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Brazilian Criminological Thinking during the First Republic (1889–1930)

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BRAZILIAN CRIMINOLOGICAL THINKING DURING THE FIRST REPUBLIC (1889–1930)

Rebeca Fernandes Dias

“È pericoloso mostrare troppo all’uomo quant’è simile ai bruti senza mostrargli insieme la sua grandezza. Egualmente pericoloso è fargli troppo vedere la sua grandezza, senza mostrargli la sua bassezza. Più pericoloso ancora, lasciargli ignorare l’una e l’altra. Giova assai, invece, mettergli sotto occhi sia l’una sia l’altra. È bene che l’uomo non si creda eguale né agli angeli né ai bruti, e che non ignori né l’una cosa né l’altra, ma che le conosca entrambe”.¹

INTRODUCTION

The 19th century was the century of science, reason, faith in knowledge and of profound secularization. It is no coincidence, then, that it was also the century in which positivist criminology emerges. God yielded his reign to science, though this withdrawal from God did not exorcise all demons. In fact, the 19th century marks the break from the man-demon binary² – evil is incarnated, inscribed in men, in their bodies, organisms and genes, and no longer only in their souls. Man became demonized, or at least certain types of men – the criminals, often referred to by criminologists, the preachers of unbiased knowledge, as wrongdoers.

That is not to say that the “demonizing” of certain individuals occurred only in the 19th century. As Pietro Costa explained, each historical period constructs its own enemies: in the Middle Ages, the heretics, among whom the most persecuted were the witches, who made pacts with the devil; in the *Ancien Régime*, the rebels, who attempted crimes of *laesa maiestatis* against the princes; in the modern era, the opponents of the nation; in the 19th century, the enemies of social order, including the criminal.³ But what type of criminal? What specifically enabled the demonization of certain individuals during the 19th century?

¹ PASCAL, Blaise. *Pensieri*. Torino: Einaudi, 1980, p. 168 (n. 400).

² Despite the current preference in academia for gender neutral language, this research paper follows the conventions of its research object, a discourse in which this problematic did not yet exist, to avoid anachronism.

³ COSTA, Pietro. Pagina introduttiva: i diritti dei nemici: un ossimuro? In: *Quaderni Fiorentini: per la storia del pensiero giuridico moderno*, 38, Tomo II, Milano: Giuffrè Editore, 2009.

To understand the specifics one must understand the context in which positivist criminology emerged and the science on which the premises of positivism drew to identify the causes of criminality and deviance. The great question, greater than “what makes a man commit a crime?” is “what makes a man become a criminal?”

In this paper, however, analysing context is merely a step toward a more specific goal, which is to understand how positivist criminology, as a body of knowledge, was adopted in Brazil during the period known as the First Republic (1889-1930), when criminology emerged and developed around intense political, economic and social transformations. The state underwent reconfiguration when the republic was proclaimed in 1889, capitalism was reshaping the economy, and society was organizing itself according to a bourgeois, individualistic model. The legal system – with the particular prominence of criminal law – tried to keep pace with these processes and encase them in its doctrines and laws.

It is also important to note that this research explores the legal culture of the time, defined for the purposes of this paper as the culture produced inside law schools. Thus, the chosen context for studying the emergence of criminology privileges an analysis of the contemporary discourses, understood as “truths”. In relation to criminal legal science, therefore, we privilege the domains of doctrine and legal thought.

I – THE EPISTEMOLOGICAL CONTEXT IN WHICH POSITIVIST CRIMINOLOGY EMERGES

Before the specific analyses of Brazilian legal culture, it is of paramount importance to identify the epistemological context in which criminology was born, as well as the Italian discussions regarding legal culture. After all, it is imperative to understand the European peculiarities as well in order to identify precisely the elements of Brazilian legal culture. To fully understand the specificity of Brazilian interpretations, comprehension of European sources – how they circulated, the effects they produced – is vital. Ultimately, before beginning the analyses of how Brazilians used this theoretical arsenal created in Europe, it is necessary to understand it, as well as the context in which it was forged, because only so can one identify exactly how much autonomy, originality and criticism were present in Brazilian legal culture.

In the century of science, the 19th century, evil had to be scientifically explained. This meant that evil had to be objectively observed, mathematically calculated, empirically apprehended, rationally controlled and/or eliminated. It had to be made visible and detectable according to “rational” and neutral criteria and scientifically understood according to positivist standards. Criminology is doubtlessly a product of Europe’s epistemological context during the 19th century, characterized in particular by the affirmation of positivism.

There were few translations of Comte available in Italy, especially in comparison to Spencer, who had most of his work translated.⁴ Regardless, Comte's positivism – especially in regards to the question of method with its extension of the experimental method of natural sciences into the moral and social sciences – prepared the intellectual environment to receive Darwin and Spencer.⁵

Evolutionism's success in the 19th century did not happen by chance. This was an explicitly scientific theory, though it carried an intense ideology. It was convenient for bourgeois interests, which held that history unfolds not by leaps or revolutions, but gradually, step by step, from the implacability of circumstance and the environment, leading to a kind of fatalism in which human action mattered little and in contrast to historical materialism. Action could even hinder the natural evolution of the historical process, as Spencer notes, with biology providing a basis for a minimal, liberal government.

In the 1860s, Moleschott's materialism also became widespread in Italy by way of Cesare Lombroso who, in 1869, translated *La circolazione della vita. Lettere fisiologiche in risposta alle lettere chimiche di Liebig*. According to materialism, all power results from matter and its properties, over which there is no superior force.⁶ This materialism represents a definite break with the spiritualistic and, above all, theological theories.

From the 1870s, under the widespread influence of Spencer, positivism split into a series of isms: evolutionism, naturalism, organicism, biologism, as well as physiologism.⁷

In addition, racial issues permeated the 19th century. While liberal and democratic discourse was becoming widespread in a legal and political framework, race as a category became a central paradigm in biology, medicine and anthropology. A new range of "scientific" discourses emerged, whose links to natural sciences legitimized their contemporary representations, though with a heavy ideological charge, in the social and historical context of industrialization, the consolidation (*ethos*) of the bourgeoisie and imperialism.

The presence of this racial discourse in the 19th century illustrates the ambivalence of modernity. In his study on liberalism, *Controstoria del liberalismo*,⁸ Losurdo points out that

⁴ Giuseppe Sergi, in the preface to "Introduzione allo studio della sociologia", by Spencer, elucidates the Italian culture's preference for Spencer over Comte. He points out that, though Comte gave some order to sociology, the one to give scientific unity between nature and society and integrate evolutionary principles was Spencer. It was he who popularized the concept of the organism, which was able to supersede the voluntaristic conception of society common to contractualist theory. (SPENCER, Herbert. *Introduzione allo studio della sociologia*. 2 ed. Milano: Fratelli Dumolard, 1887, p. XVII-XVIII).

⁵ BARBANO, F. *Sociologia e Positivismo in Italia: 1850-1919. Un capitolo di sociologia storica*. In: PAPA, Emilio (ed.). *Il positivismo e la cultura italiana*. Milano: Franco Angeli, 1985, p. 197.

⁶ SANTUCCI, Antonio. *Positivismo e Cultura positivistica: Problemi vecchi e nuovi*. In: ROSSI, Pasquale. (ed.). *L'età del Positivismo*. Bologna: Il Mulino, 1986, p. 34.

⁷ BARBANO, Filippo. *Sociologia e Positivismo in Italia: 1850-1919. Un capitolo di sociologia storica*. In: PAPA, Emilio (ed.). *Il positivismo e la cultura italiana*. Milano: Franco Angeli, 1985, p. 197.

⁸ According to Losurdo, liberalism's origins corresponded to the self-consciousness of slave-owners as a class during the establishment of capitalism, pitted against monarchic despotism and a central power, by claiming self-government and the peaceful enjoyment of lawfully owning property. In Losurdo's words, "Possiamo allora dire che quella liberale è la tradizione di pensiero che con più rigore ha circoscritto un

liberalism and racism were, in fact, born as twins. The author proposes reinterpreting the liberal myth that liberalism's path was marked only by the achievement of civil and political rights. The communities of the free sought to assert these rights by excluding many others.

This exclusion permeated the liberal tradition from its inception, which becomes clear not only when considering the exclusion of colonial populations, then seen as being from a wild, inferior race, but also by the exclusion of the lower social strata from the sacrosanct space of freedom in countries such as England and the United States, which claimed to be empires of freedom. Liberalism coexisted with black slavery, the decimation of indigenous populations and the bondage of the white lower classes, whose fate was often death or institutionalization. What Losurdo aims to show is that liberalism occurs not only in spite of these facts, but rather that they are intertwined with the liberal project.

An association to a very particular interpretation of Darwinism strengthened the question of race as it applied to social sciences. Social Darwinism transposes Darwin's mechanism of natural selection from biology to society. A representative example of social Darwinism is the Malthusian theory of the struggle for subsistence. For Malthus, the poor are to be blamed for poverty, not the rich or the government.⁹ In fact, it was common at the time to say that Darwin's theory was merely the prevailing logic of human society and politics applied to the animal and plant kingdoms.

Given the tendency to naturalize social problems and neutralize political and ideological issues under the cover of science, medical knowledge is one of the defining types of knowledge of the internal and external. In association with statistics, medicine is represented as the delimiter of what is normal and pathological while also being under the influence of positivist epistemology.¹⁰

The experimental method is also present in medicine. The observation of facts and the formulation of laws, both necessary for and complementary to scientific research from a deterministic perspective, condition the perception of phenomena according to the logic of cause and effect, in which the same causes entail the same effects. If a phenomenon changes, it must be due to yet unspecified variation.

In addition, historical knowledge expanded its area of competence at that particular moment into the social (assuming with this the nomenclature of social medicine), connecting

ristretto spazio sacro nell'ambito del quale vigono le regole della limitazione del potere; è una tradizione di pensiero caratterizzata, più che dalla celebrazione della libertà o dell'individuo, dalla celebrazione di quella comunità degli individui liberi che definisce lo spazio sacro". (LOSURDO, Domenico. *Controstoria del liberalismo*. Roma-Bari: Editoria Laterza, 2005, p. 305). "We may then say that liberal is that tradition of thought that has limited, with rigor, a sacrosanct space in which limitations in power are rule. It is a tradition of thought characterized more by the celebration of the community of individuals defining this space than by the celebration of freedom or the individual". Author's translation.

⁹ MALTHUS, R. *Saggio sul principio della popolazione*. v. XI-XII, Turin: Unione Tipografia Editrice, 1868.

¹⁰ One of its "precise" instruments for reading reality is statistics. This was understood as an emblematic instrument of positivism, since the objectivity of numbers sought to neutralize the ideological weight of population-control politics, social marginalization and the fight against criminality. In 1827, statistical studies were conducted in France and England that became important sources in relation to criminality.

environment and health, disease and urban conditions.¹¹ It sought naturalistic explanations for social conflicts and problems with medicine as a modern and uniform template, reducing human behaviour to certain objective indicators from which a type of behaviour can be identified – a process analogous to those of symptoms leading to disease. In criminal anthropology, for example, it consisted of identifying signs of dangerous behaviour.

In association with social medicine (hygiene, medicine, sanitation), psychiatry took on central importance, since it not only addresses madness, but all kinds of pathological behaviour. Medicine reveals two fronts, or rather, two objects: in society, the environment, and in the individual, the mind.

The debates that took place in psychiatric discourse during the second half of the 19th century cannot be understood without considering the process and drive of scientification that has permeated this debate and inspired a commitment to organicism. This drive was born and nourished by discovery; articulated by physiological, biological and anatomical-descriptive experimental (never spiritualistic) research; and held constant by the great mystery of cranium-brain-conscience and organism-thought relationships.¹²

The body – or, more specifically, the brain – as well as quantification are the tools that 19th century positivist psychiatry used, especially during the second half of the century, against the spiritualistic tendencies of the past.¹³ Gradually, it became possible to discuss mental illness as an organic phenomenon, no longer as a disease of the spirit. Phrenology, for example, which analyses the relationship between skull shape and behaviour, became responsible for the inculcation of generations of doctors in France who began to intervene in criminological study.

