at the Royal Academy of Medicine: one by Joaquín Quintana (March 20 and 31, 1863), who had in turn responded to another speech given by the author of this book ('Medical-psychological criteria for the differential diagnosis of passion and madness'), as the author explains in his prologue (pp. 5-12) (pp. 13-360), another one by Matías Nieto y Serrano of March 31 and April 8, 1863 (pp. 361-401) and another by José María Santucho on April 30 and May 13, 1863) (pp. 402-450). The content is strictly medical, not philosophical or legal.

[24] Esquerdo, J., *Preocupaciones reinantes acerca de la locura* (Conferencia dada en el Ateneo el día 5 de diciembre de 1878), Madrid: Álvarez Hermanos (imprenta), 1878, p. 28.

A strong statement like this reflects the criticism and accusations that some medical doctors received about their way of reporting the mental health of the accused. And later on, referring to the insane offenders, added:

"*The madman is irresponsible; the execution of him a legal murder*; the personality of the madman is sacred to God and must be inviolable to men! And behold, by one of those inscrutable mysteries of Providence, the blood of a madman spilled on the scaffold infuriates another madman and makes him another avenger!"[25]

José Esquerdo does not seem to maintain that any delinquent was insane, but rather the opposite, namely, that some insane offenders were convicted for having committed a crime without free will.

3.1.2. José María Esquerdo

Two years later, at the Spanish Anatomical Amphitheater ('Anfiteatro Anatómico Español') of Madrid, José María Esquerdo gave a lecture whose title was quite revealing: "Insane who do not seem to be so."[26] Recognizing that the voice of medical doctors who cultivate frenopahy is still "inferior" or "insignificant", Esquerdo was convinced that only a "phrenopatic ray of light" might "penetrate the conscience of the upright magistrate," leaving behind the times of "obscurantism" by declaring irresponsible those who are insane.[27]

For Esquerdo, frenopaths were particularly needed by those who were insane without looking so since they were being confused with those who were sane. They were responsible for enlightening the public opinion in general and the conscience of magistrates in particular. Once this is done – he stressed – the revolution will be completed.[28]

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[25] *Ibidem*; italics are mine.

[26] Esquerdo, J.M., *Locos que no lo parecen*. Discurso pronunciado en el Anfiteatro Anatómico Español (31.03.1880), 8 (173), 69-72 (corresponde al año XX and n. 801 del Pabellón Médico) (it was also published in Rev. Méd. Cir. Práct., 6, 353-63; 426-432) (A18 1292-5) (I use the version published in FRENIA, Vol. VII-2007, pp. 229-241, available online); see also other lectures given in 1878 by J.M. Esquerdo on mental health at the same Anfiteatro Anatómico Español, Conferencias sobre enfermedades mentales. El Anf. Anat. Esp., 6, 77; 91-2; 103-4; 117; 148-9; 164-5; 175-6; 191-2: 202-3; 209-10. Rev. Méd. Cir. Práct., 2,5-18; 149-56; 293-303; 347-51; J.M. Esquerdo, "Prólogo" del libro de J. Vera. Estudio clínico de la parálisis general progresiva, Madrid: Moya y Plaza, 1880.

[27] Esquerdo, *Locos que no lo parecen*, p. 230: "We do not care about our inferiority or our insignificance: results that the most powerful agents do not obtain are achieved by their way of acting by others who apparently do not enjoy great power; and in vain the Armstrong cannons would direct accurate and powerful fires against the rock of Gibraltar: that rock would not break off, you know, gentlemen, that the drop of water infiltrated through an imperceptible crack inside the rock makes it crash. Let us spread our doctrines until we make public opinion participate in them; that all doctors support it with lucidity and energy, and let us try above all that a phrenopatic ray of light begins through the cracks of human understanding until it penetrates the conscience of the upright magistrate. The formidable work of centuries will explode until it is buried in the oblivion of obscurantism that imprisoned the irresponsibility of the alienated, so much and so constrain it, that perhaps it does not reach those who most need that irresponsibility."

[28] Esquerdo, *Locos que no lo parecen*, p. 231: "What alienated people most immediately need our writings and words? Those who are confused with the sane: let us try to cleanse the opinion of our professors of errors, otherwise very enlightened doctors; that also on the ceilings of regal alcazars there are

Esquerdo provided a long list of insane people who were mistaken for sane people.[29] In his view, insane people were as irresponsible as children. If children were not responsible – as all criminal codes prescribed – for "the imperfection of brain development due to age deficiency,"[30] the same happened with the insane, "not because of age, but because of deformity."[31] Furthermore, he explained that a child was, in many aspects, superior to an imbecile. The first aspect in which a child was superior to an imbecile was the development of intelligence:

"[C]ompare the development of intelligence and feelings of a child at the age of nine with that of an imbecile, and at first sight there is a difference in favor of the child: his attention, his ability to know, his memory, his reflection, etc... His intellectual culture, the child knows how to read, write and count well; grammar, geography, history; he has notions of morality, of religion; in a word, any child at that age is intellectually superior to an imbecile."[32]

In addition, children were also superior to imbeciles in the moral domain:

"In the moral sense, the child is still more superior to the imbecile; he loves his parents, loves his friends and sometimes has a high regard for himself; benevolence, faith, wonder, justice, etc., are quite developed: as a general rule, the restraining faculties have a development proportional to or superior to the impulsive ones; for these organic reasons the child commits fewer attacks than the imbecile."[33]

Being that the outcome of the comparison between a child and an imbecile, and considering that "everyday experience shows us that in the imbecile not only are self-conscious feelings and instincts insufficiently developed, but that some are not even outlined," Esquerdo lamented that "the child is irresponsible *juris et de jure*, and the imbecile irresponsibility is not granted."[34]

Esquerdo could not understand how the imbecile, who was like "a child with the violent, powerful passions of man," received "no mitigation of the penalty, since his irresponsibility is not recognized, as it should be,"[35] and why "[f]or the imbecile or the

usually cobwebs: let us dispel the doubts of public opinion, and let us finally inform, illustrating the conscience of the magistrates; and once this work is finished, the revolution is done."

[29] Esquerdo, *Locos que no lo parecen*, p. 231: "Among the insane who are confused with the sane, in the first place are the imbeciles, the monomaniacs, homicides, suicides, homosuicides; the kleptomaniac, or who has the monomania of theft; pyromania, or having the monomania of fire; the genetic monomaniac; all those already determined and others that have not received a name in science, and with which I will deal later: finally, gentlemen, all epileptic or hysterical madness; the periods of onset and remission of progressive paralysis, the pseudo-lucid periods of intermittent madness and even the prodromal periods of all mental derangement."

[30] Esquerdo, *Locos que no lo parecen*, pp. 235-236: "All criminal codes, at least the ones I know, devote some article to the irresponsibility of the child: they are based, without a doubt, on the imperfection of brain development due to age deficiency."

[31] Esquerdo, *Locos que no lo parecen*, p. 236: "The child is an imperfect being in the sense of his mental capacity; the imbecile is equally so, but not because of age, but because of deformity."

[32] Esquerdo, *Locos que no lo parecen*, p. 236.

[33] Esquerdo, *Locos que no lo parecen*, p. 236.

[34] Esquerdo, *Locos que no lo parecen*, p. 236: "And yet, when everyday experience shows us that in the imbecile not only are self-conscious feelings and instincts insufficiently developed, but that some are not even outlined, the child is irresponsible *juris et de jure*, and the imbecile irresponsibility is spared, to the extent that it is illusory!"

[35] Esquerdo, *Locos que no lo parecen*, p. 236: "The imbecile is a child with the violent, powerful passions of man; spirited to attack, weak to resist; thrust and containment originating immediately and

mentally deformed, to reach irresponsibility, he must be a human monstrosity, horrible, a pack animal."[36] He could not accept the "contradiction" and the "attacks against logic" that reflected the fact that the army resorted to medical doctors to examine whether a candidate was fit or not for the army, but an insane person could be convicted and imprisoned without a proper medical examination.[37]

After examining the provision of the Spanish criminal code declaring the criminal irresponsibility of children or its attenuation in the case of minors who committed a crime without full consciousness or understanding of their acts,[38] Esquerdo requested the same treatment for the imbecile:

"[B]ased on the same principle, that is, incomplete development, we request a declaration of irresponsibility of the imbecile as such; not of the idiot, and less of the automaton, that besides committing the attacks we are referring to very rarely, it is hardly conceivable that they were the object of doubt, not only by the very enlightened judges who constitute our ordinary courts but also by that ignorant and evil populace, whatever the social class to which he belongs, that about the actions of reputed criminals does not conceive another idea or have other feelings than those of revenge and cruelty.

Likewise, there is a tendency in the content of these articles to reduce responsibility, and therefore the penalty, in those cases in which, having crossed the limits of irresponsibility, the child has not yet reached full responsibility. The mentalists were undoubtedly inspired by the same reasons, that in the way the law recognizes an intermediate age between the child and the man, in the scale of human reason they have found intermediate beings between the deformed and the normally conformed and ask for these the attenuation of the crime and the reduction of the sentence."[39]

Esquerdo's conclusion to his lecture clearly shows the divorce between some frenopaths and judges, and how the former viewed the latter:

"To finish, gentlemen: Do all these mental forms exist? If they exist, are all those insane who don't seem so crazy? They are: when you report on them, when you are asked for an opinion, give it in accordance with your conscience and the science that you honestly profess; and in times to come, when phrenopathy arises from the depths of posterity, holding us accountable for our actions and telling us: what did you do with those unfortunate people subject to your observation, entrusted to your opinion? answer: *we covered his body with the august purple cloak of irresponsibility; others tore his garments; others shackled their limbs with the prisoner's chain; others tore their flesh; others handed over their heads to the executioner's axe*."[40]

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exclusively from his organism; and yet of that fatality that presides over his actions, he does not even achieve a mitigation of the penalty, since his irresponsibility is not recognized, as it should be."

[36] Esquerdo, *Locos que no lo parecen*, p. 236.

[37] Esquerdo, *Locos que no lo parecen*, p. 236: "What a contradiction! What attacks against logic! It seems, gentlemen, that mental alienation spreads irregularity, inconsistency, aberration around it, when it has to be decided on the usefulness or uselessness of a subject for the service of arms, either whether it is a permanent or a temporary condition, one resorts to the doctor whose authority is believed irreproachable: it is the occlusion of moral freedom; by permanent vice (imbecility) or by accidental illness (madness) and then the doctor is under suspicion and repudiated."

[38] Esquerdo, *Locos que no lo parecen*, pp. 234-235, fn n. 2.

[39] Esquerdo, *Locos que no lo parecen*, pp. 234-235, fn n. 2.

[40] Esquerdo, *Locos que no lo parecen*, p. 241.

In 1883, medical doctor Ángel Pulido Fernández gave, at the Ateneo of Madrid, a lecture title of which was also very eloquent: 'Insane delinquents' (in Spanish, 'Locos delincuentes').[41] He departed from the assumption "…we know very well (…) the division between the physical and the spiritual is not and cannot be absolute in terms that influence only the moral itself and vice-versa, but rather, shuffled into a whole, constitute the absolute unity, that fundamental entity that we call man…"[42]

For Pulido, education has its own limits stemming from "the aptitudes of the species, (…) the native faculties of the individual, (…) the emotional sphere (…) and therefore the impossibility of developing a great moral sense in someone who comes with a natural atrophy about the moral organization."[43] The consequence of such limitations of education was clear:

"In this way, it is inevitably deduced that just as an individual is not ugly by his own will, he is not always bad because of his whim, but because of the forced, inevitable dragging of his [mental] organization."[44]

Pulido maintains that the existence of people with "insane temperament" is proven,[45] and that the precedents of this temperament are found, to a great extent, "in the ascendants":

"...it is already an indisputable principle in science, that a madman begets an epileptic child or vice-versa, and that propensities to nervous diseases, which can sometimes be in the same way, and others in a different way, are transferred from parents to children (...). Epilepsy and madness are, however, two forms that occur more frequently."[46]

Pulido defines insanity as "any disease of the soul, or (...) any alteration in those faculties which together constitute the characteristic functions of the soul, and which, when disturbed, deprive us of the faculty of directing our actions by means of reflection and its auxiliaries to the realization of our impulses in accordance with the laws of organization."[47] Although he acknowledges that this definition is "archi defective,"[48] he points out as follows:

[41] Pulido Fernández, A., *Locos delincuentes* (Discursos pronunciados en la Sección de Ciencias Naturales del Ateneo científico y literario de Madrid sobre el tema «*Estado actual de la ciencia frenopática y sus relaciones con el Derecho penal*», Madrid: Imprenta de la Revista de Legislación, 1883, pp. 7-80.

[42] Pulido Fernández, *Locos delincuentes*, p. 25.