The European *fin de siècle* imagery was marked by the idea of degeneration and decay. The philosophy of progress entered a state of crisis caused by political events, such as the Paris Commune, understood by the elite as symptom of civilizational disease and the emergence of dangerous classes. Philanthropy and paternalism were no longer enough to manage social order. The idea that criminality would take over society suffused public opinion through the press, affirming an episteme based on the idea that social problems could be solved by medical-style intervention. Political and literary language was guided by biology and medicine.¹⁴

The justification for this decline became linked to the concept of degeneration,¹⁵ particularly to medicine and biology. Degeneration was inimical to progress and, in order to stop it,

¹¹ VILLA, Renzo. *Il deviante e suoi segni*. Lombroso, e la nascita dell'antropologia criminale. Milano: Franco Angeli, 1985, p. 48.

¹² POGGI, Stefano. Localizzazione Cerebrale e sperimentale psicologica nei rapporti della psichiatria italiana con il dibattito europeo. Alcuni punti di riferimento (1870-1900) In: ROSSI, Pasquale (ed.). *L'età del Positivismo*. Bologna: Il Mulino, 1986, p. 309.

¹³ NICASI, Stefania. Il germe della follia. Modelli di malattia mentale nella psichiatria italiana di fine Ottocento. In: ROSSI, Pasquale (ed.). *L'età del Positivismo*. Bologna: Il Mulino, 1986, p. 310.

¹⁴ GERVASONI, Marco. "Cultura della degenerazione" tra socialismo e Criminologia alla fine dell'Ottocento in Italia. *Studi Storici*, v. 38, p. 1090, 1997.

¹⁵ *Traité des dégénérescences physiques, intellectuelles et Morales de l'espèce humaine*, published in Paris, in 1857, by Bénédict Auguste Morel (1809-1873), doctor and alienist, is one of the main sources on one of the

science provided the indicators of deviance and recommended possible cures from fighting alcoholism to eugenics as a means of racial improvement.

Degeneration became, in the 19th century, an umbrella for all types of deviance, including numerous categories of people: criminals, prostitutes, those suffering from microcephaly and the mad.¹⁶ These concepts, in fact, continued a tendency to create categories for the degenerate, the abnormal, which were all related to scientific discourses on the origin of life and of man. This was to be criminology's object of study: the abnormal, the deviant. This knowledge – self-declared as science – turned to the study of criminals and criminality in order to understand its causes, with the main goal of protecting and defending society and social order from these potentially and effectively dangerous individuals, to cure, regenerate, normalize or eliminate them so that, by controlling the process of degeneration, progress could continue. To achieve this cure or regeneration, broad knowledge related to normative power will be essential, combined with actual power enforcement measures.

Cesare Lombroso, more than just the “founder” of criminology, also represented a culmination of these fragmented formulations about criminals from a medical perspective. His emblematic and peculiar opinions make his work a source of important elements from the 19th-century discourse on “abnormality”, a discourse built on theory, practice and, most of all, in their interaction.¹⁷

It is interesting how Lombroso could synthesize so many elements from trains of thought that had gained prominence and influence at the time: the criminal (abnormal) is identified thanks to a series of observations (the experimental method) in order to arrive at the atavistic individual who, in his organic constitution, expresses a propensity (organicism and evolutionism) that practically predestines him to crime. He is born a criminal: a final, deterministic, mechanistic explanation. It is Lombroso's creation of a criminal profile, the target of such polemics and criticism, that advances criminological thought.

Criminology as criminal anthropology (the study of the criminal man) is born in the mind of doctors who conceived crime as a symptom of some disease/abnormality, with the criminal needing to be treated/cured instead of punished, since punishment would be unjustifiable when the culprit is the criminal's involuntary biological composition. The universe of law was invaded by biology and its particular scientific logic.

19th century's main topics in psychiatry: degeneration. This is defined as “deviazione malate rispetto a un tipo umano primitivo che si producono sotto l'azione di un'influenza patologica di ordine sia fisico sia morale e formano dei gruppi o delle famiglie di varietà” (NICASI, Stefania. Il germe della follia. Modelli di malattia mentale nella psichiatria italiana di fine Ottocento. In: ROSSI, Pasquale (ed.). *L'età del Positivismo*. Bologna: Il Mulino, 1986, p. 312). “morbid deviation particular to a certain type of primitive human, produced due to the action of pathological influences of physical or moral order, which creates groups or offspring varieties”. Author's translation.

¹⁶ NICASI, Stefania. Il germe della follia. Modelli di malattia mentale nella psichiatria italiana di fine Ottocento. In: ROSSI, Pasquale (ed.). *L'età del Positivismo*. Bologna: Il Mulino, 1986, p. 324.

¹⁷ VILLA, Renzo. *Il deviante e suoi segni*. Lombroso, e la nascita dell'antropologia criminale. Milano: Franco Angeli, 1985, p. 161.

II – POSITIVIST CRIMINOLOGY, CRIMINAL LAW AND THE LIBERAL BINARY

Positivist criminology emerged, then, from the intersection of medical and legal discourses, and with it, so too did a new way of thinking about criminal law.

On 18 November 1882 Ferri formally announced the creation of the “Positive School of Criminal Law”. Its emergence followed, according to the Italian jurist, the depletion of the classical school, as he called it, which Beccaria had started and that ended with Francesco Carrara and others. The “new school” understood crime as a concrete and natural phenomenon, implying that its natural causes should, accordingly, be investigated through the experimental method in opposition to the classical school, which conceived of crime as an abstract legal entity.

The positivist school proceeds from the idea of a right to punish, based on an argument of social defines, according to which sanction is means of defence against the delinquent. This became a neutralization technique through the elimination, segregation, adaptation and correction of individuals. It became associated with the construction of dangerousness, a concept that encompasses all who deviate from general values and consensus – the abnormal in biological, psychic or social terms. In fact, the logic of positivism entails measuring and adapting social defences to the potential strength of the delinquent’s attack. This is why the focus on the individual is so central: by quantifying their degree of dangerousness, one arrives at the ideal means of social defines.

This “new school” aimed to strengthen itself by opposing what Ferri called the classical school, which represented Italians’ liberal tendencies as exemplified by Carrara. This school developed during the process of political unification and while a harmonized criminal code for all of Italy was being drafted. This school, centred on Carrara, was composed of jurists who were well-known for defending liberty and justice in social life. They were active and militant jurists, seeking change by producing scholarship, working from inside institutions, and looking to reform legislation. They were convinced that criminal law was connected to the process of acquiring public liberties. Tendencies towards cultural openness, political permeability and civil sensibility marked this group, referred to by Sbriccoli as “civil criminalistics”. According to Sbriccoli, this school was characterized by openness and complexity, for it looked to integrate a critical view of society and history into legal science. It has built, therefore, a juridical culture identified with a penal system *as it should be*.

The Italian Criminal Code (1889), the result of an intense debate in criminal science during the second half of the 19th century, was the result of many dogmatic constructions from this school centred around Carrara and inspired by a more liberal view. It consecrated, for example, the end of the death penalty.¹⁸ The political choices made in this code reflect

¹⁸ Other changes: bipartition of crimes (crimes and misdemeanours – in the code the general rules were kept), a progressive prison system, suppression of case-by-case assessment in order to define sanctions and valuation of the circumstances of the crime, religious crimes substituted by crimes against religious

a cultural heritage. Even if they cannot be assigned to a school as defined by Ferri, Sbriccoli understood that Lucchini, Impalomeni, Pessina, Nocito and Brusa were part of the same tradition.¹⁹

Though it was liberal in nature and, therefore, aimed at retributive justice, the code hinted occasionally at correctionalism, inspired by a demand for amendments. It expressed a varied sanctioning system, with provisions for alternative and substitute sanctions that could be assimilated into security measures; actions aimed at special prevention; treatment for the mentally ill, minors, alcoholics and semi-imputables. Positivist criticism and proposals persisted even after the code was approved. However, as Sbriccoli states, the code did not need positivism to make criminal legislators consider security measures, which had already been part of prevention culture for over a century, or even the idea of dangerousness, which was already scientific common sense in the 19th century. They had already appeared – without uproar – in the rulings given under the 1889 code even if, in theory, they were incompatible with these notions.²⁰

It is fitting to note that, in the same year that the Italian Criminal Code was approved, the Public Safety Law was also approved (both originating from the 30 June 1889 Decree). This law provided all the necessary tools to intervene to prevent deviance, though direct criminal repression might have been illegitimate for violating the principle of legality.²¹ This law impeded the code's liberal spirit in many ways. As Martone pointed out, the public safety law retarded the code's impulses,²² since its inspiration was in the rejection of the criminal system's incapacity to respond effectively to social control in everyday life.

There was, therefore, a conflation of prevention and repression, punishment and safety measures, just as Sbriccoli pointed out, in terms of a double level of legality in the law established Italy during the post-unification period.

freedom, many morally relevant misdemeanours became indifferent according to criminal law, political crimes were more rigorously systematized and gained guarantees, the exclusion of “le norme del sospetto” (which, in the 1859 code, allowed punishment for vagrancy and idleness), the maxima and minima are devalued so that the judge has more freedom to determine the sentence, the principle marking the unity of the sentence is affirmed, incarceration sentences are diminished, there is a will to declare prison conditions as incarceration at night and work by day, the institution of parole is declared, new notions for imputability and responsibility are established. SBRICCOLI, Mario. Caratteri originari e tratti permanenti del sistema penale italiano (1860-1990) In: VIOLANTE, Luciano (ed.). *Storia d'Italia. Annali 14. Legge Diritto Giustizia*. Torino: Giulio Einaudi editore, 1998, p. 507.

¹⁹ SBRICCOLI, Mario. Caratteri originari e tratti permanenti del sistema penale italiano (1860-1990) In: VIOLANTE, Luciano (ed.). *Storia d'Italia. Annali 14. Legge Diritto Giustizia*. Torino: Giulio Einaudi editore, 1998, p. 506.

²⁰ SBRICCOLI, Mario. Caratteri originari e tratti permanenti del sistema penale italiano (1860-1990) In: VIOLANTE, Luciano (ed.). *Storia d'Italia. Annali 14. Legge Diritto Giustizia*. Torino: Giulio Einaudi editore, 1998, p. 511-512.

²¹ PETRINI, Davide. Il sistema di prevenzione personale tra controllo sociale ed emarginazione. In: VIOLANTE, Luciano (ed.). *Storia d'Italia. Annali 12. La Criminalità*, 1997, p. 901.

²² MARTONE, Luciano. La difesa dell'ordine: il dibattito parlamentare del 1888 sulla legge di pubblica sicurezza. In: MARTONE, Luciano (ed.). *Giustizia penale e ordine in Italia tra Otto e Novecento*. Napoli: Istituto universitario orientale, 1996, p. 187.

According to Sbriccoli, the code came into effect amidst both hopes and fears. Cesare Lombroso was amongst the code's harshest critics, especially in his piece *Troppo Presto*, in which he affirmed that the code had been approved without contributions from his school and already compromised by a series of mistakes. The criminal code's unity was already subject to criticism in Italy. For Lombroso, the state's diversity could contain various codes. He furthermore criticized the abolishment of the death penalty, parole, light punishments and the impracticality of imprisonment. According to him, in order to defend individuals and their property, society's own rights and properties were put at risk. The legislator's benevolence would only serve to foment criminality and guarantee impunity.

The positivist school expected tension behind the principle of legality, which is consistent with its focus on the opposite of what is represented by liberalism during the first half of the 19th century. It privileged individuals in the face of an objective system of crime and punishment; it took anthropological differences into account, despite a supposed equality in the eyes of the law; it stressed criminal politics in the face of criminal law; and it had social defence at its core rather than individual freedom.²³ The "positivist school" based on social defence privileged categories like dangerousness, in which the logic of prevention supersedes that of repression. Risk was not measured by law, for it was incorporated in the individual and depended more on medical and anthropological knowledge than on normative or legal knowledge.²⁴

So, by denying individual autonomy, the tension between law and state decidedly tended to privilege the latter, privileging the state, or at least its demand for social control, which culminated years later in totalitarian regimes.²⁵ The anthropological premise of this school was no longer a rational and autonomous individual, but a biologically or socially determined man. Thus, there was no longer purpose in basing punitive law on the rationality of the individual as a premise of freedom. Security became equated with order.