[43] Pulido Fernández, *Locos delincuentes*, p. 29: "There is, therefore, in the influence of education, not only a limit drawn by the aptitudes of the species, such as, for example, the impossibility of teaching a man to fly, but also a limit marked by the native faculties of the individual, which in the physical can be, for example, the impossibility of making a good singer out of someone whose larynx is poorly shaped for singing, while in the emotional sphere it can also be, for example, the impossibility of developing a great memory in someone who has a short memory, and therefore the impossibility of developing a great moral sense in someone who comes with a natural atrophy about the moral organization."

[44] Pulido Fernández, *Locos delincuentes*, p. 29.

[45] Pulido Fernández, *Locos delincuentes*, p. 30.

[46] Pulido Fernández, *Locos delincuentes*, p. 30.

[47] Pulido Fernández, *Locos delincuentes*, p. 31.

[48] Pulido Fernández, *Locos delincuentes*, p. 32.

[Insanity][49] "does not suppose only the lack of reason, but affects all the other psychological components, such as moral sense, will, etc., as the disease of the body does not suppose the compulsory disorder of this or that organ, but of any organ of the organism, just as the disease of the body does not suppose the obligatory disorder of this or that organ, but of any individual organ of the organism; but just as not every bodily disease incapacitates man for his bodily relations, not every madness incapacitates man for his social relations, which shows that the problem, in absolute terms, is more delicate than it seems at first sight and requires for the practice of the courts a completely casuistic illustration in which I will not enter, and which only the phrenopathic doctor can undertake and verify with the necessary guarantees of success."[50]

Then, he dealt with "homicidal madness,"[51], which he regarded as "the gravest of all madness."[52] He criticized that while criminal codes accept that a madman might be a delinquent and hence "populated are the insane asylums for the sick whom you have exempted from the punishment of justice and handed over to medical treatment," those people who commit a criminal act by virtue of an irresistible and prompt impulse are regarded as criminally responsible.[53]

Pulido also described cases of "impulsive, conscious forms of real mental derangement without delirium."[54] Further on, he addressed some cases related to "moral madness."[55]

In a third conference, Pulido touched upon the relationship between crime and madness.[56] He maintained that phrenopathy does not attempt to perfectly define "where crime ends and madness begins"[57] because it is not possible to establish "absolute, insurmountable boundaries in that much-discussed middle zone that separates crime from madness."[58] And he added on behalf of the phrenopaths:

"In the expert trials we aspire only to report on the accused as a functioning organism, and on his mental state when committing the act punishable by law: the judges will then decide on the responsibility and the penalty."[59]

[49] I use the expression insanity (rather than madness) because I understand it is a better word: it is a medical and legal term, often referring to a permanent condition vs. madness, which is general English and may be temporary. However, in 18th century England there was a Madhouses Act.

[50] Pulido Fernández, *Locos delincuentes*, p. 32.

[51] Pulido Fernández, *Locos delincuentes*, pp. 40-45.

[52] Pulido Fernández, *Locos delincuentes*, p. 40.

[53] Pulido Fernández, *Locos delincuentes*, p. 40: "You willingly accept that the madman can be a criminal; you have consigned it thus in the Penal Code, and the insane asylums for the sick are populated with those you have exempted from the punishment of justice and handed over to medical treatment; while the maniac, the lypermaniac and others who suffer from well-known mental disorders have nothing to fear from your confusion, this is not the case with those who act under the influence of impulsive vertigo that suddenly breaks out in the midst of real or apparent sanity, which overwhelms the individual and makes him commit a criminal act, later reappearing again in that serene and amenable state he was in before the attack."

[54] Pulido Fernández, *Locos delincuentes*, p. 45; on this matter, see pp. 45-49.

[55] Pulido Fernández, *Locos delincuentes*, p. 53; on this matter, see pp. 53-57.

[56] Pulido Fernández, *Locos delincuentes*, pp. 60-80.

[57] Pulido Fernández, *Locos delincuentes*, p. 61.

[58] Pulido Fernández, *Locos delincuentes*, p. 61.

[59] Pulido Fernández, *Locos delincuentes*, pp. 61-62.

Pulido argued that, in many cases, a madman behaves by virtue of his will, but this does not mean he is not insane. Hence, "it is not enough that the Code resorts to punish the will so that it exempts the madman."[60]

On the idea that "intentions are judged by the act, since there is no other criterion," Pulido replies that this "was tantamount to establishing the necessity of judging by that criterion which I was fighting against, because if the act, by its good or bad nature, often reveals the good or bad nature of the motives behind it, this is not always the case. Consequently, the only thing that can safeguard justice against the disasters of this error is the circumstantial and conscientious examination of the act itself, plus that of the individual conditions of the act."[61]

If the criminal code had already laid down insanity or madness as a defense, what more could one ask for? According to Pulido, two needs should be taken into account: "first, to make the Magistrates understand that the term insanity includes states that they consider to be of mental integrity, but which are not; and second, to study the matter in order to bring to the judicial proceedings all the enlightenment and all the guarantee of correctness that current scientific knowledge allows."[62]

Regarding the expert reports, Pulido stated that "when there is a disagreement between several experts, the Court's ruling is always on the side of those who accept responsibility. This is the story that repeats itself at every turn."[63]

3.1.4. Vicente Orts y Esquerdo

Vicente Orts y Esquerdo published in 1894 an extensive work on the madness in criminal trials from both a medical and legal perspective.[64]

In chapter I, he clearly recognized the existence of "[c]onflicts between magistrates and phrenopaths."[65] Orts warns that he sticks to "forensic medical analysis" or "phrenopathy," excluding the examination of the various philosophical, moral, legal or anthropological aspects of criminality, since such studies are not our responsibility, and at the same time to avoid that generalizing and encyclopedic defect that these works usually suffer from [...] for intending to develop the problem from multiple aspects, with which, the only thing that is achieved is clouding the issue, without reaching any practical conclusion. [...]. Studying the irresponsibility of the madman in legal terms corresponds to the Magistrate and the Lawyer, and not to us…"[66]

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[60] Pulido Fernández, *Locos delincuentes*, p. 62: "[…] it is not enough that the Code resorts to punish the will to exempt the madman, because ordinarily the mad subject will present an acting will that makes him responsible, and nevertheless not for that reason the individual ceases to be mad."

[61] Pulido Fernández, *Locos delincuentes*, p. 62.

[62] Pulido Fernández, *Locos delincuentes*, pp. 62-63.

[63] Pulido Fernández, *Locos delincuentes*, p. 64.

[64] Vicente Orts y Esquerdo, "La locura ante los Tribunales. Estudio médico-legal de la irresponsabilidad del loco", *Revista de los Tribunales*, Madrid: Centro Editorial de Góngora, 1894, pp. 5-63.

[65] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 5-17.

[66] Orts y Esquerdo, "La locura ante los Tribunales…", p. 5.

Orts explains that magistrates' suspicion and mistrust towards medical doctors was due to the extremism of mentalists who defended an absolute irresponsibility of any kind of madman, even those whose madness was doubtful.[67] Moreover, some of them maintained that any criminal act was caused by irresistible impulses that exonerate any responsibility. This led magistrates to think that mentalists wanted to take away their responsibility of administering criminal justice.[68] In his view, both mentalists and magistrates were to be blamed for such disagreement: "the Magistrates with their natural and logical ignorance of mental disorders" and "the phenopaths with their daring pretensions."[69]

Orts was optimistic and confident because, in his opinion, magistrates and prosecutors started to realize the need for physicians who were true experts capable of establishing the potential mental illness of the defendant:

"Fortunately, the Magistrates are already convincing themselves of their incompetence in the diagnosis of madness, and they begin to subordinate their opinion to that of the Physician who is not only truly knowledgeable in mental illnesses but also adds discretion and enough good sense to this competence to express his conviction in a perfectly understandable way for the man of regular culture; thus, it is safe to say that these scientific battles between the Prosecutor and the phrenopath are about to disappear from the annals and the judicial information…"[70]

Such cordiality between mentalists and lawyers (magistrates and prosecutors) was present only among the relations between the latter and those mentalists who were in favor of diminished criminal responsibility, not with those who defended absolute irresponsibility, a radical opinion that continued to be contested by lawyers with "their resistance and opposition."[71] An extreme opinion amongst some radical mentalists that caused a radical rejection by lawyers was the idea that the commission of a criminal act necessarily showed the insanity of its author. Or, in positive terms, a sane person would never commit a criminal offence.[72]

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[67] The distinction between phrenopaths and mentalists might be similar to that of France, where phrenopaths were those who deployed an organicist conception of madness, whereas mentalists saw madness as a 'disease of the psyche.'

[68] Orts y Esquerdo, "La locura ante los Tribunales…", p. 9: "The mentalists in favor of absolute irresponsibility, even in trials where the existence of insanity offered doubts, have dared to sustain irresponsibility. If to this is added the pretension of other alienists to believe that every criminal act obeys pathological impulses, nothing more is needed for the Magistrate, who cannot judge in this matter by his own opinions, by personal observations, and is obliged to form his criterion by the testimony of others, to deduce that the phrenopaths have a decided tendency to let criminals evade justice."

[69] Orts y Esquerdo, "La locura ante los Tribunales…", p. 9: "So that, in this disagreement between phrenopathy and those in charge of judging delinquents, as much or more blame than the Magistrates with their natural and logical ignorance of mental disorders, have the phenopaths with their daring pretensions."

[70] Orts y Esquerdo, "La locura ante los Tribunales…", p. 10.

[71] Orts y Esquerdo, "La locura ante los Tribunales…", p. 11: "But, we will be asked: has such a transaction been obtained by imposing phrenopathy on those in charge of applying the Code? No way. This cordiality of relations reigns only between the mentalists in favor of attenuated responsibility and the Magistrates; but the phrenopathic defenders of absolute irresponsibility continue as divorced as before from the Magistrates due to their obstinate persistence in defending idealistic theories or doctrines; and, of course, to an excess of radicalism on the part of the alienists, there corresponds an exaggeration of reaction on the part of the jurisconsults; while the former persist in their line of conduct, the latter will not abandon their resistance and opposition to radical phrenopathy opinions."

[72] Orts y Esquerdo, "La locura ante los Tribunales…", p. 11: "It also influences [...] in the prejudice that judges form regarding mentalists, the concepts that some phrenopaths have expressed, who

Orts recognized that this issue concerns criminal anthropology, but he was inclined to briefly touch upon the matter with "very brief words."[73] He criticized Lombroso's "imaginary type, ideal, fantastic (…) of born criminal," the identification between criminality and madness, and maintained that such "relationship between criminality and madness does not currently have a real existence."[74]

Orts pointed out the existence of two different kinds of madness, a medical and a legal one. Such distinction was so important that there might be someone who is mad from a clinical perspective, but fully responsible from a legal standpoint. In short, someone might be clinically mad but legally responsible. In those cases, medical examiners should manifest to magistrates that a criminal act committed by a mad person "enters in fact within the molds of sanity."[75]

In addition, Orts lamented the speed – in just ten or fifteen minutes – with which the alienists usually detect the insanity of the accused, without taking the trouble to "find out the entire court records, collect precise and exact data about how the crime was committed, check the mental state of the defendant with various and repeated somatic and psychic explorations."[76] On other occasions, they contradict each other based on the interest of each of the parties (for example, in a civil process of incapacitation), which leads the magistrates to dispense with such biased opinions.[77]

In other cases, he understands that the lawyers may also be partly to blame. Thus, for example, when resorting to madness as "the supreme resource to which the counsel can resort to when it is helpless of any other means of salvation."[78] In these cases, instead of "supporting the exonerating or mitigating factors they allege on subtleties, sophistry, and erroneous interpretations of secondary facts," they should rather abide "completely by the doctor's opinion when the insane person's responsibility is invoked," thus adhering "to the benefits of art. 8 of title I of our Criminal Code, so that in this way they do not lend themselves to wrong interpretations with incomprehensible forms of defence."[79]

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have come to consider every crime as a pathological fact, to the point of making the dividing line that should exist disappear between the truly insane and criminal act."

[73] Orts y Esquerdo, "La locura ante los Tribunales…", p. 11.

[74] Orts y Esquerdo, "La locura ante los Tribunales…", p. 11: "Lombroso came to create an imaginary type, ideal, fantastic in our opinion, of born criminal, to which he granted an atavistic genesis, then teratological, and, finally, [...] insane; thus passing the anthropological creation of it to become a moral madness. That such a type of born criminal is a mere phantom, the majority of criminal anthropologists outside of Italy have sufficiently demonstrated to Lombroso [...]; and [...] the existence of moral madness is a mirage of cabinet phrenopaths [...]. Thus, this link between criminality and insanity has no actual existence, let alone a positive reason to be admitted."

[75] Orts y Esquerdo, "La locura ante los Tribunales…", p. 12: "[t]here is a legal madness and a medical one, and we cannot go to the Courts with the latter's criteria, because there are individuals who are perfectly mad in the clinical concept, and sane as regards their criminal responsibility. We can, and moreover, must on certain occasions prescribe a curative plan to cure an impulsive obsession or a delusional aberration of an insane person, and at the same time declare him responsible for the crime or attack committed, because we are dealing with an individual who is medically, but not legally, insane. As medical examiners, we will see that the criminal act committed enters in fact within the molds of sanity, and so we must manifest it to the Magistrates."