In locating this school's basis in science and the objective method, the legal deviated from a logical objective, namely, the limitation of acts that constitute crimes and their punishments, taking a subjective view instead. This follows from the stigmatization of behaviours and their classifications based on the criteria of their dangerousness. According to Pietro Costa, while law proceeded from existing, rigid and explicit determination of what consti-

²³ COSTA, Pietro. Pagina introduttiva (Il principio di legalità: un campo di tensione nella Modernità Penale). *Quaderni Fiorentini*, v. XXXVI, p. 29, 2007.

²⁴ PIFFERI, Michelle. Difendere i confini, superare le frontiere: Le 'zone grigie' della legalità penale tra Otto e Novecento. *Quaderni Fiorentini*, v. XXXVI, p. 744, 2007.

²⁵ Not only is there a continuity in fascism's the abuse of emergency laws, but also of instruments of informal and widespread control of individuals. The break, or discontinuity, coincided with the end of the tension, since it made politics absolute and neutralized the judiciary. COSTA, Pietro. Pagina introduttiva (Il principio di legalità: un campo di tensione nella Modernità Penale). *Quaderni Fiorentini*, v. XXXVI, p. 31, 2007).

tuted crime and punishment, the new scenario focused on their differences and degrees of dangerous as the new foundation for the right to punish.²⁶

According to Floriana Colao, criminological positivism is an attempt to simplify a very complex reality. The concept of abnormality assumes a linear view of political, social and scientific differences, in a context in which authoritarian forces gained strength.²⁷ It is interesting to note that, though they defended empiricism and the necessity of observing reality in scientific activity, the positivist school's criminal types are in fact more "clients for prisons and asylums",²⁸ as Pavarini states. They are, therefore, more a product of the repressive system and social control than of nature. Criminal types are not a natural creation, but a social construction intimately connected to a specific societal mode. It is a cultural product, built on a process that is more ideological than scientific.

With the new criminal school and its criminological foundation, the criminal, in Foucault's terms, went from being an individual to an object of technology and new understandings about reparation and correction. Thus, justice was no longer about punishing but curing and correctional measures (when possible) or elimination instead of punishment. This normal/abnormal binary is the 19th century's imposed division on mankind.

The criminal is abnormal, a specific type of human whose organism is marked with the signs of "evil", of perversion.

Binaries in themselves are not new to criminology. They exist even in the liberal discourse on which the modernization of criminal law is founded from the end of the 18th century onwards, since Beccaria and Bentham. Owners and non-owners, rational individuals and un-governed masses should, according to Bentham, be disciplined through work and controlled by institutions. In the custodial system, consolidated as modern means for punishment, the dual logics of liberty/control and legal equality/norm inequity makes the contradiction of this punitive logic clear and visible. In Foucaultian terms, it is the conjunction of a criminal justice that presents itself as equal for all, but that is actually permeated by the asymmetries of enforcing disciplinary methods.

The overlap between these various schools, classical, positivist, legal socialism, and a third school (eclectic),²⁹ shows the complexity of criminal scholarship during the 19th century.

²⁶ COSTA, P. Pagina introdutiva (Il principio di legalità: un campo di tensione nella Modernità Penale). *Quaderni Fiorentini*, v. XXXVI, p. 28, 2007.

²⁷ COLAO, Floriana. Le ideologie penalistiche fra Ottocento e Novecento. In: Mazzacane, A. (ed.). *I giuristi e la crisi dello Stato liberale in Italia fra Otto e Novecento*. Napoli: Liguori Editori, 1986, p. 116.

²⁸ COLAO, Floriana. Le ideologie penalistiche fra Ottocento e Novecento. In: Mazzacane, A. (ed.). *I giuristi e la crisi dello Stato liberale in Italia fra Otto e Novecento*. Napoli: Liguori Editori, 1986, p. 116.

²⁹ The third school, or eclectic, is identified with authors such as Gabriel Tarde, Lacassagne, Liszt, Alimena. For them, social and environmental influences are the main causes of criminality. They start from positivist premises, such as observation, experience, and a focus on the criminal, but they diverge from positivism when it comes to social responsibility. According to them, punishment must be based on moral responsibility, though this should not be based on free will. Like positivists, they understand this concept to be an abstraction and that subjects are set in particular ways. They reject the idea of a criminal type, with most of its anomalies resulting from environmental influences. But most of the authors Ferri framed as part of this school conceive of different ways of classifying criminals. They claim that punish-

However, even considering the more evident differences between the schools, all belong to the same cultural mould and, by analysing them in detail, it is possible to identify not only their particular disruptions, but also their commonalities. Indeed, this new positivist thought rivalled the liberal school, also represented “with its innovations, but also with its cultural and political limitations, with its cultivation of strategic errors, a historically updated expression of Italian civil criminalism. It belonged – independently of what it considered itself to be – part of a centuries-old tradition”³⁰

During the liberal period, as explained by Pietro Costa, there was a desire to give the individual autonomy and independence, a kind of *immunitas*, with relation to power and outside interference. There was a constant appreciation of his involvement in collective life, his belonging to a political group that includes, protects, disciplines and helps him. There is constant movement and overlap between inclusion/exclusion, internal/external, with new differentiations introduced internally or by falling back on expulsion devices.³¹

The liberal state and liberal justice have always been characterized by binaries: norm/exception, order/freedom, law/power. On one side are the guarantees and on the other, the violation of rights; on one side individual rights and freedoms and on the other, the state’s security and power. According to Pietro Costa, the principle of legality lies precisely in the centre of this tension, as it is the most emblematic symbol of legal modernity, given that a fatal attraction to power through logic devices lies at its extreme. Ironically, it was by bringing opposites together, as Costa explains, that the liberal tradition was founded.³²

This liberal binary was reproduced in criminal law and it branched into two: one liberal and characterized by guarantees, which positivists called ‘the classical school’, the other characterized by criminological foundations (the new positivist school). These two branches oppose each other in terms of discourse, but in truth they have the same cultural root based on the contradiction of freedom/control and are, in practice, largely reconcilable since, in criminal law’s skewed application, they were applied to different subjects. This is why their uses are greater when reconciled than when substituting one for the other.

ment is an efficient means of repression and distinct from other means of social defence. They also claim that prevention is an important factor in fighting criminality and even more relevant than repression. They also uphold that criminal law and criminal sociology are different in the sense that the first studies crime as a legal phenomenon, while the latter studies it as a social phenomenon. These sciences, though similar, do not overlap. There is, therefore, a preoccupation (especially in Liszt) with establishing the autonomy of criminal law in the face of criminology, which is subdivided by the German author into criminal biology or criminal anthropology and criminal sociology.

³⁰ “con le sue utili innovazioni, ma anche con i suoi limiti culturali e politici, con gli errori strategici che coltivava, rappresentava dunque, tuttavia *un’espressione storicamente aggiornata della penalistica civile italiana* e si inseriva, checché pensasse di se stessa in una tradizione centenaria” SBRICCOLI, Mario. Caratteri originari e tratti permanenti del sistema penale italiano (1860-1990) In: VIOLANTE, Luciano (ed.). *Storia d’Italia*. Annali 14. Legge Diritto Giustizia. Torino: Giulio Einaudi editore, 1998, p. 506.

³¹ COSTA, Pietro. *Civitas*: Storia della cittadinanza in Europa, 3. La Civiltà Liberale. Roma-Bari: Laterza, 2001.

³² COSTA, Pietro. Pagina introduttiva (Il principio di legalità: un campo di tensione nella Modernità Penale). *Quaderni Fiorentini*, v. XXXVI, p.15, 2007.

According to Lacchè, the criminal question, with the affirmation of the liberal state, corresponds to a privileged point of view from which to analyse this order-freedom dialectic. Lucchini stated that the only limit to excessive power between politics and the law lay in the connection between criminal laws and public liberties.³³

As Pietro Costa stated, the passage from *ancien régime* to the new liberal regime included not only a redefinition of the individual, his rights and his relation to power, but also a way of doubling the individual from the autonomous and rational on the one side to the dangerous on the other. Each establishes a different relation to public power.³⁴

In this conflict between security/order and liberty lies a conflict between social classes: dangerous vs. worker, owner vs. non-owner.³⁵ As stated by Domenico Losurdo, freedom's sacrosanct space was not meant for all. This space was closed to the poor (non-owners), who were associated with wild beasts and, later, to inferior races, seen as less civilized or even incapable of being civilized. Liberalism and racism were, according to Losurdo, conjoined twins.³⁶

During the 19th century, the importance of medical discourse and its corresponding view of "normality", as well as the racial discourse, penetrated legal liberal discourse, giving this binary a new dimension through biological terms. Morel's category of "degeneration" served as the umbrella under which the "abnormal" was included. But inclusion in this category implied exclusion from society, for deviants' own safety and health.

The "scientific" construction of these "degenerate individuals" is the result of a criminal intervention's adaptation. It was no longer conducted with a specific focus on the criminal phenomenon, but also as a way to govern. Normal, healthy individuals (read rational, white men, civilized according to the European mould, focused on work and with their instincts and sexuality under control) turned against certain types, which were seen as the opposite or a deviation from normality and, therefore, as a constant threat, as enemies of social order.

This entire theoretical arsenal arrived in Brazil, particularly from the 1870s onwards. Though liberalism and the classical school, as Ferri had called it, had influenced the new codes from both the empire and the First Republic, ideas coming from the new positive school and its criminological discourse, were well received and assimilated by Brazilian jurists. These ideas were often seen as the most advanced in criminal law, resulting in a series of legal and institutional transformations, above all in the application of punishment and of controlling the population, which at this time was undergoing significant changes.³⁷

³³ LUCCHINI, Luigi. Inaugurando il Secondo Cinquantenario della Rivista. *Rivista Penale*, v. LI, p. 11-12, 1925.

³⁴ COSTA, Pietro. Pagina introduttiva (Il principio di legalità: un campo di tensione nella Modernità Penale). *Quaderni Fiorentini*, v. XXXVI, p. 12, 2007.

³⁵ SBRICCOLI, Mario. Caratteri originari e tratti permanenti del sistema penale italiano (1860-1990) In: VIOLANTE, Luciano (ed.). *Storia d'Italia*. Annali 14. Legge Diritto Giustizia. Torino: Giulio Einaudi editore, 1998, p. 489-490.

³⁶ LOSURDO, Domenico. *Controstoria del liberalismo*. Roma-Bari: Editora Laterza, 2005.

³⁷ For further information, see DIAS, Rebeca Fernandes. *Pensamento Criminológico na Primeira República: o Brasil em defesa da sociedade*. Tese (Doutorado em Direito) – Setor de Ciências Jurídicas, Universidade Federal do Paraná, Curitiba, 2015.

III – THE CONTEXT OF CRIMINOLOGY’S RECEPTION IN BRAZIL

The reception of criminology in Brazil took place in a context of deep social and political changes from the end of slavery to the consolidation of the republic. The expectation was, therefore, one of openness and inclusion.

Brazil had a mature legal culture. The noteworthy School of Recife welcomed Europe’s more current doctrines (monism, evolutionism, positivism, Darwinism) already from the 1870s, reflected Brazilian thought and its specificity, and sought autonomy for Brazilian culture. The reception of these ideas prepared the integration of positivist criminology. The premises of a more “modern” way of thinking, free from spiritualism and a past from which they sought distance, made it possible for these criminological ideas to be received with increasing sympathy. They were presented as the evolution of criminal law, with more modern proposals, more appropriate for containing criminality and ensuring social order, which is part of the motto on the republican national flag.³⁸

The First Brazilian Republic originated in a military intervention and one of its main characters was a heterodox positivist, Benjamin Constant, who aimed for a sociocratic republic and mistrusted liberal institutions like representative democracy. The republic was also mainly instigated by republicans in São Paulo led by Quintino Bocaiúva, who were inspired by North American liberalism. Its essence, according to José Murilo de Carvalho, was federalism in the sense of a desire for political decentralization, and in which some people’s more democratic aspirations were choked by a liberalism informed by social Darwinism and the idea that the common good consisted of nothing more than the sum of particular interests.