[76] Orts y Esquerdo, "La locura ante los Tribunales…", p. 14.

[77] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 14-15.

[78] Orts y Esquerdo, "La locura ante los Tribunales…", p. 15.

[79] Orts y Esquerdo, "La locura ante los Tribunales…", p. 15.

In chapter II (entitled 'Ultra-radical doctrine'), Orts deals with some of the ideas of those who defend the irresponsibility of the accused in all cases.[80] While the 'radical' doctrine defends "the absolute irresponsibility of the insane in all cases in which the mental illness is confirmed,"[81] the 'ultra-radical' doctrine understands that "every psychopathic disorder, no matter how insignificant and temporary, carries within itself a perfect right to enjoy the benefits of title I, art. 8 of our Criminal Code."[82] That doctrine was found only among some mentalists in Madrid, for whom "crime is a symptom of madness."[83] To the idea of considering any "crime as a symptom of madness," Orts replied that "[t]he crime is indeed a symptom, but from a sociological disease called delinquency."[84]

Orts y Esquerdo criticized the ultra-radical doctrine, despite its "humanitarian, excessively altruistic" approach, for being "in disagreement and opposition to that universal truth, consecrated by all legislation, by religions and by the various philosophical systems of the universe, that *man is free to decide between various options that challenge him in various ways at the time of performing an act, with the sole intervention of his will, and therefore, he is legally responsible for those actions which morality disapproves, and the Code punishes*."[85]

For the ultra-radicals, it was necessary to oppose the "wise conditional restriction" established in art. 8 CP 1870: "The imbecile and the madman are exempt from any criminal liability unless they have acted in an interval of lucidity." Faced with the pretence of considering the insane irresponsible in all cases, Orts defended the potential reasonableness of a criminal, stating that the insane may not be free in some areas but may be free in others:

"A partial madman is mad, completely mad in all acts included within the sphere of his drives or obsessions; but this same madman is perfectly sane and therefore responsible for his crimes in all acts foreign to his obsessions and impulses because they do not even minimally compromise his intellectual faculties and his will. Here we have therefore explained and justified that medico-legal understanding of madness and sanity."[86]

Orts argued that a madman can enjoy lucid intervals in which he can and must answer for his actions:

"The madman in his lucid intervals, in his lasting remissions, recognizes the free exercise of his mental faculties, enters into the full enjoyment of his civil rights and accurately assesses the pros and cons of all his actions; he is therefore criminally responsible for his crimes, just as

[80] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 18-34.

[81] Orts y Esquerdo, "La locura ante los Tribunales…", p. 19.

[82] Orts y Esquerdo, "La locura ante los Tribunales…", p. 19.

[83] Orts y Esquerdo, "La locura ante los Tribunales…", p. 22.

[84] Orts y Esquerdo, "La locura ante los Tribunales…", p. 21.

[85] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 22-23; italics are mine; and went one as follows: "what we can proclaim is that, with the restriction of irresponsibility to those cases that positively and undoubtedly deserve it, a coercive measure is imposed on that overflow of passions and bad instincts that, with their pernicious monstrosities, they come to disturb the social order; what we understand, finally, is that with the severe repression of crime and of all those who in fact are not within the medical-legal concept of true madman, criminality will decrease and social order will be guaranteed, which would not happen otherwise if we accept in all its parts the doctrine that we are going to analyze succinctly."

[86] Orts y Esquerdo, "La locura ante los Tribunales…", p. 23.

civilly he has the perfect right to enjoy all the pre-eminence of any citizen; because remission and the lucid interval are temporary states of healing, during which reason is not clouded, the insane person in remission can be considered as not insane for civil and criminal purposes. In the same way that we would have no problem signing a certificate authorizing the validity of a contract or will made by a madman in remission, we would not hesitate to demand full responsibility or its attenuation for a criminal act, and in this way we would at least be consistent."[87]

In order to corroborate this thesis, Orts resorted to the French authority who fervently defended the absolute irresponsibility of the madman, Falret, who, in his work *Les aliénés et les asiles des aliénés*, stated that "the most convinced supporters of the irresponsibility of all the insane, whatever the variety of their delusion, are forced to recognize that legal responsibility and civil capacity can reappear during periods of momentary suspension of the disease."[88]

Regarding mitigating factors, Orts dealt critically with the ultra-radical claim that declared the irresponsibility for crimes committed by women under the influence of menstruation.[89] In order to refute this claim, he resorted to the work of the French Séverin Icard and his work *La femme pendant la période menstruelle*,[90] in which he expressly denied that the medical declaration that a crime has been committed in that period is sufficient to exonerate her author from criminal responsibility. Otherwise, Icard points out, "[t]his would be to openly protect vice and open an easy path for it. We would soon see some women at the time of their menstruation to give themselves freely to their bad instincts, and immediately take advantage of their menstrual state to claim impunity."[91] Analogous argument was used with respect to the pregnant woman,[92] as well as the woman who commits a crime under the effects of childbirth.[93]

Orts also touched upon other possible mitigating causes (neurosis, epilepsy and hysteria, among others.[94] On the hysteria, he pointed out that "[t]he hysteria is so generalized in women, that requesting the attenuation, due to suffering from neurosis, is equivalent to requesting the reduction of the sentence of all feminine crimes."[95] For Orts, the case of the epileptic is the most complex, being "doubtful, to a certain extent, the appreciation of their individual freedom, or their unconsciousness when carrying out any criminal act."[96] In his opinion, these cases must be analyzed one by one.

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[87] Orts y Esquerdo, "La locura ante los Tribunales…", p. 24.

[88] Orts y Esquerdo, "La locura ante los Tribunales…", p. 24.

[89] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 26-27; nowadays, this is called PMS (premenstrual syndrome), which most women suffer. It may reach the point of a serious condition: premenstrual dysphoric disorder, which has indeed been considered a mitigating factor by Courts.

[90] Icard, S., *La femme pendant la période menstruelle; étude de psychologie morbide et de médecine légale*, Paris, 1890.

[91] Orts y Esquerdo, "La locura ante los Tribunales…", p. 26.

[92] Orts y Esquerdo, "La locura ante los Tribunales…", p. 27.

[93] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 28-29.

[94] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 30-33.

[95] Orts y Esquerdo, "La locura ante los Tribunales…", p. 31; note that in the nineteenth century hysteria was considered a diagnosable physical illnes in women. It is assumed that the basis for diagnosis operated under the belief that women are predisposed to mental and behavioral conditions; on this matter, see Chodoff, P., "Hysteria and women", *The American Journal of Psychiatry* 139 (5) (May 1982), pp. 545-551.

[96] Orts y Esquerdo, "La locura ante los Tribunales…", p. 32.

The problem with ultra-radical phrenopathy is that being, "for the most part, very respectable in the clinical aspect, perhaps they know how to *medically* observe, in an excellent and masterful way, the insane; (...); but, lacking medico-legal knowledge, they are left incomplete when they try to apply their clinical experience to forensic medicine."[97]

To the 'Radical School' Orts devoted chapter III.[98] Such school was made up of those who maintain that "[e]very alienated person is irresponsible for the criminal acts committed by him,"[99] without the need to "search for the motives that preceded the criminal act, the manner in which it was carried out and other circumstances accompanying the criminal act."[100] Although few remain after the work of Tardieu and Legrand du Saulle, who opted for partial irresponsibility, other authors continued to defend the absolute irresponsibility of the madman: Falret and Cullerre in France, Griesinger in Germany, Mattos in Portugal, Gine and Galcerán in Spain.[101]

In this regard, the different legal regime of the French criminal code (FCC) with respect to the Spanish one (SCC) is highlighted. Indeed, while the SCC required the expert to declare in his opinion whether the offender was able to act "within a reasonable interval,"[102] the French model was less demanding when stating that "[t]here is no crime or misdemeanor if the defendant was insane at the time of the act."[103]

This explains why Falret, the great defender of the thesis of the absolute irresponsibility of the madman, pointed out that the only task of the forensic doctor was to know if "[t]he individual under examination was insane or healthy in spirit at the time of committing the act for which he was accused."[104] Such an opinion was indeed in line with the requirement of the French CP, but not with the Spanish text, as Orts rightly stressed.[105] From there, Orts described and refuted some of the arguments put forward by the members of this School.[106]

In chapter IV ('Fundamentals of the opportunist doctrine'), Orts described the 'opportunist' doctrine, or the so-called 'attenuated responsibility' doctrine, led by Casper and Tardieu.[107] In his view, such doctrine came "to resolve in fact the conflicts [...]) between the phrenopaths and the Judiciary."[108] Orts disagrees with the German Casper, the French Molinier and the majority of the Spanish magistrates, who maintained – mistakenly, in his opinion– that "the partial madman, the monomaniac, must be declared responsible for all the crimes committed by him."[109] He did share the thesis of Tardieu

[97] Orts y Esquerdo, "La locura ante los Tribunales…", p. 33.
[98] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 35-45.
[99] Orts y Esquerdo, "La locura ante los Tribunales…", p. 35.
[100] Orts y Esquerdo, "La locura ante los Tribunales…", p. 35.
[101] Orts y Esquerdo, "La locura ante los Tribunales…", p. 35.
[102] Art. 8 in fine SCC 1870.
[103] Art. 65 FCC 1810.
[104] Orts y Esquerdo, "La locura ante los Tribunales…", p. 36.
[105] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 36-37.
[106] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 37-45.
[107] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 46-53.
[108] Orts y Esquerdo, "La locura ante los Tribunales…", p. 46.
[109] Orts y Esquerdo, "La locura ante los Tribunales…", p. 46.

(France), Damerow (Germany) Taylor (England), as well as of other authors who accepted this doctrine (Legrand du Saulle, Ball, Motet, Voisin, Blanche, Vibert, Magnan and Garnier, among others).[110] For Orts, "the instructive fact that most of the mentalists currently defending this school have previously been resolute supporters of absolute irresponsibility, but their contact with the courts has taught them the essential need to modify their clinical criteria in medico-legal expert opinions."[111]

Based on his agreement with the *practical doctrine*, Orts understood, following the "immortal medical-legal doctor Dr. Mata", that art. 8 SCC 1870 required that the examination would not be limited "to verifying the mental state of the defendant at the time of committing the crime, but must also study the degree of moral freedom that he may have enjoyed at the time of the criminal act, and conclude from this examination if the criminal act was sane or insane, to decide for responsibility or irresponsibility."[112]

After stating that this thesis then enjoyed the greatest prestige among mentalists and medical examiners, Orts delved into the foundations on which it is based.[113] Thus, for example, he rejected Galcerán's criterion, according to which it would only be necessary to know whether or not the offender is insane "to conclude irresponsibility or punishment."[114] He also criticized the problem of the graduation of the penalty applicable in cases of intermediate madness, as a consequence of demanding irresponsibility for the insane and the penalty for the sane.[115] In his opinion, the opportunistic doctrine allows dealing with intermediate cases, as well as those of 'degenerative alienation'[116] and epileptics.[117]

Not satisfied with having defined and described the 'opportunistic doctrine,' Orts devoted the last chapter to show the variety of advantages of such school to which he felt ascribed.[118] In doing so, he criticized the ultra-radical doctrine of some frenopaths, showing the incongruence of "of preaching one principle and practicing the opposite." More specifically, Orts could not understand how a madman might be subject to responsibility for the evil he/she had done inside the asylum and not outside or inside society.[119] For Orts, the coercive measures applied to a mad person do not pursue his/her

[110] Orts y Esquerdo, "La locura ante los Tribunales…", p. 47.

[111] Orts y Esquerdo, "La locura ante los Tribunales…", p. 47.

[112] Orts y Esquerdo, "La locura ante los Tribunales…", p. 48.

[113] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 48-53.

[114] Orts y Esquerdo, "La locura ante los Tribunales…", p. 47.

[115] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 49-50.

[116] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 50-51.

[117] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 51-53.

[118] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 54-63.

[119] Orts y Esquerdo, "La locura ante los Tribunales…", p. 54: "It is appropriate to ask now: if inside the asylum you hold the madman accountable for his acts and you practice this doctrine daily, why should you oppose so resolutely that even less than that be done in society? If the madman is the same in and outside the asylum, you have to be consistent, and what you do in your clinics you must proclaim outside.

In our view, there are no more incomprehensible things in our social customs than that inconsistency, proverbial in all branches of human knowledge, of preaching one principle and practicing the opposite. We would applaud the ultra-radical phrenopaths if, in their madhouse, they abode absolutely by this doctrine of irresponsibility; but frankly, we find it anomalous, absurd and inconsequential that an alienist goes to the chair to support the doctrine of absolute irresponsibility, shortly after having ordered a madman to be put in a straitjacket, because he has been insulted by him."

healing or improvement, but to repress his/her acts in order to somehow prevent repetition. In short, a certain degree of accountability shows the madman the convenience not to repeat that act. He maintained that the idea that the goal of punishment is just the healing of the convicted was "unfounded."[120] In this line of thought, he fully agreed with Jules Voisin, who maintained that "when you are in the presence of an idiot or imbecile individual who has committed a criminal act, you will decide mitigated responsibility or a complete irresponsibility, depending on the nature of the crime and according to the education he had received."[121]

Orts argued that the medicine of the mind was advanced enough to know how each kind of insane commits crimes, being relatively easy to ascertain whether the delinquent should or not be responsible for what he/she did.[122] Hence the matter could be clearly elucidated by mentalists through "a thorough examination of the criminal act and the mental state of the defendant […], without fear of wrong interpretations."[123] And he added:

> "The data provided by mental medicine are so conclusive, as regards the manner in which the insane commit their crimes, that having reservations and maintaining doubts about this point, further implies ignorance of the legal medicine of madness or school exclusivism, which exposes truly insoluble phrenic problems."[124]

Orts recognized that the doctrine of attenuated responsibility posed problems to mentalists in examining the cases and drafting their reports since they were supposed to study i) the existence of insanity, and ii) the degree of free will the delinquent enjoyed in the precise moment he/she committed the criminal act. In doing so, medical experts were focusing just on the medical-legal domain, not in the criminal law one.[125] "But does this

[120] Orts y Esquerdo, "La locura ante los Tribunales…", p. 54: "On more than one occasion, just like other doctors, we have applied a coercive measure to contain the excesses of any insane person, not to cure him, because we were not going to cure a paralytic, an epileptic madman, a delusional, a psychopath suffering from Magnan's syndrome, etc., since all these diseases are incurable, but to repress the madman, and prevent him from giving himself over to his morbid impulses; and, we repeat, without this small responsibility, anarchy would be absolute within the asylum and there would be no possible means of subjecting the alienated to a good regimen. If we discount the straitjacket applied to the onanist, surely there is no other curative application of that kind of device. In all the other cases that the Physician applies repressive measures, it is in order to demand a small responsibility from the madman. Therefore, the observation that punishment is imposed just to heal is unfounded."

[121] Orts y Esquerdo, "La locura ante los Tribunales…", p. 54, citing the then recently published work by Jules Voisin, *L'Idiotie* (A. Alcan, 1893).

[122] Orts y Esquerdo, "La locura ante los Tribunales…", p. 56: "Mental medicine clearly teaches us how the alienated carry out their crimes, and with its lessons we can accurately specify, with only the reading of the summary and the statement of the detainee, to which category of madmen that particular attack belongs to. Later, if the somatic and psychic examination of the defendant indicates the same mental illness that results from the criminal act, we are in a case of suggesting irresponsibility; but if the defendant offers us the symptomatic appearances of a lipemaniac and the criminal act has had all the characteristics of the epileptic event, then the doctor should not rule irresponsibility…"

[123] Orts y Esquerdo, "La locura ante los Tribunales…", p. 56: "We understand, contrary to the radicals and ultra-radicals, that a thorough examination of the criminal act and the mental state of the defendant is enough to know exactly the nature of the crime, without fear of wrong interpretations."

[124] Orts y Esquerdo, "La locura ante los Tribunales…", p. 56.

[125] Orts y Esquerdo, "La locura ante los Tribunales…", p. 57: "Undoubtedly, with our doctrine of attenuated responsibility, the work of the expert becomes more complicated, having to respond to the two aspects with which he appears before the Court. As a phrenopath he will diagnose madness; he will see if it is simulated or dissimulated, thus performing a purely clinical work. Afterwards, as a forensic expert, he

mean, or does it require the creation of new criminal legislation?" asked Orts. And he answered as follows:

"No way. Here in Spain, only with the first paragraph of articles 8 and 9 of our Criminal Code, we have enough to legally apply the responsibility of the insane, and the same happens in all countries; therefore, such new legislation is not necessary."[126]

Furthermore, for Orts, such legislation enabled the implementation of the doctrine of attenuated responsibility, a criterion that "further enhances the medicine of the mind" because it involves the hard work of "[a]ppreciating the sane or insane character of a crime," which "is something more difficult and that indispensably demands a complete and profound knowledge of the madness, an exact verification of the mental state of the defendant and a comparative study of his syndrome and of the characteristics of the crime"; this work could only be performed by the "phrenopath and no one else, not even the simple doctor."[127]

After examining all the existing doctrines, "which one will we accept?," asked Orts. For him, the answer was clear because only with the attenuated responsibility "society is better guaranteed and more in line with our criminal Code and with modern phrenopathy conquests."[128] And he continued by asking himself: "What does this opportunistic doctrine consist of? What are its fundamental principles?"

Orts could not help repeating and briefly specifying "the primordial principles of the opportunistic doctrine (…) in a few words. They are the following":[129]

1. When the individual presents obvious symptoms of madness, whether general or partial, and the criminal act has all the characteristics corresponding to that madness, request absolute irresponsibility
2. If the individual is an imbecile, partially insane, epileptic, hysterical or generally paralyzed in the prodromal stage, and the criminal act does not belong to the category of facts proper to the mental condition suffered, request either the attenuation of responsibility or full

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will analyze the degree of moral freedom that the defendant enjoyed at the time of the action, to come to know if the criminal act was sane or insane, thus responding to the medical-legal part and not the law, as the radicals suppose."

[126] Orts y Esquerdo, "La locura ante los Tribunales…", p. 57.

[127] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 57-58: "Furthermore, the criterion that we, supporters of the doctrine of attenuated responsibility hold, exalts mental medicine more. Limiting oneself to verifying the mental state of the defendant, as the radicals maintain, is something that any old patient in an insane asylum could do. Appreciating the sane or insane character of a crime is something more difficult, which indispensably demands a complete and profound knowledge of the madness, an exact verification of the mental state of the defendant and a comparative study of the syndrome presented by him and the characteristics of the crime, a tough job, which can only be performed correctly by the true phrenopath and by no one else, not even the general practitioner, because he cannot know the clinical characteristics of the maniac, lipemanic, paralytic, hysterical, choreic, epileptic, imbecile, degenerative, impulsive, hallucinatory, delusional, etc."

[128] Orts y Esquerdo, "La locura ante los Tribunales…", p. 60: "Exposed the principles of all the doctrines, which one will we accept? We do not hesitate to proclaim that of attenuated responsibility, because with it society is better safeguarded and more in line with our criminal Code and with modern phrenopathy conquests."

[129] Orts y Esquerdo, "La locura ante los Tribunales…", p. 60: "We have said it repeatedly in the course of this work, and it would almost be useless to repeat it now; however, to briefly specify the primordial principles of the opportunistic doctrine, we are going to repeat it in a few words. They are the following: ..."

responsibility, according to the minor or major participation that the pathology of the accused may have had in the commission of the crime.

3. The fact of suffering from a neurosis, pregnancy, childbirth, etc., can only be invoked as mitigation of responsibility in cases in which the neurosis or degenerative organization of the defendant has a direct relationship with the nature and the way of carrying out the crime."[130]

Only with that doctrine – Orts pointed out – "irreconcilable divergences between the phrenopaths and the Magistrates" would definitively end.[131]

For that to be possible, though, a ruling of the Spanish Supreme Court needed to be changed. In this vein, it has established, in one of its rulings, that, "having rejected the defense of insanity, the mitigating or attenuating circumstances could not be accepted for the same case."[132] For Orts, considering the content of the provision concerning the mitigating circumstance and art. 8 referring to the defence of the insane and the imbecile, that ruling of the Supreme Court was not in line with these criminal Code provisions.[133] Even more, such ruling was not only contrary to legislation but also to the advancement of medical sciences because there were many cases in which "the Medical expert can neither request irresponsibility nor the responsibility because the first would be excessive benevolence and the second exaggerated severity"; in such cases, "he must be irrevocably forced to request a mitigation of responsibility, the only way to rule according to his science and conscience."[134] For Orts, the conclusion was undeniably crystal clear:

"If all the alienists in our country accept and defend the principles of the opportunistic doctrine, we are sure that those conflicts between the phrenopathy and the Judiciary will disappear forever from the state of the Courts."[135]

3.2. Criminal law science domain: the rise of the principle of dangerousness

As it was seen at the beginning of this chapter, the disagreement between Figuerola Ballester and Groizard y Gómez de la Serna, both lawyers and law professors, reflected the confrontation of two ways of understanding the foundations of criminal law

[130] Orts y Esquerdo, "La locura ante los Tribunales…", pp. 60-61.

[131] Orts y Esquerdo, "La locura ante los Tribunales…", p. 61: "With this doctrine it can be affirmed that those irreconcilable divergences between the phrenopaths and the Magistrates have ended, so as not to return."

[132] Orts y Esquerdo, "La locura ante los Tribunales…", p. 62: "The Supreme Court, in one of its rulings, has established the jurisprudence that, having rejected the defense of insanity, the extenuating circumstance cannot be accepted for the same case."

[133] Orts y Esquerdo, "La locura ante los Tribunales…", p. 62: "Now it's up to us to note that the Criminal Code says: "The following are mitigating circumstances: 1º Those expressed in the previous chapter, when all the requirements to exempt from responsibility in their respective cases are not met." In this previous chapter to which it refers, which is none other than article 8, the defense of the insane and the imbecile is included, and therefore, either we are very obfuscated, or the Supreme Court does not adhere to the written law in the referred sentence."

[134] Orts y Esquerdo, "La locura ante los Tribunales…", p. 62: "Such an erroneous interpretation must disappear from the Judiciary and it must abide by the articles of the Criminal Code as a whole, because, as we have tried to demonstrate in the course of this work, there are cases in which the Medical expert can neither request irresponsibility or responsibility, because the first would be excessive benevolence and the second exaggerated severity, and he must be irrevocably forced to request a mitigation of responsibility, the only way to rule according to his science and conscience."

[135] Orts y Esquerdo, "La locura ante los Tribunales…", p. 62.

and the purpose of punishment. Figuerola Ballester, who was not a criminal lawyer, knew the new doctrines that claimed for a criminal law more focused on eradicating danger than on the principle of culpability, which brought the discussion to the metaphysical issue of the free will of the accused, instead of bringing the discussion to the practical issue of how to protect society from those people who threaten social peace.

Although the reception of positivism in late-nineteenth-century Spain did not have a significant legislative impact,[136] in the early twentieth century such doctrine contributed to the rise of the principle of dangerousness thanks to the works of Pedro Dorado Montero and his admirers Quintiliano Saldaña and Luis Jiménez de Asúa. Not all criminal lawyers of the first half of the twentieth century endorsed this thesis or expressed it in a radical way as Saldaña and Jiménez de Asúa did. In order to show this part of the criminal law doctrine, I'll analyze some works written by two well-known criminal law professors of that period, Enrique de Benito and Mariano Ruiz-Funes.

3.2.1. Pedro Dorado Montero

As stated above, Pedro Dorado Montero defended that criminal law should become an instrument of protection for all against criminals."[137] His work enjoyed a high scholarly authority among some positivist criminal lawyers such as Quintiliano Saldaña and Luis Jiménez de Asúa. Although an important part of Dorado's work was written and published in the nineteenth century, part of it came out in the twentieth century. On the insane and the role of medical doctors in criminal trials, for example, he wrote the book *Los peritos médicos y la justicia criminal* (Madrid: Reus, 1906); chapter IV was entitled "Errores judiciales – Locos condenados por los tribunales."[138]

For Dorado Montero, "in the problem [...] of psychiatric experts, I see represented the whole problem of the administration of criminal justice."[139] And he added a summary of his main thesis as follows:

> "To deal with the fundamental problem of criminal law, that is, the way in which men should exercise their so-called penal power correctly over their fellow men, and to deal with the problem of medical-psychiatric expertise is, in a certain way, the same thing."[140]

Dorado pointed out that mistrust between judges and psychiatrists unfortunately did not exist only in Spain, but in many other countries. He maintained that many insane were convicted, just because judges were not willing to "open their eyes to the teachings of truth."[141] As a consequence,

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[136] Masferrer, "The reception of the positivist School in the Spanish criminal law doctrine (1885-1899)", fn nr. 12; see also Roldán Cañizares, E., "From the Sacred Springtime of Criminal Law to the Limits of Criminological Positivism in Spain", *The Limits of Criminological Positivism. The Movement for Criminal Law Reform in the West, 1870-1940* (M. Pifferi, ed.), Abingdon: Routledge, 2022, pp. 135-153.

[137] See the references contained in fn nrs. 6 and 7.

[138] I use a version of that chapter published in the journal *Reis* 47/89, pp. 263-282 (available at https://dialnet.unirioja.es/servlet/articulo?codigo=249340).

[139] Dorado Montero, "Errores judiciales – Locos condenados por los tribunales", p. 264.

[140] Dorado Montero, "Errores judiciales – Locos condenados por los tribunales", p. 264.

[141] Dorado Montero, "Errores judiciales – Locos condenados por los tribunales", p. 265: "They censure their opponents because they do not want to open their eyes to the teachings of the truth and because with them they are unjustly causing numerous victims."