Republican federalism aimed at reconciling different groups and interests. This translated into a decentralization marked by “coronelism” and governors’ politics. Its power dynamics, centred on the defence of very restricted interests, barred the development of the common good and of an inclusive citizenship. The First Republic could be considered less democratic than demophobic. According to Christian Lynch, democracy during this period was reduced to a parliamentary, instead of monarchic, government; democracy meant decentralization and, therefore, federalism and democracy were equivalent.

Considering series of undeniable interests, the republic prepared to create laws that would meet liberal ideals. Maintaining hard-won freedoms was a way to confer legitimacy on the new regime, which initially faced resistance. Ironically, its first piece of legislation was not the constitution (1891), which established individual guarantees, but the criminal code (1890).

³⁸ Another important process that happened in this political transition and that has affected legal culture is the education reform started by Benjamin Constant, which permitted the decentralization of intellectual production from 1891 onwards. Beyond the inevitable wider circulation of ideas which happened also due to the requirement for schools to produce academic publications, the classes offered changed, except for ecclesiastic law, a consequence of the separation of church and state, the creation of philosophy and legal history chairs, as well as a chair for military criminal law and prison system in addition to criminal law.

It was an early demonstration that the necessity of maintaining order and social safety in the republic superseded the guarantee of individual rights and liberties.

One way to keep order and political stability during the First Republic, which guaranteed the edifice of Governor's Politics through the repression of "irrational and passionate, vile and barbarian" opposition, was the indiscriminate use of states of emergency and federal interventions. These instruments were used during the so-called "Republic of the Sword" under Deodoro da Fonseca, who, months after approving a liberal constitution shut down Congress and declared a state of emergency, and Floriano Peixoto, who succeeded Deodoro's resignation and ruled the republic with an iron fist despite his unconstitutional government. Over the course of the First Republic from 1889 to 1930, 11 states of emergency were declared in 1891, 1892, 1893, 1897, 1904, 1910, 1914, 1917/1918, 1922/1923, 1924/1926 and 1930. When a second civilian president, Campos Sales, took power, the republic returned to Governor's Politics, which, however, did not prevent resistance to the government or more states of emergency from being declared.

In a symbolic declaration, Campos Sales stated:

I do not fear appearing contradictory, owing to my republican past, in defending these ideas. I do not fear, also, to declare in front of the Senate, of the Country, that in this Republic I am a conservative (...) I want order, because I want freedom. I am no anarchist. The country is exhausted; an existence full of jolts drains its strength; it is necessary that we establish peace.³⁹

According to Campos Sales, a state of emergency did not contradict liberal institutions. As he understood it, "The state of emergency is a beneficial measure and can coexist with free institutions", being "a necessity in modern society" that "by restricting individual freedom for a time, with temporary measures, assures the permanent interests of the Nation."⁴⁰

But what nation was he referring to? Another question that troubled intellectual republicans was 'who are the Brazilians?'. Who makes the nation? The people? The definition of these terms, which was marked by the racial discourse during the first republic (1889-1930), also interfered with the reception of the criminological discourse, which ostensibly originated in the premise of racial inequality.

A new order and social structure, which started to take shape during the republican period, claimed legality and specific means of control for itself as well as an elaborate discourse to justify and legitimize itself. As Antônio Candido stated: "(...) An absolute sovereign's police is ostentatious and brutal, for the absolute sovereign is not worried in over-justifying

³⁹ SALES, Campos. Apud RIBAS, Antônio Joaquim. *Perfil biográfico do Dr. Manuel Ferraz de Campos Sales*. Brasília: Editora da UNB, 1983, p. 255. Apud LYNCH, Christian. O caminho para Washington passa por Buenos Aires: a recepção do conceito argentino do estado de sítio e seu papel na construção da República brasileira (1890-1898). In: *Revista Brasileira de Ciências Sociais*, vol. 27, n. 28 fevereiro, 2012, p. 160.

⁴⁰ BRASIL. Atas do Senado Federal, de 15 de junho de 1892. Apud LYNCH, Christian. O caminho para Washington passa por Buenos Aires: a recepção do conceito argentino do estado de sítio e seu papel na construção da República brasileira (1890-1898). In: *Revista Brasileira de Ciências Sociais*, vol. 27, n. 28 fevereiro, 2012, p. 163.

his acts. But a constitutional State's must be more hermetic and refined".⁴¹ Belabouring the increase in criminality is one of the discursive arguments, for example, to justify restructuring and intensifying social control practices.

Social hygiene is one way to legitimize state intervention in the population without necessarily contravening liberalism, since it is based on neutral and scientific discourse. A civilized society and a government for which freedom reigned enlisted medicine as an instrument of social control, which happened through a double project of normalization: of society, by a medical definition of what constitutes the perfect society made viable, especially, by public hygiene; and that of medical knowledge and practice, giving the doctor power over health enabled by the institutions of medical learning in colleges and by repressing charlatanism.⁴² Through social hygiene, individual rights could and would be ignored, but this was "legitimate" if in the name of public health. The relevance of inserting social hygiene into governmental practices was consistent with a state that, though claiming to be liberal, had to deal with a series of questions like urbanization and a social reconfiguration (a process of civilization modelled on Europe). There are the realms of the law, of individual freedom and norms, where social medicine and medical knowledge prevailed, where security and social health superseded individual guarantees. According to Aírton Seelaender, this discourse was schizophrenic in that the contradictions were known. Therefore, discourses adapt to their recipients, which explains the prevalence of defending normative intervention over some individuals, in particular those in the "dangerous classes," and legally protecting others. As Lília Schwarcz stresses:

Pathologies in Brazil seem to reach all, but the main targets (...) were the former slaves, the urban poor, those who live in slums and favelas, immigrants, women and children, casual workers, and those who lived in the countryside. Eugenics, social hygiene and a certain social exclusion seemed grounded in the will to combat the sub-citizenship of the Brazilian man, caused – according to these theories – by the lack of prevailing health, especially among the rural and poor populations.⁴³

But, in truth, it was not so much schizophrenia as it was a discontinuity in the levels of discourse, which rearticulates itself to define the exclusion-inclusion criteria. As Nilo Batista stated, the inferiority of blacks, as defined by slavery, became a biological inferiority,⁴⁴ even before acquiring a legal frame and being sustained by power and legitimated through a series of "scientific" discourses.

Equality in face of the law was contradicted by science, which empirically detected the evident inequality of individuals. Brazil's intellectuals accepted this contradiction in order to

⁴¹ CANDIDO, Antonio. A verdade sobre a repressão. Rio de Janeiro: Paz e Terra, 1980, p. 113. Apud NEDER, Gizlene. *Discurso Jurídico e Ordem Burguesa no Brasil*. Porto Alegre: Sergio Antonio Fabris, 1995, p. 20.

⁴² MACHADO, Roberto. *Danação da norma: medicina social e construção da psiquiatria no Brasil*. Rio de Janeiro: Edição Graal, 1978, p. 257.

⁴³ SCHWARCZ, Lília Moritz. População e Sociedade. In: SCHWARCZ, Lília Moritz (ed.). *História do Brasil Nação (1808-2010): Abertura para o mundo (1889-1930)*. v. 3. Rio de Janeiro: Objetiva, 2012, p. 53.

⁴⁴ ZAFFARONI, Raúl (ed.). *Direito Penal Brasileiro: Teoria Geral do Direito Penal*. 4th ed. Rio de Janeiro: Renavan, 2003, p. 442.

naturalize and perpetuate historically consolidated inequalities. In the republic, where slaves were included as liberalism's subjects, discourse had to organize itself so that legal inclusion would not preclude real exclusion. Bourgeois liberalism suited Brazil not only because slavery was ending and capitalism rising, but it was also appropriately sized. Along with this redefinition of liberal discourse, which appropriated Spencer and social Darwinism, positivist criminology (especially of the Italian variety) and racism were absorbed by the elite, who benefited from this exclusion. Both discourses combined to establish a "criminalization directed towards configuring and preserving social spaces with set frontiers, that could not be crossed in its dynamics or even territorially",⁴⁵ since liberalism and authoritarianism were, after all, historically linked in Brazil. According to José Murilo de Carvalho:

In Brazil (...) in spite of the end of slavery, society was marked by profound inequality and a concentration of power. Under these circumstances, liberalism gained its character of consecrating inequality, the survival of the fittest. Attached to the presidential system, republican Darwinism had in hand the ideological and political tools to establish a deeply authoritarian regime.⁴⁶

Criminological discourse in its positivist moulds inserted itself into this combination between liberalism and authoritarianism, becoming absorbed by a significant part of criminal doctrine during the First Republic in spite of scant resistance.

IV – THE ABSORPTION OF POSITIVIST CRIMINOLOGY BY BRAZILIAN JURISTS

Analysing how criminological thinking was absorbed by Brazilian legal culture, as specifically identified with the criminal law scholars in the country's main contemporary law schools, reveals that it was gradual at first. Most of the resistance happened during the 19th century.

Tobias Barreto, a professor of legal philosophy at the Recife law school and one of its first disseminators,⁴⁷ was a stern and keen critic especially of Lombroso's ideas. He was very acerbic, as his thought and works testify. Detecting inconsistencies and exaggerations in the Italian psychiatrist's premises, he commented ironically that, if taken into consideration, they would result in committing all of humanity.

⁴⁵ ZAFFARONI, Raúl (ed.). *Direito Penal Brasileiro: Teoria Geral do Direito Penal*. 4th ed. Rio de Janeiro: Renavan, 2003, p. 457.

⁴⁶ CARVALHO, José Murilo. *A formação das almas: imaginário da República no Brasil*. São Paulo: Companhia das Letras, 1990, p. 25.

⁴⁷ Though he was not a criminal law professor, this jurist's analysis is justified by the fact that, alongside João Vieira, he was one of the first disseminators of Lombroso's ideas in the country. Works analyzed: BARRETO, Tobias. *Estudos de direito e política*. São Paulo: Instituto Nacional do Livro, 1962; BARRETO, Tobias. *Estudos de direito*. Brasília: Senado Federal, Conselho Editorial, 2004; BARRETO, Tobias. *Menores e Loucos em Direito Criminal*. Brasília: Senado Federal, Conselho Editorial, 2003.

He was also alert to the incursions of medical knowledge into law. His monism, his resistance to Spencer's evolutionism and sociological naturalism helped to safeguard his vision of law and of the importance and influence of man as a social, not merely natural, being and, therefore, as a result of human culture. This vision not only allowed him to break with natural law, but also with deterministic naturalism. For example, he used the logic of evolution to argue against determinism, as when he stated:

I consider crime to be one of the clearest manifestations of the naturalistic principle of heredity. As such, even when manifested (...) as a morbid phenomenon, as the result of illness, nothing prohibits that, in this domain, as in all natural domains, adaptation eliminates the irregularities of this inheritance. If by force of natural or artistic selection, even birds change the colour of their feathers, and flowers the colour of their petals, why can't man, by the same process, change his nature (...) Therefore, while the defenders of criminal pathology (...) do not find a precise way to stop crime, punishment will always be necessary. We will eventually see in it, in the name of Darwin and Haeckel, something similar to the Spartan selection, or a sort of legal selection by which corrupt member are set apart from the common social organism.⁴⁸

Thus, he made use of Darwin's theories, his relation to man, culture and law without breaking with the ideas of criminal responsibility and the need for punishment. Though he considered crime to be one of the more significant signs or manifestations of heredity, he objected to the naturalist's determinism. For him, even in admitting this truth, irregularities in any natural being could still be eliminated by adaptation and selection.⁴⁹

As the republic consolidated, so did positivist criminology in Brazilian legal culture. In regards to the teaching of criminal law, João Vieira, a professor of criminal law at the law school in Recife,⁵⁰ was the first criminalist to subscribe to positivist criminology. He disseminated the ideas of the then "new school of criminal law", showing in his writings a clear affiliation. At first, his writing displayed a still confused and syncretic absorption that preserved moral responsibility, but gradually his considerations became deeper and more certain. However, his projects to replace the code showed a parsimony that betrayed a conviction particular to positivist criminologists: changes must happen slowly for greater depth and effectiveness. After all, the project was to adapt an entire legal culture not only through doctrine, but also

⁴⁸ BARRETO, Tobias. *Menores e Loucos em Direito Criminal*. Brasília: Senado Federal, Conselho Editorial, 2003, p. 11-12.