"Many of those considered as criminals, and even as hopeless, depraved and incorrigible criminals, are nothing but abnormal, deficient, insane, incapable, weak in spirit for this or that reason, and more in need, therefore, of a suitable therapeutic, prophylactic and protective treatment that enables, invigorates and strengthens them, than deserving of the penal rigor to which they are subjected."[142]

Dorado defended that the incorrigible delinquent and recidivists needed the treatment of a medical doctor rather than being prosecuted and convicted by judges.[143] However, the gravest – and most frequent – injustice was, as psychiatrists "also unanimously" recognized it, the case of the 'insane delinquent' (in Spanish, 'locos delincuentes'),[144] who were unacceptable.[145] At this point, Dorado continued the chapter with an account of particular cases that occurred in other countries and also in Spain,[146] where "there is no doubt that the current administration of justice is committing, as it is working, many injustices."[147]

However, the evidence given by Dorado Montero about Spain is notably weak in comparison with that he showed about other jurisdictions. In fact, at some point, after describing what was happening in other countries, he added:

"It is to be expected that the same thing happens in Spain as in other countries and perhaps to a greater extent due to the little cultivation that psychopathology has among us and the consequent little appreciation and use of its teachings. I know, however, little data on the subject, and I am unaware of any ad hoc studies that have been published. Mr. Salillas has long announced one, but it has not come to light, having seen only a sketch of it so far."[148]

He first dared to declare, in a categorical way ("no doubt"), the "many injustices" perpetrated in the Spanish administration of criminal justice, but later on, he recognized that had "few figures" or "little evidence" on the matter. The chapter went on describing more cases – again, the majority of them from outside Spain –,[149] taking for granted that these were not "isolated or exceptional" cases, but rather "symptomatic of a general, persistent and organic state of things."[150]

3.2.2. Quintiliano Saldaña

[142] Dorado Montero, "Errores judiciales – Locos condenados por los tribunales", p. 265.

[143] Dorado Montero, "Errores judiciales – Locos condenados por los tribunales", p. 266.

[144] Dorado Montero, "Errores judiciales – Locos condenados por los tribunales", p. 266.

[145] Dorado Montero, "Errores judiciales – Locos condenados por los tribunales", pp. 267-268.

[146] Dorado Montero, "Errores judiciales – Locos condenados por los tribunales", p. 268-275 (for other countries), pp. 275-277 (for Spain).

[147] Dorado Montero, "Errores judiciales – Locos condenados por los tribunales", p. 272.

[148] Dorado Montero, "Errores judiciales – Locos condenados por los tribunales", p. 275; he was referring to the article by Salillas, R., "Los locos delincuentes en España", *Revista General de Legislación y Jurisprudencia* 94 (1899), pp. 117 ff.

[149] Dorado Montero, "Errores judiciales – Locos condenados por los tribunales", pp. 277-282.

[150] Dorado Montero, "Errores judiciales – Locos condenados por los tribunales", p. 282: "It cannot be assumed that these are isolated and exceptional cases; it is clear that this is not the case, but on the contrary, those that are exposed have the significance of mere examples and denouncing symptoms of a general, persistent and organic state."

Quintiliano Saldaña, in his work *Modern criminal conceptions in Spain*,[151] touched upon the purpose of punishment. After a historical overview of the sense of purpose of sentencing and, more specifically, of the individualization of the sentence,[152] he dealt with the doctrine of the purpose of the sentence (*Zweckstrafe*), resorting to the German criminal lawyer Franz von Liszt, of whom Saldaña was a disciple.[153] In his opinion, "the penalty of deprivation of liberty obtains its highest value when it manages to free the prisoner, already rehabilitated; that is, to return him educated for life in freedom."[154]

Saldaña's thesis on the need for a punishment that really prevented the convicted to commit a crime was radical, even more radical than those he resorted to. At some point, he asked himself: "How long will the sentence serve the purpose of neutralization[155]?". Citing Von Liszt statement that "As soon as the offender's act shows a strongly ingrained criminal predisposition […] one must attend to the security of the legal order by neutralizing the offender,"[156] he added:

"So *what determines the approach of innocuousness is not the seriousness of the particular act carried out, nor the action criminally sanctioned by law, but the dangerousness of the offender* (*Gefärhligkeit*). At this point, the problem arises as to whether society has the right to proceed against an antisocial member, whose danger is evident before any penal law has been violated. Liszt himself has not gone so far as to deduce this consequence from this theory either. For him, criminal law continues to be the forced legal limit of the punitive Power of the State, the bulwark for the defense of the individual against the tyrannical rule of the majority, the Leviathan."[157]

As Saldaña argued, when pursuing innocuousness, the relevant criterion was not the seriousness of the crime, but the dangerousness of the offender. This is why he lamented that Von Liszt did not go further in applying coercion even before the crime was committed. However, he praised Prins for having "extended the right of social defence to cases in which society needs to apply coercion against the individual to prevent future crimes."[158] And he added:

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[151] Saldaña, Q., *Modernas Concepciones Penales en España. Teoría Pragmática del Derecho Penal*, Madrid: Editorial Calpe, 1923, pp. 65-107.

[152] Saldaña, *Modernas Concepciones Penales en España*, pp. 72 ff.

[153] Saldaña, *Modernas Concepciones Penales en España*, pp. 83-96.

[154] Saldaña, *Modernas Concepciones Penales en España*, p. 91.

[155] Although the literal translation would be 'innocuousness', I use the word 'neutralization' in the sense of: "Neutralization, through isolation or elimination, of the criminal who cannot be reinserted into society, with the aim of preventing him/her from committing criminal offences."

[156] Here Saldaña cited the work of Von Liszt, *Lehrbuch*, paragraph 16, II, 5; 1c., 84.

[157] Saldaña, *Modernas Concepciones Penales en España*, pp. 93-94; italics are mine.

[158] Saldaña, *Modernas Concepciones Penales en España*, p. 94, citing the work of Prins, *La défense sociale et les transformations du droit pénal*, chapter VI, paragraph 1, Bruxelles, 1910, pp. 141-156 (in the Spanish translation by F. Castejón, Madrid: Reus, 1912, pp. 139-152); Saldaña seems to misread von Liszt, since, as Luis Jiménez de Asúa pointed out, "he even considers certain individuals who have not yet committed a crime to be in a dangerous state: such…dangerously insane" (see fn nr. 181). In this vein – curiously enough –, Saldana seems to invert the positions between Prins and von Listz; see how Karl Härter also argues that von Liszt was precisely going in the direction of applying security measures and police surveillance to dangerous insane persons before a crime was committed; he also evokes on this point the criticism of the German system by Prins and the French one in 1905 (on this matter, see Härter's article entitled "Insane Offenders, Dangerous Criminals, Criminal Responsibility and Security Measures:

"I also follow the orientation of Prins, but I believe that this right of society must go beyond the limits of the currently permitted cases, namely: forced education, and internment in an asylum for the insane and abnormal."[159]

After praising Prins for accepting the possibility of imposing punishments or "coercion against the individual to prevent future crimes," Saldaña lamented that Ferri did not admit such "ultimate consequence": for Ferri, "only when the antisocial has carried out an act prohibited in the Criminal Code can a penalty be imposed on him."[160]

Saldaña seems to misread Prins' doctrine since the Belgian criminal lawyer did not admit the possibility of punishing before the commission of the crime either. The reader might check and see for him/herself the chapter where Prins supposedly – at least, for Saldaña – admitted the "ultimate consequence."[161] Although the title of the chapter ("De l'état dangereux avant le délit") might give the impression that Prins was indeed discussing a possible criminal intervention before the commission of a criminal act, that was not the case. In those pages, in which – for Saldaña – Prins admitted such intervention (pp. 141-169),[162] Prins only discussed in a very classical way for the time the need for implementing protective intervention against abnormals, degenerate or dissocialized children, conceived as "the nest of future delinquents" (in French, "La pépinières des classes dangereuses"). In doing so, Prins only asked for the implementation of the "protectional Justice model" for juveniles that came indeed into force in many countries at that time, in Belgium through a law of 1912. Although it is true that in such a model, in the name of 'protection', the justice intervention was authorized before the commission of any criminal act by the juvenile, this went along with a 'decriminalization' of the justice intervention, which was officially replaced by 'protective measures' (rather than by criminal intervention). Unlike Prins, Saldaña sought to achieve the innocuousness of dangerous people in the criminal law domain, not through non-criminal 'protective measures.'

For Saldaña, the concept of innocuousness was to be accepted, developed and implemented in criminal law. In this vein, he endorsed Von Liszt's proposal of resorting to "a safe boarding school that absolutely guarantees the isolation of the dangerous criminal from Society, as long as his dangerous state subsists."[163] Such measure

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The Network of Positivist Criminology and the Reform of Criminal Law in Imperial Germany", published in this issue of *GLOSSAE. European Journal of Legal History*).

[159] Saldaña, *Modernas Concepciones Penales en España*, p. 94.

[160] Saldaña, *Modernas Concepciones Penales en España*, p. 94: "Instead, in the Latest Preliminary Draft of the Italian Criminal Code, prepared by Ferri, this ultimate consequence is not admitted. According to him, only when the antisocial has carried out an act prohibited in the Criminal Code can a penalty be imposed on him. Only in the special structure of this applied penalty does the dangerous character of the agent find expression. The title of the Italian Draft speaks of a Criminal Code 'for crimes', not of repression against dangerous criminals. Hence, to the new Italian Criminal Code, a Code on police offences will probably be added – albeit broken down. In this field, therefore, the penalties would not have any application. And yet, it may be precisely a fault that reveals a dangerous state, perhaps a serious one due to its circumstances…."

[161] Adolphe Prins, *La défense sociale et les transformations du droit penal*, Bruxelles, 1910, chapter "De l'état dangereux avant le délit" (available at https://gallica.bnf.fr/ark:/12148/bpt6k58219746/texteBrut).

[162] See fn nr. 156.

[163] Saldaña, *Modernas Concepciones Penales en España*, pp. 94-95: "Once again we refer to Liszt and to the possibility that criminal law accepts and develops the concept of neutralization [or

encounters two difficulties, namely, "the external organization" and "the relationship between guilt and […] dangerousness," which "often relate to, but they also often contradict, each other," as the German criminologist Adolfo Merkel had proved.[164] Saldaña also highlighted Liszt's awareness of the "the difficulties uniquely offered by the multiple intermediate states between chronic delinquency, psychopathic constitution and genuine psychosis" or, in short – in Von Liszt's words –, how to get the innocuousness "within the legal order, of the released convict, either in an *ad hoc* establishment, or in a section of the same establishment."[165]

As a general statement, Saldaña thought that "innocuousness is not *the* absolute end of the sentence, but *one* of its ends," with the exception of those who are incorrigible, as Von Liszt pointed out.[166] In fact, the difficulty of making a "clear distinction" between incorrigible and susceptible to social reintegration remained and [n]either has Liszt been able to say anything definitive about this."[167] After having focused on the innocuousness of dangerous people, Saldaña maintained that "[t]he ideal of future criminal law […] must be: not elimination, but determination [or reintegration]."[168]

Saldaña considered himself a legal pragmatist. As he explained, "[p]ragmatism is not deterministic; pragmatism believes in free will,"[169] and "[h]umanism consists simply in the awareness of a limitation: human limitation."[170] In his book, after rejecting various conceptions or versions of pragmatism (religious, logical, and ethical),[171] he leans

innocuousness] […] in a safe boarding school that absolutely guarantees the isolation of the dangerous criminal from Society, as long as his dangerous state subsists."

[164] Saldaña, *Modernas Concepciones Penales en España*, p. 95: "This is an issue of external organization, and the difficulty consists in the problem of the relationship between guilt and what, with a single word, we call dangerousness. Guilt and dangerousness often correspond, but they also often contradict each other. For example: in the multi-recidivist, or in the weak-spirited delinquent. The German criminologist Adolfo Merkel, demonstrated this contrast as no one else has."

[165] Saldaña, *Modernas Concepciones Penales en España*, p. 95: "Liszt also recognizes the difficulties uniquely offered by the multiple intermediate states between chronic delinquency, the psychopathic constitution and genuine psychosis. 'Although in this case it is possible to speak of diminished responsibility and attenuated application of penalties -he affirms-, the fundamental issue of innocuousness, within the legal order, the released convict remains, either in an *ad hoc* establishment or in a section of the establishment' [citing Von Liszt, *Lehrbuch*, paragraph 16, II, 5; 1 c., 84]").

[166] Saldaña, *Modernas Concepciones Penales en España*, p. 95: "Here is a general consideration: That innocuousness is not the absolute end of the sentence, but one of its ends. Single exception: in the case of an incorrigible. As early as 1882, he proclaimed von Liszt's thesis about 'incorrigible criminals' [citing Von Liszt, *Aufsätze und Vorträge*, I, 166, 170, 173]."

[167] Saldaña, *Modernas Concepciones Penales en España*, pp. 95-96: "A difficulty remains: how will we delimit, with clear distinction, the circle of the incorrigible and that of those susceptible to social reintegration? There is the easy check, as to the dangerous state of a man; but when can we justly pronounce his incorrigibility? Liszt has not been able to say anything definitive about this either. I have (p. 95) here just one undoubted thing: the increase or decrease of the circle of the incorrigible will be in inverse proportion to the educational progress of imprisonment."

[168] Saldaña, *Modernas Concepciones Penales en España*, p. 96: "The ideal of future criminal law, although it may seem unrealizable for the time being, must be: not elimination, but determination. That is, reintegration of the antisocial as a useful member of the Society; not his expulsion from it."

[169] Saldaña Q., "Guía de estudio para el pragmatismo", estudio preliminar de *Modernas Concepciones Penales en España. Teoría Pragmática del Derecho Penal*, Madrid: Editorial Calpe, 1923, pp. 5-54, in particular p. 25.

[170] Saldaña "Guía de estudio para el pragmatismo", p. 27.

[171] Saldaña, *Modernas Concepciones Penales en España*, pp. 101-102 (religious), pp. 102-103 (logical), pp. 103-104 (ethical).

towards 'legal pragmatism',[172] together with the conception of the Historical School of Law,[173] "for whom there is no other Law but 'the one that is lived,'"[174] a thesis that he accepted due to his inclination towards the *theory of efficient law* (or *theory of effective law*, if literally translated from the Spanish '*teoría del Derecho eficaz*'), rather than a 'fair law,' whose metaphysical basis – he thought – "denaturalizes the law."[175] He does not explain, though, how he combined his rejection of such metaphysical basis that "denaturalizes the law" with his belief "in free will." It might be because for him free will was just a belief, not something reasonable or that could be explained in a rational way.

Three years later, Saldaña gave a lecture in which he presented his legal philosophy again:

"... I profess the philosophy of pragmatism, which does not attach any value to truths, if they are not verified in practice by their results, by their consequences."[176]

In addition, he explained a bit more about his notion of "legal pragmatism," a formula derived from Jeremy Bentham:

"[It] establishes the useful distinction between the immediate, probably ephemeral, effects or results of an action, and its mediate and distant effects, that is, its lasting consequences. This doctrine is very demanding, that, in order to verify the truth in practice, it is not satisfied with successes without a future; he awaits the 'yield' of this truth in its ultimate consequences. From this point of view, each institution is a social and legal truth. Laws and courts, regulations and penalties, are legal institutions subject to this pragmatic control, in what we have called 'effective legal theory.'"[177]

3.2.3. Luis Jiménez de Asúa

Since – as said – "the discussion between free will and determinism is infertile for criminal law,"[178] Jiménez de Asúa maintained that such a problem should be left "to the field of Philosophy." And he added:

"What interests criminal lawyers is *the notion of potential dangerousness that the criminal represents for society*. From the moment that this state is verified, *there is a need to defend oneself, whether the act is free or determined, whether it comes from a responsible person or an incompetent person*. Later, when it comes to determining the kind of measure with which

[172] Saldaña, *Modernas Concepciones Penales en España*, pp. 104-105.

[173] Saldaña, *Modernas Concepciones Penales en España*, pp. 105-106.

[174] Saldaña, *Modernas Concepciones Penales en España*, p. 105.

[175] Saldaña, *Modernas Concepciones Penales en España*, p. 105.

[176] Saldaña, Q., *The Universal Social Defense* (Conferences of Paris, Rome and The Hague), Madrid: Editorial Center of Góngora, 1926, p. 10.

[177] Saldaña, *The Universal Social Defense*, pp. 11-12: "[...] establishes the useful distinction between the immediate, probably ephemeral, effects or results of an action, and its mediate and distant effects, that is to say, its lasting consequences. This doctrine is a very demanding one, which, in order to prove a truth in practice, is not content with successes without a future; it expects the 'yield' of this truth in its definitive consequences. From this point of view, every institution is a social and juridical truth. Laws and courts, regulations and penalties, are legal institutions subjected to this pragmatic control, in what we have called 'effective law theory'".

[178] See fn nr. 17.

the defense is going to act, it is when the peculiar condition of the dangerous subject must be taken into account, in order to individualize the treatment."[179]

The "dangerous state" of the offender was, for Jiménez de Asúa, what really mattered in criminal law, and consisted in "the probability that a criminal will offend or reoffend."[180] Note that such individual was treated as an offender or delinquent even before having committed a crime ("an individual will commit a crime or reoffend"). In doing so, he resorted to the authority of Von Liszt, who, in a paper presented to the Congress of the International Union of Criminal Law, held in Brussels in 1910, "broadens much more his concept of the dangerous state, and extends it to young delinquents, to those who commit crimes by vagrancy and by alcoholism, the alienated and mentally handicapped (in some cases) perpetrators of crimes, and the multiple repeat offender; he even considers certain individuals who have not yet committed a crime to be in a dangerous state: such as abandoned children and adolescents, dangerously insane and habitual drinkers."[181]

At this point, he asked himself whether "the concept of potential dangerousness be extended, without restrictions, to individuals with diminished imputability." Jiménez de Asúa envisaged the following two options:

> "Intermediate cases between mental health and madness must be taken into account by criminal law, but the problem lies in knowing how to assess them and, if possible, then speak of 'diminished accountability' or 'attenuated', or if it would be preferable, in view of the potential dangerousness, to abandon any idea of punishment, even if it were mitigated."[182]

In his view, the option of the classical school was "absurd": assuming that imputability is not complete and hence trying to measure the penalty according to the specific degree of responsibility, encountered the problem triggered by "those men who, being not entirely insane, are more dangerous, because they resist perverse impulses less than entirely healthy men, and know how to choose the means and opportunities to accomplish their goals."[183] In criticizing the classical school's option, Jiménez de Asúa resorted to the authority of Prins, who sustained that since the insane might be less responsible but more dangerous, it would make no sense to impose him/her a lenient penalty than to their sane counterparts. Society needed to defend itself from insane people who were particularly dangerous.[184] So, for Jiménez de Asúa the conclusion was clear:

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[179] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 16; italics are mine; I'll be traslating 'estado peligroso' with the expresión 'potential dangerousness' (rather than with the literal 'dangerous state').

[180] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 19.

[181] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 18.

[182] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 21.

[183] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 22: "This transcendental question about people with mental disorders was resolved by the classical school through the formula of attenuated responsibility and punishment. That is, since it is assumed that imputability is not complete, it is necessary to try to balance penalty and responsibility. But this system is absurd (p. 21): those men who, being not entirely insane, are more dangerous, because they resist perverse impulses less than entirely healthy men, and know how to choose the means and opportunities to accomplish their goals."

[184] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 22: "In effect – as Adolfo Prins rightly says –, since the insane, the less responsible person can be, at the same time, the most dangerous, the imposition of a reduced sentence would compromise public order. The situation is therefore considered by the classics in an erroneous way. The insane criminal is not a criminal that requires fewer guarantees than the normal one. The normal ones commit, at certain moments, threatening acts, but later they return to the

"In sum, only the potential dangerousness formula resolves this question. In the case of the mentally handicapped, the penalty must give way to the security measure."[185]

He longed for a 'finished theory' of the "potential dangerousness of the delinquent (…) that entirely replaced the classic concepts of imputability and responsibility," something that, in his view, Adolfo Prins started to explore.[186] But a kind of transaction between both theories -imputability and dangerousness- was not enough: it was necessary to "[t]reat (…) the offender of the norm as a dangerous being, and do not make distinctions that harm the fertility of the concept."[187] In short, for Jiménez de Asúa what justified the security measures applicable to the criminal was not his/her degree of responsibility, but his/her *temibilità* or potential dangerousness that threatens social security.[188]

The generalization of the theory of *temibilità* or dangerous state would have important consequences. First, an increased imposition of security measures ("medidas asegurativas," is the Spanish expression he used), with a much more preventive – than retributory – focus.[189] He also suggested:

"Once the formula of the potential dangerousness is fully accepted, *punishment – if it has not completely disappeared, replaced by security measures* – will not be a revenge, nor an atonement, nor even a correctional measure in the romantic Röderian sense; it will be a medium that participates in the triple aspect of intimidation, correction and harmlessness, depending on the case; a sentence adapted to the character and nature of the agent; that is to say, what the Germans call, with an untranslatable phrase, *Gesinnungsstrage*, which raises the angry and monotonous protests of von Birkmeyer and his disciple August Köhler."[190]

Second, judges should be granted most discretion without estimations that might restrict it: the dangerousness or *temibilità* of the delinquent is what would determine the

regular path; the mentally ill remain defective; in a permanent way they are in a dangerous state for themselves, for their immediate environment and for society [...]."

[185] Jiménez de Asúa, *El estado peligroso del delincuente*, pp. 22-23.

[186] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 23: "Thanks to von Liszt's and Prins' efforts, the study of the notion and the nature of the potential dangerousness has become today the fundamental question, both from a scientific and legislative point of view. But [...] it must be recognized that its concept is not yet firmly delimited, nor entirely fixed. Adolfo Prins already speaks, in his most accurate work, 'of the dangerous state of the delinquent in general,' and it seems that he intends to *build a complete theory that entirely replaces the classic concepts of imputability and responsibility. And this is what is needed*"; [my italics].

[187] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 23: "Let us not half-sponsor fruitful ideas: let us disapprove of every transaction. Accepting the potential dangerousness as a partial formula, coexisting with the concepts of imputability and culpability, in the old sense, speaking of danger to society in certain senses and understanding that it does not exist in others, is a serious error. The delinquent reveals with his acts an evident fearfulness that threatens the co-associates. Treat, therefore, the offender of the norm as a dangerous being, and do not make distinctions that harm the fertility of the concept."

[188] Jiménez de Asúa, *El estado peligroso del delincuente*, pp. 23-24: "Synthesizing. He must undergo insurance treatment, not because the man who has committed a transgression is free to act, not because he is identical to himself and similar to others, not because he is normal or intimidating (...), but because it constitutes a social danger, because with his acts he reveals his *temibilità* or dangerous state."

[189] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 25: "The generalization of the theory of the fearfulness of the offender requires that greater use be made [...] of insurance measures, with which, unlike the classic penalties, they seek to prevent rather than repress, and since the penalty is still hold, it needs to be stripped of its old expiatory meaning."

[190] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 25; italics are mine.

kind and duration of the punishment or security measures applicable in each particular case. Hence, Jiménez de Asúa proposed the replacement of the 'definitive sentence' by the 'indeterminate sentence.'[191]

The third – and more radical consequence of the generalization of the potential dangerousness – was that it should not just affect those who had committed a crime, but also those who were dangerous even before having committed a crime. Resorting again to the authorities of Von Liszt and particularly to Prins,[192] he explained the thesis of the latter as follows:

"Prins is also, on this point, the one who best defines the just doctrine. *But in order to be able to intervene, it is necessary – according to the wise Belgian professor – that they be abnormal, defective, degenerate beings*. Therefore, with respect to abnormal men who have not yet committed a crime, society would be disarmed. Therefore, one more step is required: in the case of individuals inclined to crime, when due to their bad conduct, their background, etc., it can be inferred that they are going to violate the law and disturb social peace, it is necessary for the State to act with preventive measures and safeguards, even if they are normal men."[193]

Unlike Saldaña, Jiménez de Asúa did not give a specific reference to where Prins had made such a radical statement. However, he was fully aware that "this entire system conflicts with the classic principle *nulla poena, sine lege*, which master Dorado Montero hoped would cease to be necessary in future criminal law," and that "great objections have been raised [in some countries – particularly, in France –] against the generalization of the dangerous state."[194]

Jiménez de Asúa recognized that no jurisdiction at all had dared to legally admit and introduced "the formula of the dangerous state with a broad criterion, capable of replacing the old concepts of imputability and responsibility," although few laws showed "that to a certain extent, and sporadically, the fearsomeness criterion is making its way."[195] The idea of 'potential dangerousness' was contained in some modern projects

[191] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 25: "It is also evident that the formula of the potential dangerousness demands that the judges be granted the widest discretion, and that the quantum of the penalty – and even less that of the security measures – not be appraised a priori; The offender must be subjected to criminal treatment until his dangerous state ceases and must not be prolonged beyond what his fearfulness demands; that is, that the 'definite sentence' must be replaced by the indeterminate sentence."

[192] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 25: "But the notion of the dangerous state must not be circumscribed to those who have already broken the law. In fact, it is the crime that highlights the danger; but for the above-mentioned German-Belgians [von Liszt and Prins], the potential dangerousness also manifests itself before the crime, and then society must defend itself."

[193] Jiménez de Asúa, *El estado peligroso del delincuente*, pp. 25-26.

[194] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 26: "It cannot be ignored that this entire system conflicts with the classic principle *nulla poena, sine lege*, which master Dorado Montero hoped would cease to be necessary in future criminal law. Faced with the risk of seeing the individual guarantees that affect the freedom of the citizen in danger, and due to the fear of the arbitrariness of the judges, great objections have been raised – especially in France – against the generalization of the dangerous state."