⁴⁹ BARRETO, Tobias. *Menores e Loucos em Direito Criminal*. Brasília: Senado Federal, Conselho Editorial, 2003, p. 11.

⁵⁰ Analyzed works: ARAÚJO, João Vieira. *Ensaio de Direito Penal ou repetições escritas sobre o Código Criminal do Império*. Pernambuco: Typografia do jornal do Recife, 1884; ARAÚJO, João Vieira. *Antropologia Criminal*. *Revista O Direito*, v. 17, n. 49, 1889; ARAÚJO, João Vieira. *Código Criminal Brasileiro: Commentário filosófico-científico em relação com a jurisprudência e legislação comparada*. Recife: Editor José Nogueira de Souza, 1889; ARAÚJO, João Vieira. A reforma das leis criminais. *Revista O Direito*, v. 55, 1891; ARAÚJO, João Vieira. Projecto de Código Penal: Exposição de motivos – Parte Geral. *Revista Acadêmica da Faculdade de Direito de Recife*, 1893; ARAÚJO, João Vieira. Il nuovo progetto di Codice Penale Brasiliano. *Scuola Positiva*, 1893; ARAÚJO, João Vieira. *O projeto do Código Penal e a Faculdade de São Paulo*. Recife: Pantheon das Artes, 1895; ARAÚJO, João Vieira. *Código Penal comentado theórica e praticamente*. Rio de Janeiro, São Paulo, Recife: Laemmert & Cia editores, 1897; ARAÚJO, João Vieira. *Nova Edição do Código Criminal Brasileiro de 1830*. Rio de Janeiro: Imprensa Nacional, 1910.

through a judiciary whose classical roots could turn the modernization of criminal law into more of a problem than a solution.

His debates with João Baptista Pereira, author of the republican code and professor criminal law at the law school in Rio de Janeiro,⁵¹ so criticized on many fronts, are emblematic. They show that the disputes in the field of criminal legal culture would take up the duality of the classical and positivist schools, a duality that existed for the duration of the First Republic as a constant in the discipline's canon. Considered a classical document at the time, the criminal code's lack of prestige reveals much about the new school's ideas.

Both professors were key figures in legal criminal culture at the time. Amidst their exchange of barbs, we can determine where these authors stood, as they usually took strategic positions in the different currents of criminal legal thought. They personified a wider dispute, mostly imported from Italy, between the classical (old or tradition) and positivist (new) "schools".⁵² João Baptista Pereira opted for tradition and stood by the classical school, which he thought represented the main pillars and premises of civilized and contemporary criminal science. João Vieira adhered to the "new" "scientific" school, inherited from the Recife school, the strength of Spencer's evolutionism reflected in his perception of criminal science. Despite his initial confusion, his adherence became ever more incisive, though this theoretical conviction was not reflected in practical terms or in concrete proposals to transform the classical code into a criminological code, as Ricardo Sontag put it well.⁵³ But countless reasons excuse the jurist who was likely our first "criminologist". João Vieira was not naïve and was aware of the controversy around this school in Europe and, even more keenly, in Brazil. He witnessed the approval of an eminently classical code at the birthplace of criminology. He appropriated the discourse of criminologists, such as Ferri and Garofalo, who also held that positivist reforms would be inevitable, though gradual. He took over revising the republican code, trying to insert positivist elements into its premises. However, he was more focused on the past than on innovation. João Vieira tried to derive new ideas from the former Imperial Code, which was considered less classical than the republican code, and to thereby appropriate prestige in Brazilian legal culture. The code was conferred an almost saintly aura reminiscent of the glossators' relationship to Roman law. If the effort novelty and science were not enough to convince, tradition, the past, a source of much prestige, might result in more attention and adherence to this new school.

⁵¹ PEREIRA, João Baptista. *Da Condição actual dos escravos: especialmente após a promulgação da Lei. n. 3270 de 28 de setembro de 1885*. Rio de Janeiro: Imprensa Nacional, 1887; PEREIRA, João Baptista (ed.). *Parecer sobre o Projecto do Código Penal: em discussão na Câmara dos Srs Deputados ao Congresso Nacional*. Rio de Janeiro: Typographia do Jornal do Commercio de Rodrigues & Comp., 1897; PEREIRA, João Baptista. *Código Penal de 1890: Notas Históricas (partes I-VIII)*. *Revista de Jurisprudência*, 1898, 1899.

⁵² For further information, see DIAS, Rebeca Fernandes. *Pensamento Criminológico na Primeira República: o Brasil em defesa da sociedade*. Tese (Doutorado em Direito) – Setor de Ciências Jurídicas, Universidade Federal do Paraná, Curitiba, 2015.

⁵³ SONTAG, Ricardo. *Código Criminológico? Ciência Jurídica e Codificação penal no Brasil (1888-1899)*. Rio de Janeiro: Revan, 2014.

But precisely in this dispute classical and positivist jurists ended up scorning ambiguity and, more than particular ambiguities, those of liberalism, the broader legal and political context to which they belonged. Liberalism was a modernizing instrument during the imperial period, and so it remained during the republic. On 15 November 1890 president Marshall Deodoro da Fonseca stressed the liberal character of the republic in the National Congress: “many reforms and improvements on our criminal laws followed the delineating of the judiciary organism, and one code was decreed with the most liberal and humane doctrines being pursued and with the most solid guarantees to freedom, life, property and the rights that result from it”.⁵⁴ Therefore, liberal discourse was also useful in lending legitimacy to this new government.

But to be liberal in imperial and in republican Brazil meant different things. During the empire, liberalism was conservative and, according to Alfredo Bosi, to be liberal in Brazil meant: a) freedom to produce, sell and buy; b) freedom to political representation; c) freedom to oblige slave work by legal coercion; d) freedom to acquire land by free trade.⁵⁵

Slavery and liberalism coexisted without necessary contradiction. Modernizing the state through rational laws did not imply modernising society in the sense of including all people under law, but in creating a sacrosanct space where only few were included. In this sense, the empire’s liberalism, conservative and moderate, replicated the basis of an economic liberalism based on the proprietor’s freedom of trade and a legal liberalism, deriving the standard premise of legality from the jurists’ discourse. This is the moderate liberalism João Baptista Pereira, who, ironically, wrote the republican code.⁵⁶

⁵⁴ FONSECA, Deodoro da. Apud SONTAG, Ricardo. *Código Criminológico? Ciência Jurídica e codificação penal no Brasil (1888-1899)*. Rio de Janeiro: Revan, 2014, p. 214.

⁵⁵ BOSI, Alfredo. *Dialética da colonização*. São Paulo: Companhia das Letras, 1992, p. 200.

⁵⁶ Identifying him with moderate liberalism, characteristic of the empire, does not mean to imply that he was also in favor of slavery. In 1885, João Baptista published a piece in which he commented on an interpretation of Law 3270, from 28 September 1885, the Sexagenarian Law. This law determined that a slave would be set free after the age of 60. The interpretation of this law was formulated in a memoir titled “*Das relações dos sujeitos á condição de servir, specialmente após a promulgação da lei n. 3270 de 28 de Setembro de 1885*”, published by the Lawyer’s Institute. In this piece, Dr. Silva Costa affirmed that slaves would have acquired freedom under this law, a condition that he interpreted differently than in Roman law. For Silva Costa, for example, from this law on, slaves could no longer be objects in a contract. João Baptista wrote in order to state his position against this interpretation of the law, which to him meant that a slave’s condition could never be altered before he turned 60. In some passages of this piece, it is possible to infer that the author does not defend slavery, but he cannot refrain from positioning himself against a reading of the law that would contradict it. In this piece, the writer is not a man of politics, but a man of the law, the jurist João Pereira, conferring on the law a technical – not political – interpretation. “Without a doubt the servile condition is overabundant; this is entrenched in the institution, for it is an essential element in the formation of civil law, which is based on people’s rights (...) Concessions obtained by slaves, for motives of political order, for feelings of humanity, which came to ease the bad luck of this unfortunate class, do not erase the inability, which was general, and for this reason it is not legal to compare *statuliber* to the minor and to the interdict, as some legal consultants do (...)” Still: “Is it not singular, even stupendous, that in virtue of such clear dispositions, without any doubt, with no possible sophistry, that it be broadly proclaimed in Brazil that there are no longer slaves, when the entire nation awaits with anxiety and inquietude the end of this great battle that, for some years now, is being

The conservative liberalism of the empire asserted itself in relation to a very specific layer of society: the non-slaves. These were still excluded as subjects of liberalism. Some inhabited the sacrosanctity of freedom; the others were enslaved.

In the republic, in which slaves were counted by law among those subject to liberalism, discourse must fit or be refitted, and it was inevitably redefined. This redefinition of the liberal discourse appropriated much from Spencer's ideas and social Darwinism. As stated by José Murilo de Carvalho: "Connected to presidentialism, republican Darwinism had in hand ideological and political instruments to establish a deeply authoritarian regime".⁵⁷

João Vieira fit into this republican liberalism that, linked to evolutionism, racial discourses and social Darwinism, affects criminal law by privileging social interest and security at the cost of individual rights. He did not fail to consecrate the principle of legality or to recognise freedom as one of the individual's central rights, but social defence took precedence in his discourse. If freedom loses some of its centrality, it does not yet yield to equality, which, since it belonged to a social context of slavery, is a more marginal aspect of imperial liberalism. For, in the republican context, equality was relativized not only by racial issues, but also by the criminological discourse that strengthened something already particular to the liberal binary: those inside of and excluded from a sacrosanct space from tramps and wrongdoers to criminals and delinquents – a part of humanity of inferior evolution and civilization.

When the liberal freedom-slavery binary is eliminated, the freedom-security binary expands. Security aspects are strengthened, and those excluded from sacred spaces due to slavery continue to be rejected. These people are prone to personify the main targets of control, of which the criminal system is but a ramification, and become vagrants, wrongdoers and criminals.

It is curious that, in order to legitimize a positivist idea, João Vieira enlisted jurists considered to be classical. João Baptista, from his high classicism, sometimes slipped into criminological arguments. As a defence strategy for the schools, their commonalities were often uncovered in the theories that marked 19th-century legal cultures. This made Mario Sbriccoli's hypothesis that this "sea of schools" and disputes were part of a similar, broad, cultural tradition even clearer.⁵⁸

fought in the fields of politics to set once and for all the servile question?". It is understood that, to João Baptista, it was no longer about defending or not defending slavery; the tendency indicated its eventual abolition. But that eventuality should be the consequence of a political decision, not of a hermeneutical maneuver, of a forced and equivocal interpretation of the law. (PEREIRA, João. Baptista. *Da Condição actual dos escravos: especialmente após a promulgação da Lei. n. 3270 de 28 de setembro de 1885*. Rio de Janeiro: Imprensa Nacional, 1887, p. 14 e 25).

⁵⁷ CARVALHO, José Murilo. *A formação das almas: imaginário da República no Brasil*. São Paulo: Companhia das Letras, 1990, p. 25.

⁵⁸ SBRICCOLI, Mario. Caratteri originari e tratti permanenti del sistema penale italiano (1860-1990) In: VIOLANTE, Luciano (ed.). *Storia d'Italia*. Annali 14. Legge Diritto Giustizia. Torino: Giulio Einaudi editore, 1998.

João Vieira and João Baptista, liberals in their particular ways, each assumed an understanding of criminal law and debated vociferously, though they failed to notice the proximity of their positions.