[195] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 27: "No Legislation has even dared to accept the formula of the dangerous state with a broad criterion, capable of replacing the old concepts of imputability and responsibility. But the study of foreign legislation shows us that to a certain extent, and sporadically, the fearsomeness criterion is making its way," a theme that he developed on pp. 27-28, where he mentions art. 6 of an Egyptian law of June 4, 1909 (p. 27), and paragraph 43 of an Austrian project of 1912 (p. 27).

from different European jurisdictions, referring to "delinquents due to vagrancy; criminal drinkers; habitual, professional, and incorrigible criminals; alienated criminals, abnormal, etc., and minors who have violated the law,"[196] and he added: "Rare are the precepts in which the potential dangerousness is recognized before the crime."[197]

Touching upon Spain, Jiménez de Asúa lamented that "[o]ur current laws, based, almost all of them, on the old principles, ignore the potential dangerousness of the criminal."[198] And he added:

"But not only is the formula of the potential dangerousness absent from our law, but the subject of the crime is underestimated as a human being, and the action is attended to more than the conduct of the person who executed it (...).

When it comes to security measures against individuals in a dangerous state, everything remains to be done in our homeland. Absent from our laws are defensive means against habitual, professional, and incorrigible criminals; no isolation of drinkers; no forced labour for those who violate the laws due to vagrancy, considered a crime in CP 1848, and which today, with an absurd criterion, is seen as an aggravating circumstance."[199]

Jiménez de Asúa was not optimistic: "Little or nothing we expect of the future." For a legal reform to be possible, a 'technician' should be "entrusted with the task with full responsibility on his behalf, as Switzerland, Denmark, Sweden, etc. have done," but this never happened in Spain, where "politics interferes with everything and corrupts everything, with its petty personal struggles."[200] He thought that scholars "speak too softly, too serenely for our words to reach the impure domain of politics."[201]

Consequently, despite the growing increase of criminality in all countries, Jiménez de Asúa found it very difficult to replace the ancient classical principles by a modern conception that turned repressive criminal law into a true *preventive criminal law* that might protect society and, at the same time, a true *protective law of criminals*,[202] as Dorado Montero defended:

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[196] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 28: "…the categories of offenders that the modern projects mentioned, from Switzerland, Germany, Austria, Serbia, Denmark and Sweden, consider to be in a dangerous state, are: delinquents due to vagrancy; criminal drinkers; habitual, professional, and incorrigible criminals; alienated criminals, abnormal, etc., and minors who have violated the law."

[197] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 28.

[198] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 29.

[199] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 29; and he added: "The precept that the Criminal Code contains about crazy people and imbeciles in the second and third paragraphs, no. 1 of art. 8, could become a security measure; but, in reality, until the works of the judicial asylum that is being built in the Dueso Penitentiary Colony are finished, we still lack an establishment that meets modern demands, where to confine and treat dangerous alienated criminals" (pp. 29-30).

[200] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 31: "Little or nothing we expect of the future. In Spain, politics interferes with everything and corrupts everything, with its petty personal struggles. A modern Code can only be written by a technician, who is entrusted with the task with full responsibility on his behalf, as Switzerland, Denmark, Sweden, etc. have done. Among us, when a competent person is approached to elaborate a law, it is in an unofficial way, for the convenience of the minister and remedy for his encyclopedic ignorance. This is how Bernaldo de Quirós prepared the Montilla Project [1902], and this is how Salillas elaborated the Ugarte project of 1905."

[201] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 32: "We speak too softly, too serenely for our words to reach the impure domain of politics."

[202] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 33: "Replacing the ancient classical principles, which were great monuments of logic, but whose practical inefficiency has denounced, with sad

"In its broadest sense, in *the regions of utopia*, the *magister* Dorado Montero, who died to the misfortune of Spanish science, in full maturity of thought and in full activity of his intelligence, spoke of this protective Law of criminals."[203]

For Jiménez de Asúa, "[t]he law of crimes and punishments breaks off, every day more, from the trunk of the legal tree, to seek new blood in the fertile fields of Social Medicine."[204] He clearly followed in the Dorado Montero's footsteps, perhaps living "in the regions of utopia" when longing for a criminal law somehow coopted by a medical science dominated by the positivistic school, eroding the safeguards and guarantees of the entire building of the classical criminal law under the system of the rule of law.

3.2.4. Enrique de Benito

In 1921, Enrique de Benito published his lectures given at the University of Valencia on the 'Modern orientations of criminal law.'[205] De Benito placed in 1876 the change from the classical school to the positivist one: "Until 1876; since on that date crystallizes, with the Lombrosian theories, the penal positivist school, which supposes a radical change of conception."[206]

Dealing with section II ('The new orientations of criminal anthropology'), De Benito touched upon the criminal treatment of the insane. He explains the simple criterion reached when the issue was discussed at the French *Societé generale des prisons*, with interventions by Prins, Van Hammel and Von Liszt:

"…reserving the madhouse for fully irresponsible criminals, the prison for the entirely responsible and special semi-clinical, semi-penitentiary treatment, in ad hoc establishments, for the semi-responsible."[207]

Although such criterion was adopted by the preliminary drafts of the Criminal Code, De Benito stressed that it was "not easy to adopt with the old criterion of the classic criminal codes, such as the Spanish one" because it "distinguishes only between the sane

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eloquence, the growing increase of criminality in all countries, these modern conceptions dawn that turn repressive law into a true Preventive criminal law, protector of society, and that, perhaps, for this very reason, has to become a true protective law of criminals. (...), basically, when defending society against the danger that the criminal represents, protection and safeguards are used against the criminal, as they are also used with respect to the incapable in general, who society considers fearsome."

[203] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 33; italics are mine.

[204] Jiménez de Asúa, *El estado peligroso del delincuente*, p. 34.

[205] De Benito, E., "Las Orientaciones Modernas del Derecho Penal" (Conferencias dadas en la Universidad de Valencia durante la primavera de 1921), Valencia: *Anales de la Universidad de Valencia*, Vol. 1, Cuaderno 5º, 1921, pp. 380-418 (A19 16850-5) (available at https://mobiroderic.uv.es/bitstream/handle/10550/55520/23243.pdf?sequence=1&isAllowed=y).

[206] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 381.

[207] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 392: "When the question was discussed at the *Societé generale des prisons* of France, Prins, Van Hammel and Von Liszt intervened in the debate, and a simple criterion prevailed: that of reserving the madhouse for fully irresponsible criminals, the prison for the entirely responsible and special semi-clinical, semi-penitentiary treatment, in ad hoc establishments, for the semi-responsible, for the semi-insane of Grasset. And this is also the criterion adopted by the preliminary drafts of the Criminal Code, which, as will be seen in the following conference, dictate special treatment for limited liability offenders."

and the insane, reserving the madhouse for the latter and condemning the former to prison."[208]

Moreover, there was no possibility to apply "number 1 of article 9 and considering the half-mad as involved in a circumstance that excuses incomplete insanity, that is, in a mitigating circumstance." That solution was 'deficient' according to the principle of responsibility of the classic school of criminal law because it was not appropriate to impose a punishment to someone who was not sane. That was the reason why the Spanish Supreme Court ruled that a modifying circumstance would be applicable to the half-insane, so they should go "to the asylum or prison. Two equally unfair solutions," De Benito stated.[209]

The fact that De Benito disagreed with the solution provided by the Supreme Court, does not mean he disregarded the principle of imputability. On the contrary, he thought it appropriate to evaluate the responsibility in the administration of criminal justice, although he recognized that "[t]he degree of responsibility of the offender cannot be deduced with certainty in any case but from a careful medical-psycho-pedagogical examination." In his view, such "triple examination" should be always done, and "not only when requested by the parties or when agreed on by the judge."[210] And he added:

"Because it is only practiced exceptionally, that is why not a few abnormal people who are difficult to diagnose escape timely treatment, not a few masked half-insane, and why there are many men in prisons who should not be in them. And that is more than a question of interpretation and curia: it is a sad question of fairness, justice, and even Christian charity."[211]

In section III ('The penalty and the security measure for the new criminal law'),[212] De Benito described how all preventive law has emerged with such vigor that Dorado Montero has been able to say that this would be the criminal law of the future."[213] De Benito stated that the new criminal law "has reached, in the preventive effort, to the last limits," and showed full knowledge of some measures that were being implemented in

[208] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 392: "However, this reasonable solution is not easy to adopt with the old criterion of the classic criminal codes, such as the Spanish one, which distinguishes only between the sane and the insane, reserving the madhouse for the latter and condemning the former to prison."

[209] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 392: "It will be said that there is a perfectly legal sanction: that of applying number 1 of article 9 and considering the half-mad as involved in a circumstance that excuses incomplete insanity, that is, in a mitigating circumstance of number 1 of article 9. But as this solution is deficient, because it only allows a mitigation in the punishment, but in the end it is purely a punishment that is imposed on the half-crazy, the jurisprudence decides that the half-crazy is not favored with any modifying circumstance, that is, by benign interpretation included as crazy in number 1 of article 8: to the asylum or prison. Two equally unfair solutions."

[210] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 392: "It should always, not only when requested by the parties or when agreed by the judge, but always, proceed to this triple examination, as an inexcusable diligence of the prosecution."

[211] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 392.

[212] De Benito, "Las Orientaciones Modernas del Derecho Penal," pp. 393-399.

[213] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 394: "This is how all preventive law has emerged, with such vigor that Dorado Montero has been able to say that this would be the criminal law of the future; preventive law that includes, among many other things, the fight against morally abandoned and wayward children, the fight against alcoholism, the fight against misery and vagrancy, the complicated police of customs, etc."

Europe and the United States,[214] as well as the fact that "in modern criminal science the importance of punishment has diminished and its effectiveness has even been discussed," resorting to some European criminal lawyers who were then preaching the new Gospel of a criminal law based more upon security measures than upon punishment (Ferri, Liszt, Garraud, Tarde and Carnevale).[215]

In describing the development of punishment, De Benito departed from an "undoubted thing," namely, "that in modern Criminal Law, the penalty has been suffering various cuts and attacks,"[216] such as protests against short prison sentences, conditional sentences, indeterminate sentences and, particularly, the emergence of security measures that seek "protecting society from certain subjects, particularly dangerous or exceptionally worthy of protection."[217] After describing the differences between the punishment and the security measures,[218] he presented the variety of security measures as follows:

"These security measures are varied. They include, among them, *the internment of insane criminals, dangerously insane and partially insane in special establishments*; that of drunken and alcoholic delinquents in asylums for drinkers and that of vagrants and beggars in workhouses. In

[214] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 394: "It has reached, in the preventive effort, to the last limits; to avoid the dangers of a criminal physiological inheritance, sterilization has been advocated in North America, the asexualization of certain criminals, a measure sanctioned in Indiana in 1907 and accepted by other States of that great confederation, but which has not prospered, until now, in Europe, because it was shipwrecked at the Criminal Anthropology Congress in Cologne, although something similar is beginning to be accepted, since the preliminary draft of the Swiss general criminal code prescribes that abortion be carried out in certain cases."

[215] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 394: "It will be understood, then, that in modern criminal science the importance of punishment has diminished and its effectiveness has even been discussed. Ferri considers that it is insufficient; Listz believes that it is, on many occasions, an uncertain and dangerous medium and advocates preventive measures; Garraud maintains that it is not the most effective means; Tarde has written that there is a 'luxury crime' (arson, indecent assault, etc.), for which punishment is intimidating, and another 'necessary crime' (theft due to hunger, etc.), for which prevention is better than punishment. Let us not be surprised, therefore, that Carnevale wrote in his *Critica penale* a chapter on the decline of punishment."

[216] De Benito, "Las Orientaciones Modernas del Derecho Penal," pp. 394-395: "The undoubted thing is that in modern Criminal Law, the penalty has suffered various cuts and attacks. The first attack has been on short sentences in the protests against short prison sentences [...].

The modern penalty has also been cut back in another way: its conditionality, which has given rise to the conditional sentence. Conditional sentencing means the suspension of the sentence pending the condition that the offender will not re-offend [...].

The new criminal law understands that the penalty should not be predetermined in the sentence, at least as far as its duration is concerned. Correctionalism already understood it this way, for which, once the guilty person's amendment has been achieved, it is abusive to continue imposing punishment […]"

[217] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 396: "Here is another cut back of the penalty, in the new Criminal Law. The main characteristic of the draft penalty systems is the existence, alongside the penalty, of the so-called security measure. The fundamental distinction between punishment and security measures is not very clear. The security measure circumscribes the sphere of punishment itself. The security measure has a special purpose that is based on uniquely protecting society from certain subjects, particularly dangerous or exceptionally worthy of protection."