In 1894, Viveiros de Castro, criminal law professor in Rio de Janeiro, published “The New Criminal School”, with which he sought to disseminate the new ideas in criminal law, which he felt were still nationally underrated. The work, considered by Viveiros de Castro himself to be the first book in Portuguese on criminal sociology (though João Vieira de Araújo was the first jurist in Brazil to bring attention to the New School), aimed to present and disseminate the new criminal school’s ideas, considering that they were still met with much resistance, in Brazil.⁵⁹

Viveiros de Castro’s liberal spirit is as present in his writing as that of criminal positivism’s masters and their premises, which could be seen as anti-liberal. Social defence is a premise that places society, not the individual, at its centre. There is a demand for strong state intervention through repressive institutions and practices in the name of social defence as well as a focus on prevention that tends to target the causes of criminality. The criterion of “dangerousness” (meaning that the response for the crime is based on “how dangerous the person is”, “how much danger the person represents to society”) is very subjective, since it focuses on the individual rather than the act, which can compromise legality, which itself is already at risk through increased judicial discretion.

How is one to understand this combination of overt liberalism and strict adherence to the new criminal school? By problematizing the discourse of Viveiros de Castro and going beyond his use of “democratic”, these discourses can be rendered compatible.

To Brazilian jurists like Viveiros de Castro, there was no contradiction between liberalism and criminal positivism. They claimed to be liberal at every turn: they defended the principle of legality, stood against the abuse of police power and safeguarded the freedoms of expression, of profession and of religion. At the same time they used social defence as the basis for sentencing and the death penalty as way of eliminating those who could not adapt.

The freedom-order binary reflects a corresponding binary of subjects as honest/wrongdoers. This binary does not only fit into criminal positivism, it has been part of legal and criminal cultures since Beccaria and Bentham. The field of exclusion has always been present next to the sacrosanct space of inclusion. One more radical tendency of liberalism, in fact, was the struggle to include more and more groups into this space: women, blacks (during the 20th century) and homosexuals (during the 21st). One cannot deny this positive aspect and the broadening of liberalism’s margins despite its binary. Conservative liberalism, however, prevailed in Brazil even during the republic and conserved its boundaries with that sacro-

⁵⁹ Analyzed works: CASTRO, Viveiros. *A Nova Escola Penal*. Rio de Janeiro: Domingos de Magalhães, 1894; CASTRO, Viveiros. *Attentados ao pudor*. Rio de Janeiro: Domingos Magalhães Editor, 1895; CASTRO, Viveiros. *Delitos contra a honra da mulher*. Rio de Janeiro: João Lopes da Cunha Editor, 1897; CASTRO, Viveiros. *Ensaio Jurídico*. Rio de Janeiro: Laemmert & C., 1892; CASTRO, Viveiros. *Jurisprudência Criminal: casos julgados, jurisprudência estrangeira, doutrina jurídica*. Rio de Janeiro: Livreiro Editor, 1900; CASTRO, Viveiros. *Questões de Direito Penal*. Rio de Janeiro: Jacintho Ribeiro dos Santos Editor, 1900.

sanct space, creating ever more markers of difference, which made criminological thought extremely useful. Viveiros de Castro's democratic and republican tone, though preferable to the empire's liberalism for its lack of slavery, was still very much connected to a conservative logic that tended to prevail over radical logic. This was because the division of mankind due to racial discourse as well as evolutionism and social Darwinism, served as a background for Viveiros de Castro's conception of criminality and the ways to fight it. This breach recurs at several points in his writings, such as when he defends the death penalty and in his emphatic agreement with Garofalo, one of positivist criminology's most conservative thinkers.

Brazilian jurists' "obliviousness" of this apparent incompatibility between criminological liberalism and positivism annuls the liberal binary, presupposing this space of exclusion: for those outside that sacrosanct space of freedom, the criminal/wrongdoer, consequences apply that violate their individual rights. Thus, social security supersedes in acting against wrongdoers and protecting individuals who belong to that sacred space. In this sense, social defence and the defence of individual rights are incompatible, for the defence of society by individuals who belong in this sacred space also applies to those on the outside, and in relation to the latter all individual guarantees may be suspended.

This combination was no accident, since criminal positivism merely exacerbates one of liberalism's aspects, order/security, that intensified as it entered a crisis. This crisis, which happened in Europe far before arriving in Brazil, spread throughout the country along with socialist and anarchist ideas and the aggravation social issues, especially in the early 20th century. It is no coincidence that criminological thought gained new, fervent followers, such as Moniz Sodré, Candido Motta, Esmeraldino Bandeira and more moderate followers such as Lima Drummond, during the same period.

Lima Drummond, also a criminal law professor in Rio de Janeiro,⁶⁰ displayed somewhat 'opportunistic' tendencies, in the sense that he absorbed some elements of the positivist school, but without breaking with other fundamental premises of the "classical school". This conciliation between the schools, trying to elide their opposition and reify them more overtly, seems to be the author's main trait.

This complementarity, where Lima Drummond mixes and fluctuates between classical and positivist elements, also pertains to most jurists who adhere more devoutly to the positivist school. The point, therefore, is to intensify the opposition between the schools in criminology without compromising liberalism, not how Drummond identifies these connecting points. Actually, criminal positivism matched and was based on a liberal discourse. To base criminological positivism on liberal discourse is not only a performative contradiction for some Brazilian jurists, but it also made viable through liberalism's internal contradictions of freedom/order and individual rights/social defence that in practical terms solved this impasse with an intrinsic, exclusionary logic. This binary allows criminal positivism to be reconciled

⁶⁰ Analyzed works: DOMINGUES, Paulo. *Regime Penitenciário: segundo as Preleções de Lima Drummond*. Rio de Janeiro: Jacinto Ribeiro dos Santos, 1914; DRUMMOND, Lima. *Estudos de Direito Criminal*. Rio de Janeiro: Maemmert & C.- Editores, 1898.

with liberalism through the protection of individual rights for some and the safety mechanism for others.

Some elements hailed in this new positivist school already existed in the “classical” liberal school – the duality of subjects, preoccupation with social defence, the idea of fear – all of which appeared in some form in the concept of perversity and the rules and discipline of a “normalized” incarceration to convert delinquents into contributing citizens. These elements are reinforced through positivist discourse. Linked to medical discourse, it tends to strengthen the sphere of norms over that of the law, and it divides humanity even further the social dangers they ostensibly pose, which purport scientific measurement but instead result from a particular ideology.

In Lima Drummond’s work, the combination of schools also became an attempt to reconcile the liberal impasse between the protection of individual rights and social defence. This reconciliation in his mind is necessarily “contaminated” by the duality of the subject’s logic. This is present, of course, in both criminal positivism and liberal classicism.

Esmeraldino Bandeira⁶¹ and Lima Drummond were contemporaries who taught criminal law in Rio de Janeiro at the same time (from the 1890s until the mid-20th century), though in different schools. Bandeira’s views were, however, much more amenable to the criminal positivist school than Lima Drummond’s. He may even be considered an informed admirer and faithful follower. In a speech on 21 November 1908 at the S. Pedro de Alcantara Theate, in Rio de Janeiro, he honoured Enrico Ferri:

In speaking of Ferri I honour one of this century’s more gracious and prolific minds with the collective admiration of a cultured teaching faculty, who know him to be the author of a rigorously scientific doctrine in its foundation and premises, nobly human in its conclusions and teachings (...) It is a known fact that nature sometimes joins in one man the higher qualities of a race, qualities that, as a rule, are distributed parsimoniously amongst individuals. Though Ferri is but one man’s voice, he speaks for his age.⁶²

⁶¹ Analyzed works: BANDEIRA, Esmeraldino. *Relatórios dos anos de 1909 e 1910 apresentado ao presidente da Republica dos Estados Unidos do Brazil em abril de 1910*. Rio de Janeiro: Imprensa Nacional, p. XXXII, 1910; BANDEIRA, Esmeraldino. *Estudos de Politica Criminal*. Rio de Janeiro: Typographia Leuzinger, 1912; BANDEIRA, Esmeraldino. Adaptação da Lei Bérenger no Brazil. Discurso e apresentação do respectivo projecto na sessão de 18 de julho de 1906 na Camara dos Deputados Federaes. In: BANDEIRA, Esmeraldino. (ed.). *Estudos de Politica Criminal*. Rio de Janeiro: Typographia Leuzinger, 1912; BANDEIRA, Esmeraldino. Enrico Ferri e a escola positiva de Direito Criminal. In: BANDEIRA, Esmeraldino. (ed.). *Estudos de Politica Criminal*. Rio de Janeiro: Typographia Leuzinger, 1912; BANDEIRA, Esmeraldino. Individualização da Pena. In: BANDEIRA, Esmeraldino. (ed.). *Estudos de Politica Criminal*. Rio de Janeiro: Typographia Leuzinger, 1912; BANDEIRA, Esmeraldino. O Homem Criminoso e a Penitenciária. In: BANDEIRA, Esmeraldino. (ed.). *Estudos de Politica Criminal*. Rio de Janeiro: Typographia Leuzinger, 1912; BANDEIRA, Esmeraldino. O Patronato. In: BANDEIRA, Esmeraldino. (ed.). *Estudos de Politica Criminal*. Rio de Janeiro: Typographia Leuzinger, 1912; BANDEIRA, Esmeraldino. Sentenças Indeterminadas. In: BANDEIRA, Esmeraldino. (ed.). *Estudos de Politica Criminal*. Rio de Janeiro: Typographia Leuzinger, 1912; BANDEIRA, Esmeraldino. Succedaneos da prisão. In: BANDEIRA, Esmeraldino. (ed.). *Estudos de Politica Criminal*. Rio de Janeiro: Typographia Leuzinger, 1912.

⁶² BANDEIRA, Esmeraldino. Enrico Ferri e a escola positiva de Direito Criminal. In: BANDEIRA, Esmeraldino. (ed.). *Estudos de Politica Criminal*. Rio de Janeiro: Typographia Leuzinger, 1912, p. 227.

In Esmeraldino Bandeira, the question of balancing individual rights and social defence reflects exactly terms Ferri conceived through the positivist school. To Ferri, an important aspect of this school that even corresponds to an opposition towards the classical school is the value of equilibrium between individual and social rights. Ferri's critique is that the classical school privileges individual over social rights to the detriment of society, since his individualism is focused essentially on the person of the delinquent. One way to draw attention to this new positivist approach was by valuing victims and their families, as well as victims' rights during trial.⁶³ Most positivist arguments actually tend to favour the interests of society over the individual. Balance, then, seems to be sought by a discourse that values the individual-victim and not the criminal, which is reinforced by the fact that this school postulates a breach between criminals (read: abnormal) normal subjects. Esmeraldino Bandeira work displays the same dynamics, since this breach grounds his thought on criminality and reactions to it. It is also evident when he defends substituting incarceration for other types of punishment, or when he justifies the necessity of patronage to help freed convicts and those who have left incarceration in the name of the offended and of society.

Lima Drummond, though with some divergence from positivism, argues for the balance between individual rights and social defence in terms very similar to Esmeraldino Bandeira and the criminologists.

Esmeraldino Bandeira's thoughts are thus aligned to republican liberalism, rearticulating the liberal binary of freedom-security and always preferring the latter in the name of defending society. Therefore, the role of criminal law in this dynamic best fits the terms of the positivist school.

In São Paulo, the absorption of criminological thought came later than in Recife. One important jurist who helped this diffusion was Pedro Lessa.⁶⁴ Though his chair was in the philosophy of law instead of criminal law, he prepared the reception of positivist criminology in Brazil. He popularized Spencer's evolutionism and Haeckel, Littré and Ardigó's thoughts in São Paulo. He was a complex jurist who absorbed the main ideas of his time: organicism, evolutionism and scientism, without necessarily denying natural law. He did not adhere to any particular "school". In fact, he is a heterodox jurist, which is clear in how he received and absorbed criminological thought by defending countless positivist ideas (social defence, fear, artificial selection, incorrigible criminals, criminal asylums) while criticizing criminal anthropology. His psychic determinism, so contrary to the "classical" free will, differs little from the model of criminal responsibility as transposed in the "classical" codes. If it began with an autonomous will, then there would be no meaning in preventing, attenuating or aggravating

⁶³ FERRI, Enrico. Il progetto del Codice di procedura penale – Discorso parlamento (22 maggio 1912). In: FERRI, Enrico. (ed.). *Difesi penali*, v. III, 1886, p. 324.