[218] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 396: "Luckily, the penalty is necessarily a consequence of the crime, and the security measure may not be (for example, in most cases of protection of minors); so it is, that while punishment has a retributive meaning, the security measure does not have precisely that character. Listz has said that security measures seek the adaptation of individuals to society or the isolation of those incapable of adaptation; and Stoos understands that pain leads to suffering, and the measure does not. Conti has spoken to us correlatively about penalty and 'penal supplement.'"

the Swiss draft is also the custody of professional criminals and in the Austrian of certain repeat criminals."[219]

Then De Benito briefly touched upon the imposition of security measures on each one of all particular cases: for insane criminals,[220] for partially insane in special establishments,[221] for drunken and alcoholic delinquents in asylums,[222] for vagrants and beggars in workhouses,[223] and for habitual and repeat offenders.[224] In doing so, he reflected an outstanding knowledge of legislative measures approved in different jurisdictions, particularly from Europe and the United States of America. In this vein, he stated that "[i]t is impossible to know criminal law in depth, without knowing comparative legislation."[225]

Although Enrique de Benito was not as radical as Saldaña or Jiménez de Asúa, he was "firmly convinced that the future of criminal law, if it is truly to progress and if the repressive function is truly to be effective in the fight against crime, lies in the so-called individualization of the sentence."[226] In this line of thought, he did not agree with the classical school of criminal law concerning "the criterion of qualitative and quantitative

[219] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 396; italics are mine.

[220] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 396: "First of all, security measures for crazy criminals. The issue of judicial asylums, of which England has two and several, highly perfected, North America, is no longer relevant today."

[221] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 396: "In addition, security measures against semi-responsible criminals. For them, Pins proposes special asylums, Aschaffenburg (in *Das Verbrechen und seine Bekampfungs*), intermediate institutions between asylums and workhouses, and Grasset attenuated punishment and then internment in a special health home. Blueprints also often combine both. *The fundamental principle of this security measure is the indeterminate duration*" [my italics].

[222] De Benito, "Las Orientaciones Modernas del Derecho Penal," pp. 396-397: "Also security measures against drunken and alcoholic criminals. The asylums for regular drinkers that were proposed in various Congresses and that the Washington Congress recently advocated are prescribed. In England, for example, there are already numerous institutions of this kind. The idea has entered the field of legislation and the Swiss draft, and in a similar way the German, empowers the judge so that, after the sentence, he orders the placement of the alcoholic in an asylum for drinkers."

[223] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 397: "Likewise, security measures against vagrants and beggars. Formerly they were threatened with whipping and mutilation. Now, assistance and protection are prescribed for those who are accidentally disabled and for the disabled, and prolonged internment in forced labor houses for professionals. In Belgium there are begging deposits and art. 42 of the German draft, and similarly the Swiss draft, empowers the court, when the crime is a consequence of dissolute conduct or laziness, to impose, in addition to the penalty or in lieu thereof, internship in a workhouse up to three years."

[224] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 397: "Finally, security measures against habitual and recidivist offenders. The problem of the fight against recidivism is capital. It will be difficult to go against crimes of passion and even against occasional crime; but recidivism can and should be reduced. Recidivism must be seriously considered, above all because of the dangerous state that it entails. That is the modern criterion. US criminal law calls for life imprisonment after a certain number of repeat offenses. The Norwegian criminal code, in its art. 65, decrees the continuation of the recidivist, after completing his sentence, in indefinite imprisonment not exceeding 15 years. A similar criterion is that of English legislation and the Swiss bill prescribes indefinite, temporary or perpetual stay in special establishments."

[225] De Benito, "Las Orientaciones Modernas del Derecho Penal," p. 399.

[226] De Benito, E., *Individualización penal*, Madrid: Biblioteca de la Revista general de Legislación y Jurisprudencia, vol. IX, Hijos de Reus, Editores, 1916, pp. 5-63, p. 5; see also De Benito, E., *Sobre delincuencia precoz*, Madrid, 1908.

proportionality between the penalty and the crime."[227] For him, the right criterion for a punishment to be effective was "the nature of the delinquent" (rather than "appropriate to the crime"):

> "The principle of individualization of the penalty consists in affirming that for the penalty to be effective, it must not be appropriate to the crime, but to the nature of the delinquent who has to suffer it."[228]

For De Benito, the proportionality of the punishment – both qualitative and quantitative – to the crime was impossible, "because two things that are of a completely different nature cannot be proportionate." Besides, "punishing two criminals of a different nature in the same way, with which, what is good for one, is harmful for another" would be unfair. In addition, when determining the penalty, there was a "rational necessity" to depart from the offender, "who is the one who has to suffer it and in whom the penalty has to produce the fruits that the law expects from it."[229]

Among other manifestations of the individualization of the sentence, De Benito dealt with the 'system of parallel sentences,'[230] accepted in the Norwegian Criminal Code of 1904 and to a lesser extent in the Dutch of 1881.[231] The Norwegian Criminal Code included two custodial sentences: *foengsel* and *hefte*; the former with a duration of 15 days to 15 years and rigorous with the possibility of greater aggravation, the latter between 15 and 20 years but milder with the possibility of free choice work and with possibilities of improvement in food and without loss of rights. According to art. 24 of the Norwegian text, although *foengsel* is "the only custodial sentence prescribed by law, it may be replaced by the *hefte* of equal duration if the circumstances allow it to be deduced that the act is not the result of a perverse intention."[232]

De Benito maintained that the best system for individualizing the sentence was the legal one, rather than the judicial or administrative one.[233] The judicial one would be "dangerous" and the administrative one "incomplete."[234]

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[227] De Benito, *Individualización penal*, pp. 5-6: "The classical school of criminal law, and the Codes inspired by it, conceived the penal system on the basis of the criterion of qualitative and quantitative proportionality between the penalty and the crime. The penalties must be proportionate to the crime, both in quality and quantity. The starting point for the application of the penalty is the crime; the penalty is applied to the crime; to such crime, such penalty."

[228] De Benito, *Individualización penal*, p. 8.

[229] De Benito, *Individualización penal*, p. 8: "This principle is based on the impossibility that the penalty can be proportional, qualitatively and quantitatively, to the crime, because two things that are of a completely different nature cannot be proportionate; of the injustice that it would mean to ensure that the punishment was proportionate to the crime because this would often lead to punishing two criminals of a different nature in the same way, with which, what is good for one, is harmful to another, and, in the end, from the rational necessity that the starting point to determine the penalty that should be chosen is the offender, who is the one who has to suffer it and in whom the penalty has to produce the fruits that the Law expects from it."

[230] De Benito, *Individualización penal*, pp. 16-18.

[231] De Benito, *Individualización penal*, pp. 16-17 (for the Norwegian Criminal Code of 1904), pp. 17-18 (for the Dutch Criminal Code of 1881).

[232] De Benito, *Individualización penal*, p. 17.

[233] De Benito, *Individualización penal*, pp. 18-19.

[234] De Benito, *Individualización penal*, p. 19.

3.2.5. Mariano Ruiz-Funes

As a criminal lawyer, Mariano Ruiz-Funes was a renowned criminalist. He received the Lombroso Award (Turin, 1927) for his work entitled *Endocrinología y criminalidad* (Madrid, 1929).[235] He had a close friendship with Luis Jiménez de Asúa, with whom he shared his training in Krausism.[236] In 1931, as he was already a well-known criminal law professor at the University of Murcia,[237] Ruiz-Funes published a book on imputability.[238]

In this brief study, he made a summary presentation of the regulation of imputability in the comparative field,[239] departing from art. 64 of the French CP (1810) – which employed the expression 'dementia' –[240] and in the Spanish criminal codes (1822, 1848-50, 1870 and 1928). He described how art. 26 of the SCC 1822 used a classic imputability formula ("no tiene conciencia de sus actos y libertad de elección"; in English, "he is not aware of his own actions and lacks freedom of choice"). The SCC 1848-50 used the expression 'loco' and 'demente' (in English, 'insane'), and the SCC 1870 opted for the word 'imbecile', "within whose denomination everything mentally deficient fits, (...) and of the insane, with the exception of internal, circular, double-form or lucid interval."[241] The art. 55 SCC 1928 used the terms "mental disturbance or weakness, of pathological origin," that is, "the old madman (disturbance) and the traditional imbecile (weakness)" – in Spanish, "el antiguo loco (perturbación) y el imbécil tradicional (debilidad)" –.[242] And later on, Ruiz Funes stated:

"…all the issues that affect mental illness, in its relationship with crime, are problems of medical diagnosis and judicial resolution. *The medical expert is not the interpreter of the law to which a judgment of responsibility is requested. The judge is not a medical expert, that the determination of a disease is requested*."[243]

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[235] He also published *Endocrinología y criminalidad* (1929), *Delito y Libertad* (1930), *Tres experiencias democráticas de legislación penal* (1931), *Actualidad de la venganza* (1943), *El delincuente y la justicia* (1944), *Evolución del delito político* (1944), and *Criminología de guerra* (1947), among others.

[236] Both Jiménez de Asúa and Ruiz-Funes were drafters of the *Ley de vagos y maleantes* (in English 'Law of vagrants and thugs') in 1933, whose purpose was the repression of conduct considered asocial such as pimping, exploitation of begging, vagrancy, petty theft or drug addiction; on this matter, see Heredia Urzáiz, I., "Control y exclusión social. La Ley de Vagos y Maleantes en el primer franquismo", *Universo de micromundos. VI Congreso de Historia Local de Aragón* (Carmelo Romero Salvador, Alberto Sabio Alcutén, coords.), Zaragoza, 2009, pp. 109-122.

[237] On this matter, see the works by Blasco Gil, Y., Saorín Pérez, T., "Rastro y ausencia del penalista Mariano Ruiz-Funes en la Universidad: república, exilio y provisión de su cátedra en la postguerra", *Anuario de Historia del Derecho Español* 83 (2013), pp. 773-826; Las universidades de Mariano Ruiz-Funes: la lucha desde el exilio por la universidad perdida, Murcia: Editum – Ediciones de la Universidad de Murcia, 2014; "Universidad e Hispanidad. Tres décadas de trayectorias entrecruzadas del ministro José Ibáñez Martín y el catedrático exiliado Mariano Ruiz-Funes", *Revista de Indias*, vol. LXXVII, núm. 269 (2017), pp. 263-304.

[238] See fn nr. 16.

[239] Ruiz-Funes, *La Imputabilidad Penal y sus Fórmulas Legales*, pp. 8-10.

[240] Ruiz-Funes, *La Imputabilidad Penal y sus Fórmulas Legales*, p. 8.

[241] Ruiz-Funes, *La Imputabilidad Penal y sus Fórmulas Legales*, p. 11.

[242] Ruiz-Funes, *La Imputabilidad Penal y sus Fórmulas Legales*, p. 11.

[243] Ruiz-Funes, *La Imputabilidad Penal y sus Fórmulas Legales*, pp. 14-15 [my italics].

Ruiz-Funes did not expressly deny free will, but was not in favor of the metaphysical foundation of criminal responsibility either, as the classic criminal lawyers used to do. Hence, he praised Ferri, who "gloriously bursts into the field of criminal disciplines."[244] He rightly synthesized Ferri's theory, but he lamented that "[c]riminal law, clinging to these two directions [free will (classical school) and determinism (positivist one)], runs the risk of getting lost in an ineffective and sterile discussion. While such controversy occurs, crimes increase and effective means of fighting are not adapted for or against them."[245]

4. Concluding considerations

It would be wrong to think that all early twentieth-century criminal lawyers endorsed Saldaña and Jiménez de Asúa's proposal of replacing the principle of responsibility by that of dangerousness. Not at all. In fact, after Dorado Montero's death, they were the most representative figures who fervently embraced the new theories of criminal law, sometimes even to the extent – as explained above – of misreading and exaggerating by going further than the theories of the most relevant authors who preached the need for a shift from imputability to dangerousness (particularly, Von Liszt and Prins).

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

Moreover, most of the lawyers admitted the need for reports by medical experts, although the declaration of criminal responsibility corresponded to judges. As Ruiz-Funes pointed out, "[t]he medical expert is not the interpreter of the law to which a judgment of responsibility is requested."[246] Vicente Orts y Esquerdo consistently explained the origins of the mutual mistrust between judges and some medical doctors,[247] particularly those who maintained radical or ultra-radical theories, to the extent of arguing that anyone who commits a crime is to be considered insane.

[244] Ruiz-Funes, *La Imputabilidad Penal y sus Fórmulas Legales*, p. 3: "Accountability is built by the classic criminal lawyers on a metaphysical basis. Freedom to want and freedom to determine are the two terms of the construction. Against this visual angle of the punitive law classics, Ferri gloriously bursts into the field of criminal disciplines, speaking to us about the theory of imputability and the denial of free will. He founds the impossibility on determinism, alleging that only human acts are known to us, but that we ignore the coefficients of causality that produce them, that is, we know about acting, but it is not given to us to penetrate the complex problem of why a certain action is performed."

[245] See fn nr. 16.

[246] See fn nr. 241.

[247] Such mistrust could be perceived, for example, when describing and analyzing the works by José Esquerdo, José María Esquerdo and Ángel Pulido Fernández.

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

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