⁶⁴ Analyzed works: LESSA, Pedro. Há um direito natural? *Revista Acadêmica da Faculdade de Direito de São Paulo*, v. 2, p. 134, 1894; LESSA, Pedro. O direito no século XIX. *Revista Acadêmica da Faculdade de São Paulo*, v. 8, p. 178-179, 1900; LESSA, Pedro. *O determinismo psychico e a imputabilidade e a responsabilidade criminaes*. São Paulo: Typ. Duprat & C., 1905; LESSA, Pedro. *Estudo de Philosophia do direito*, 2 ed. Rio de Janeiro: Francisco Alves, 1916.

circumstances, as Lessa stresses in an example. His thought, however, defies classification in a particular school, though he is often misunderstood. As a result, Lessa is hard to fit into any particular school. His philosophical and criminological syncretism and eclecticism are clear, which is not particular to Lessa, but also shared by many Brazilian jurists who were influenced by the “1870s generation.” Pedro Lessa did not belong to the Recife School, but he absorbed many of its debates and brought them to São Paulo. As Juliano Rodrigues Torres put it, this eclecticism is characteristic of the Recife School, with different manifestations of positivism (legal, sociological, natural, conceptual) and evolutionism connected to Darwin, Spencer and English empiricism. Therefore, “Despite this game of opposition between legal positivist theories in Europe, a portion of Brazilian legal thought will receive and incorporate these ideas between 1870 and 1920, constructing a discourse in which all of these streams coexist without major conflicts”.⁶⁵ This seems to be Lessa’s general position from that particular period.

Severino Prestes⁶⁶ became the first professor of criminal law in São Paulo to subscribe to criminological positivism. A self-declared republican and liberal, member of the positivist school and practitioner of racial discourse, Severino Prestes symbolizes Brazilian republican positivism during its initial forty years, when being a liberal meant embracing the principle of social defence. It was, after all, a freedom based on the difference presented by racial discourse. This freedom applied only to a limited, sacrosanct space that excluded criminals, referring to the racially inferior who were to be segregated for the sake of safety and the defence of society, which in turn consisted of those belonging to the sacrosanct space of freedom.

José de Aranha⁶⁷, also a criminologist and professor at São Paulo’s law school, was a monarchist and natural law theorist of the classical school. He was optimistic about the Brazilian people’s temperament, defined by hard work and destined for progress. At the time José de Aranha represented a past tradition in the scientific and political terms of criminology. In cultural terms, however, he was seen as a vanguard, for there were still many sceptics and pessimists about the Brazilian people regarding their aptitude for progress, given the racial discourse’s suffusion of the nation’s understanding of itself. And so, in politics as in culture and science, José de Aranha “rowed against the current” of criminal law during the second decade of the republic.

The government was, after all, “republican” in that order and progress were supreme. During this time, however, the Brazilian republic was still immature, and its society was still unstable. Perhaps – and not without reason – the jurists who subscribed to republicanism at the time mostly adhered to the premise of the right to punish so as to keep society safe. As

⁶⁵ TORRES, Juliano. *A ordem e a fera: o fenômeno jurídico no pensamento de Clovis Bevilacqua*. 176 p. Dissertação (Mestrado em Direito) – Setor de Ciências Jurídicas, Universidade Federal do Paraná, Curitiba, p. 71, 2013.

⁶⁶ Only work found and analyzed: PRESTES, Severino. *Lições de Direito Criminal: colleccionadas e redigidas por Francisco de Castro Junior*. Rio de Janeiro-São Paulo-Recife: Laemmert & C. – Editores, 1897.

⁶⁷ Only work found and analyzed: ARANHA, José. M. *Preleções de Direito Criminal*. Typografadas por Augusto Moreira Soares, 1906.

for progress, at the time order and security were most necessary and, therefore, those who valorised the individual relative to society, like José de Aranha, represented “conservatism” and the past.

The definite engagement with criminological positivism in São Paulo arrived with Candido Nanziazeno da Motta,⁶⁸ who significantly reproduced criminological theories, especially of the Italian school (Lombroso, Ferri and Garofalo). He hardly questions these theories, refraining not only from critical analysis, but commenting little about the criticism these theories had received since the second Congress for Criminal Anthropology, held in France in 1889.

The fight for existence and the aptitude for work were the key elements in his thought, since they justified state intervention, especially in regards to minors, who were Candido Motta’s main concern. It is no coincidence that he linked himself so tightly to the ideas of Ferri. The author’s premises lead to an extremely interventionist state. From a determinism characterized by social issues he arrives at statolatry. It aimed through prevention and substitution to mould the individual into a contributing citizen, apt to work for his subsistence. This normalization was to take place in one’s character most of all.

In this sense, the inherent contradictions of criminological positivism and the process of their reception is revealed in the analysis of Candido Motta’s work. In his consistently organicist, materialist and naturalist rhetoric, for example, he frequently invokes the need to establish morality and character, which is always included in his discourses about the soul.

In reclaiming a scientific analysis of crime and the criminal, he ends up analysing them with moral – rather than medical – premises and models. This ideological approach spares them a more scientific examination. As Turatti put it in light of Italian legal socialism, the anthropological school’s greatest fault was its inability to criticise their contemporary society deeply. It overlooked, for example, that some attitudes seen as normal by bourgeois standards could be condemnable from a different, external moral point of view.

Motta’s moralism and interventionism concerns not only minors and criminals but prostitution as well. The jurist considers prostitution the result of anthropological causes, both physical and social. But as a necessary evil, it had to be simultaneously tolerated and neutralized through administrative measures directed at women. To Motta, *police* intervention would enable actions aiming *morality* and *hygiene* to protect public morality and order,⁶⁹

⁶⁸ MOTTA, Candido. *Classificação dos criminosos*. Dissertação apresentada para o concurso à vaga de lente substituto da 3ª secção (direito criminal) na Faculdade de São Paulo. São Paulo: Typographia a Vapor Carlos Gerre & Cia, 1897; MOTTA, Candido. Prostituição. Polícia de Costumes. Lenocídio. *Revista da Faculdade de Direito de São Paulo*. v. 5, p. 312-315, 1897; MOTTA, Candido. Os menores delinquentes e seu tratamento no estado de São Paulo. *Diário Oficial*, São Paulo, p. 8, 1909; MOTTA, Candido. *Direito Penal*. São Paulo: texto datilografado, 1927; MOTTA, Candido. A mão de obra penal. *Revista da Faculdade de Direito de São Paulo*, v. 29, p. 238, 1933.

⁶⁹ a) hotels are not allowed, these women must live in a private home of up to 3 people (a measure aiming to stop work of sexual nature); b) the windows must have curtains on the inside and blinds on the outside (to keep from witnessing what is happening inside); c) one cannot engage passersby through words or gestures, or speak to them; d) the blinds must be closed at certain determined hours; e) must dress in

though not women's individual rights. These actions or preventative measures were published under the title "Provisionary Police Regulations on Mores" and distributed to women. They were widely criticized for violating individual freedom, for the police's incapacity to regulate an institution that was not even recognized, and so on. Aware of some abuses regarding the execution of his regulations, Motta answered that: "these abuses, which are always punished, are preferable to public dissoluteness and the scandals that shame us"⁷⁰

Candido Motta adapted himself to the interventionist republican logic of the Brazilian state. This intervention was distinct in its authoritarianism and disrespect towards individual guarantees, its segregationist intervention that affected certain individuals in particular, and in its links to physical as well as moral hygiene. In this sense, criminological discourse seemed fitting since it legitimized this intervention, including through "scientific" arguments. After all, a state not only could, but *should*, interfere to defend society.

Moniz Sodré, a professor of criminal law from Bahia, and avowed liberal and democrat and devout positivist, paid attention to the criticism of the anthropological school based on the argument of social defence and its despotism, specifically: the idea that any act taken in order to defend society defence is justifiable. This means that the author did not ignore liberals' objection to this school. In this sense, he initially defended the anthropological school by using one of Ferri's arguments that history was a succession of abuses and a series of bloodily martyred victims, justifying the right to punish with absolute, divine justice. It also claimed that the positivist school sought a balance between individual and social guarantees; so much so, expounded Sodré, that, in order to contain abuses of power, its adherents recommended popular criminal action (no longer exclusive to the Public Ministry), reparations for legal mistakes to those unjustly prosecuted and sentenced, and the reclassification of certain crimes from criminal to civil status. He analysed this supposed balance thusly:

It is a fact that the anthropological school does not act as the classical which, starting with Beccaria, its real founder, tried hard to progressively circle around the person of the criminal with guarantees – even to the detriment of justice and against the interests of society. But in the 18th century these ideas, so generous towards the criminal, were justifiable as a noble reaction against the barbarian and cruel legal measures of the Middle Ages. These days, when it is no longer possible to accept the theory that the State is the enemy of the individual, it becomes indispensable to have a timely and necessary counter-reaction, a strong stance, irreducible when facing the whims of tyranny. But it pays to remember that, even if the metaphysical school came up with a programme to defend accused individuals from the exorbitances of power, its defence of individualism remains incomplete and partial, always imperfect, for the victim's interest and individuality were neglected, never receiving special attention from the classical criminalists, so worried were they with the idea of protecting delinquents.⁷¹

decent manner when on the street, covering their body and breasts; f) at public functions, such as the theater, must behave with decorum, not being allowed to speak with men when in view of the public. (MOTTA, Candido. Prostituição. Polícia de Costumes. Lenocídio. *Revista da Faculdade de Direito de São Paulo*, v. 5, p. 312-315, 1897).

⁷⁰ MOTTA, Candido. Prostituição. Polícia de Costumes. Lenocídio. *Revista da Faculdade de Direito de São Paulo*, v. 5, p. 315.

⁷¹ SODRÉ, Moniz. *As três escolas penais: clássica, antropológica e crítica (estudo comparativo)*. 8th ed. Rio de Janeiro: Freitas Bastos, 1977, p. 340.

This demonstrates Sodré's concern with justifying his criticism towards the anthropological school, which conceived them as a danger towards individual rights. Claiming to be a democrat and a liberal, this did was incoherent with his affiliation to a school accused of abusing of power. The argument, then, is about equilibrium between individual rights and social defence as well as justifying the reduction in guarantees for delinquents and increasing the defence of victims' rights. This also comes from a discourse that differentiates between delinquent and victim in regards to their humanity, terms very similar to those of Ferri, Esmeraldino Bandeira and Lima Drummond, as mentioned above.

To Sodré, the classical school had had its last gasp, and though it still figured in the conservative and modernity-adverse codes favoured by the enemies of evolution, it had already been superseded in doctrine. For him, the anthropological school steadily won support amongst the wise criminalists and would "definitely conquer victory in this continuous and daily fight for truth".⁷²

In his opinion, the moment was near when the sentence would mix all mechanisms of social defence, since scientific advances propelled the study of irresponsibility (read: abnormality):

(...) as the human spirit evolves and science progresses, the circle of irresponsibility becomes wider. Nowadays, the class of the irresponsible is made not only by the mad; but also the deaf-dumb, the sleepwalkers, the alcoholics, the hypnotized. It becomes natural to believe that the day is not far when all men will become morally irresponsible, it will be the true banality of the determinist philosophy's dogma (...) Punishment will then be seen by all as a measure of social protection, as it is now understood by the anthropological school, and no longer, by this view, be distinguished from any sentiment other than social defence.⁷³

For Sodré, this was alarming or dangerous, but quite the contrary. It was a natural consequence of scientific advancement. This contrasted sharply from Tobias Barreto who clearly foresaw even at the end of the 19th century that, in taking criminal anthropology to its limit, all would be put away in asylums.

In Filinto Bastos, also a criminal law professor at the law school in Bahia and an abolitionist apparently sympathetic to the feminist movement, there is a consistent resistance against the central premises of the positivist school. This resistance stems from a liberalism leaning more toward individual freedom than toward the safety of society – a more democratic view. To him, the premise of mankind's duality is absent. He generally defends the law's autonomy in the face of criminal anthropology and sociology, and he defends that social interest cannot override individual rights, since the individual is more than a cell in the social organism. He stresses the utility of sentences; sustains free will and moral responsibility as criteria for punishment, and he repels the criminal type. Moreover, to him the criminal is not simply abnormal, following the classical school's terms, by which "it is certain that the classical

⁷² SODRÉ, Moniz. *As três escolas penais: clássica, antropológica e crítica (estudo comparativo)*. 8th ed. Rio de Janeiro: Freitas Bastos, 1977, p. 342.

⁷³ SODRÉ, Moniz. *As três escolas penais: clássica, antropológica e crítica (estudo comparativo)*. 8 ed. Rio de Janeiro: Freitas Bastos, 1977, p. 246.

school, in admitting a fundamental equality between all men – delinquent or not – repels the premise of the anthropological school that the delinquent is an anomaly, a distinct variety of the **genus homo** (...).⁷⁴

Thus, it would appear that the premise of the breach between men proposed by the *norm* did not prevail in Bastos's work. The absence of this premise may be one of the reasons, in addition to the limiting of the legal sphere in face of the intrusion of other sciences, that made him resist the positivist school's postulates. And since the dissemination and adherence to the new school in the teaching of criminal law tended to intensify in the first decade of the 20th century, he was "swimming against the tide".

In Curitiba, the syllabi of two criminal law professors of the period, Antonio Martins Franco (who graduated in São Paulo), and Ulisses Falcão (from Rio de Janeiro), displayed roots in positivist criminology. Ulisses Falcão declared the victory of the positivist school with exacerbated and laudatory optimism:

It is the total triumph of the New School's ideas, overcoming the old legalities which, up until Lombroso, seemed to be the newest science but which were undone and diluted by the merest breath of his geniality. It is the triumph of mental medicine illuminating the life of Criminal Law and normalizing its application in defence of society.⁷⁵

This passage is certainly symbolic, as it illustrates mental medicine restoring the law and normalizing its application in defence of society. Mental medicine normalizes the application of law through medicine for the protection of society, but also normalizes society by fitting those who were abnormal, deviant or delinquent into a "norm" (that is, the standard – the contributing citizen). Still, considering the analysis of the discourse and view of the criminal as ill, it is clear that Vieira did not worry about the intrusion of medical knowledge into law's right to punish, a worry that was already significant in the work of Tobias Barreto, José de Aranha and Filinto Bastos. This argument inspired many of positivism's critics to claim that criminal law was being cancelled by criminology or criminal sociology. Pará saw this intrusion as not only legitimate, but necessary to make social defence more effective and even more humane. He concluded that:

(...) one must look with care to all of these multiple questions, so that they may be opportunely resolved according to the best guidance of sociology and progress, that we can gradually advocate an appropriate and humane treatment to delinquents, similar to what is ministered to the those with other infirmities, thus defending our time from the judgment that history and criticism fatally reserve for us.⁷⁶

⁷⁴ BASTOS, Filinto. *Breves Lições de Direito Penal: de conformidade com o programa adoptado na Faculdade Livre de Direito da Bahia*. Bahia: Libro-Typographia Almeida, 1906, p. 28.

⁷⁵ VIEIRA, Ulisses Falcão. O criminoso e a repressão penal. *Paraná Judiciário*, v. IX, n. V, p. 359, 1929.

⁷⁶ VIEIRA, Ulisses Falcão. O criminoso e a repressão penal. *Paraná Judiciário*, v. IX, n. V, p. 359, 1929.

CONCLUSION

Analysing the period's criminological culture reveals that, as the republic consolidated itself, so too did positivist criminology. Most jurists absorbed certain premises from evolutionism and Darwinism, including the latter's social variant of society as an organism, and from the divergence from contractualist theories and natural law. The latter persisted only through Pedro Lessa, who merged it atypically with evolutionism, and through José de Aranha, who cast it almost theologically with moral laws differentiating man while at the same time directing him to the purpose of Creation.

The issue of race, built on the European model, is explicit in the thoughts of João Vieira, Viveiros de Castro, Phaelante da Camara, Severino Prestes and Candido Motta. In fact, though it does not appear with the emphasis one might suppose, human inequality in racial terms was something of a common assumption that was often taken for granted. Though not as frequent or as explicit, it is undeniable that those who subscribed to positivist criminology, which sprung from the presupposition of human inequality based on race, assimilated this discourse naturally. The acceptance of positivist criminology implied human inequality as a premise, and race was one of the factors determining this inequality.

Social Darwinism, understood as strong binaries between the criminal/honest, the abnormal/normal and between the ideas of incorrigibility and of eradication as an alternative, is reproduced emphatically through João Vieira, Viveiros de Castro, Esmeraldino Bandeira, Gervasio Fioravanti, Candido Nazianzeno Motta, Moniz Sodré, Severino Prestes and even amongst those who did not subscribe to the anthropological school, like Pedro Lessa, who went so far as to advocate eugenics.

The importance of work and moral education for survival and as an instrument of regeneration is also a commonplace of these jurists, most prominently Candido Motta, Pedro Lessa and Lima Drummond, who even defended harsher laws against vagrancy.

The relation between individual freedom and the defence of civil society is also a constant theme and even featured as one of the focuses of this research. For each jurist, I have analysed how this discussion arose, though it is worth mentioning that most of them favoured defending society at the expense of the individual (with the exceptions of José de Aranha and Filinto de Bastos, who opposed the anthropological school). This can be linked to the widespread duality of individuals, which arose from medicine, in modern criminal law that was also present in their initial premises. Medical knowledge, which demonized certain individuals based on a scientific discourse and allowed for popular imagery that sought more means of guaranteeing security and social order in the face of fear and danger.

The ideas of fear and danger, therefore, are central to these authors, who consider them as the defining criteria for the types and extent of criminal punishment. Danger, however, lies in the individual, and not the in the individual's action. This logic is reflected in every criminalist's work, including Lima Drummond, in whose work the new positive school's concept of fear is common. It appears even in the writings of Filinto Bastos, though in his work this concept emerges in relation to the code while discussing mitigation and atten-

uation and when addressing recidivism. Dangerousness became one of positivism's more central concepts, since it was one of the main instruments that recommended a focus on the individual's criminal rights. However, despite boasting about the objectivity of its truths, this school created a concept that was as subjective as that of the free will or more so, since measuring humans' normality/dangerousness proved no be less problematic than measuring their freedom.

João Vieira was the first criminalist to support criminological positivism. He openly advocated the ideas of what was then the "new school of criminal law". In his first piece, he presented a still confused and syncretic understanding, still allowing for the idea moral responsibility, though his analysis gradually grew in depth and conviction. However, his projects to replace the code show a parsimony that should not necessarily be taken for an inability to transform his premises into laws, but an awareness of the positivist criminalists that changes should be gradual, so that they become deeper and more effective. The purpose of such reforms was, after all, to adapt an entire legal culture not only through doctrine, but through the judiciary which, because of its a more classical foundations, could turn the modernization of criminal law more into a problem than a solution.

His debates with João Baptista Pereira, author of the republican code that was so criticized on various "fronts", are emblematic and show that the contentions in the field of criminal legal culture absorbed the duality of the classical and positivist school, a duality that throughout the First Republic and remained a constant presence in academic programmes. It is important to note that the criminal code's lack of prestige while it was considered to be classical facilitated the reception of this new school's ideas.

The Recife school was an early adopter of criminal positivism, and its criminal law faculty included professed followers. Phaelante da Camara was a member, as was João Vieira, an evolutionist influenced by the European racial discourse who criticised the republican code for not having incorporated new anthropological ideas and a believer in cataloguing criminals. Gervasio Fioravante considered confinement as absurdity defended dangerousness as the main criterion for recidivism and favoured definitive sentences for incorrigible criminals. Octavio Tavares, like Ferri, considered crime to be a natural and complex phenomenon and defended undetermined sentences.

Rio de Janeiro was a nursery for positivist criminology. The presence of João Baptista Pereira as a criminal law professor was not enough to make the schools in the republican capital, both of which were deeply influenced through alumni by the Recife school, fertile ground for positivist criminology. Lima Drummond, though with more parsimony and interest in conciliation between the schools, could not avoid including hints of the new school in his writing. Drummond did not claim to be a follower. Rather, he believed that positivist ideas should be studied and incorporated for their utility with considerations of social and temporal context. He saw no necessity of breaking with the "classical school", so he combined elements of both schools. Viveiros de Castro, though more strident in his belief that the positivist school was the latest evolution in criminal law, at times betrays a commitment to classical premises. For example, he considered mad individuals to be unimputable and irresponsible

in agreement with classic. Esmeraldino Bandeira developed positivist premises with great resourcefulness. His syllabi were thorough and free of the occasional contradictions that appeared in the initial writings of João Vieira and in some topics addressed by Viveiros de Castro. Bandeira did not insinuate the open conciliatory tone of Lima Drummond regarding positivist priorities, which also minimally present in Candido Motta.

In São Paulo, criminological thought was absorbed somewhat later than in Recife, though most of its professors gradually subscribed to criminological positivism. Pedro Lessa, through a philosophy course and from a particular heterodoxy, promoted evolutionism without breaking away from natural law and contesting free will, defending (psychological) determinism.

As for criminal anthropology, it actually defends many of the premises of the positivist school. These include social defence as grounds for punishment, the incorrigibility of certain criminals and their inevitable elimination, and the concern with building the moral character of youth. Severino Prestes did not dare to discuss free will, but he presented himself as an “intransigent defender” of the positivist school. In him, racism is also prevalent, as it was with Candido Motta, marking the definite conversion of São Paulo to the new ideas in criminal law. His work features application to minors and the strictures of criminological normalization, and he even participated in the creation of a law that established institutionalisation for minors. Just as in Pedro Lessa’s work, concern for the moral character of individuals turned towards the mysteries of the soul despite his evolutionism and determinism. José de Aranha sounded like a stubborn voice from the past in this whirlwind of new ideas, even to the point of clinging to monarchism. His criticism of the positivist school is lacking in comparison to that of Tobias Barreto. He does not have the same perspicacity and lucidity, appealing to outdated arguments with little persuasive power, such as natural law and its theological roots. While Tobias Barreto armed himself with the weapons of “pathological criminals” in order to fight them, José de Aranha resorted to old tricks with little firepower.

In Bahia, Moniz Sodré and Filinto Bastos were at odds. Both criminalists were prominent nationally, but Sodré’s work analysing the three criminal schools (classical, positivist and critical) resonated more widely due to constant refinement. Bastos’s classically informed criticism of positivism was not as well received. Filinto Bastos managed to compose a shrewder criticism than José de Aranha by identifying Ferri’s argumentative tricks, such as a “forced” interpretation of free will. He was also more of a man of his time, even defending feminism and women’s emancipation. He is one of the few not to break with the classical principle of human equality by not accepting the normal/abnormal binary in order to understand criminals.

In Curitiba, both criminal professors at the time – one having graduated in São Paulo and the other in Rio – notably presented positivist criminology in their teaching programs and, in the case of Ulisses Falcão, he openly declared his adherence to the new school. This shows that Curitiba, even with its peripheral status, noticed and absorbed the discussions being had in the more traditional (Recife and São Paulo) and politically central (Rio de Janeiro) schools.

Even with some initial and topical resistance during this period, positivist criminology gradually became hegemonic in criminal law scholarship, especially from the first decade of the 20th century.

During the First Brazilian Republican, being liberal also meant taking on the premises of social defence, since it consisted of a liberty settled on difference, was based on a racial discourse and asserted itself as a restricted, sacrosanct space from which criminals were excluded. These individuals tended to coincide with those considered racially inferior, who were to be segregated for the security and safety of a society composed by those belonging to that free, sacrosanct space. Thus, during Brazil's First Republic, to be a liberal meant defending society through a criminological prism. It meant defending a narrow, specific segment of society.

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