

Law and Norm: Science and Biopolitics through a Foucauldian perspective

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Abstract

This essay is an attempt to describe the genealogy, that is, the historical emergence of the judicio-medical apparatus of scientific discourse that is known as “criminology”, in order to raise epistemological questions concerning its conditions of possibility and its conditions of production in the context of modern western societies. More specifically, the main question that should be asked is if the discourse and practices of criminology belong exclusively in the area or field of Law and Justice or whether they belong also and inevitably in the area or field of the Norm and Medicine. Thus, a historical–philosophical survey should examine the conditions of possibility and the consequences of this judicio-medical apparatus, since its emergence and its production are based not only on the concept of Law but also on the concept of the Norm.

Keywords: Criminology, Norm, Law, Biopolitics, Foucault

Introduction

Around 1807 – 8, Georg Wilhelm Friedrich Hegel (1770 – 1831) set rather clearly and plainly a – very simple in form, but deeply serious in its content – question: “Who thinks abstractly?” And he gave the following short, sharp and surprising answer: “The uneducated, not the educated”. Subsequently, Hegel makes all speed to give a concrete example of such abstract thinking: “A murderer is led to the place of execution. For the common populace he is nothing but a murderer. Ladies perhaps remark that he is a strong, handsome, interesting man. The populace finds this remark terrible: What? A murderer handsome? How can one think so wickedly and call a murderer handsome; no doubt, you yourselves are something not much better! This is the corruption of morals that is prevalent in the upper classes, a priest may add, knowing the bottom of things and human hearts. One who knows men traces the development of the criminal's mind: he finds in his history, in his education, a bad family relationship

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between his father and mother, some tremendous harshness after this human being had done some minor wrong, so he became embittered against the social order — a first reaction to this that in effect expelled him and henceforth did not make it possible for him to preserve himself except through crime. — There may be people who will say when they hear such things: he wants to excuse this murderer!”¹

Thus, if, according to the Hegelian perspective and perception of things, the “one who knows men” traces the formation and development of the criminal in every aspect and fold of his life and personality, is the single and only example of non-abstract, that is, of non-metaphysical but of concrete and scientific thinking, then we should not be surprised by the fact that, even before the end of the nineteenth century, this very example was the model for Criminology. As it was aptly written, in 1893, by the Austrian Professor of Criminology and Law, Hans Gustav Adolf Gross (1847 – 1915), in his *Handbuch für Untersuchungsrichter als System der Kriminalistik* (1893), an investigator should acquire a deep and profound knowledge of human behaviour by noting down the individuals that surround him: “To this end everything in life can be utilised—every conversation, every concise statement, every word thrown out by chance, every action, every aspiration, every trait of character, every item of conduct, every look or gesture, (...)”.²

Therefore, the question that arises is how from a phenomenology of the spirit have we come into a phenomenology of the criminal?³ How, during modernity, have western societies been distanced from the radical critique to the metaphysical thinking of the abstract and reached the scientific worship of the concrete? Shortly, how have we found ourselves in a great distance from the abstract and moral way of thinking that characterized *not only* the common populace *but also* the ladies of the upper class who, according to the Hegelian example, equally abstractly see the criminal either as a moral monster or as an interestingly peculiar being? And how have we managed to reach the concrete, profound, that is, scientific knowledge of the biography and the thoroughly detailed mapping of the criminal personality? How, that is, at which price and through which means? Do we still remain in the field of *Right* and *Law*, when we refer to crime or do we actually approach the field of *Medicine* and the *Norm*? Could there be any kind of criminology that has not already been a forensic science? These questions might be heard as

¹ Georg Wilhelm Friedrich Hegel, “Who thinks abstractly?” in Walter Kaufmann, *Hegel: Texts and Commentary*, (Garden City, NY: Anchor Books, 1966), pp. 113-118.

² Hans Gross, *Criminal Investigation. A practical handbook for magistrates, police officers and lawyers*, tr. J. Adam & J. Collyer – Adam, (Madras: A. Krishnamahari, 1906), p. 32.

³ Gross, *Criminal Investigation*, p. 27: “We may remind our readers that the subject with which this book deals in part, *Criminal Phenomenology*, is but one branch of the wider science of Criminology”.

peculiar and untimely at a time, during which the identification of the criminal is taking place inside the police lab, before he even sits accused in the dock, but they have a profound and great historical and theoretical significance for the understanding not only of the past but also of the present of our societies and of the formation and construction not only of Criminology but also of Medicine.

Conditions of possibility of a judicio-medical domain

Therefore, it is time to be more concrete. In 1831, the Phrenological Society of Paris was founded, in order to promote the scientific ideas of the Austrian neuroanatomist and physiologist Franz Joseph Gall (1758 – 1828), who believed that it was absolutely possible to acquire knowledge of the personality and both mental and moral faculties of an individual on the basis of the external shape of its skull. The examining method called craniology, according to Gall permitted the identification of up to 27 different fundamental inclinations or tendencies that are abutted to the different regions of the brain. The empirical affirmation of his phrenological theory had taken place in various prisons in Germany, around 1805, as he found there through craniologies that all the thieves were inscribed at the *maximum* rate – that is, at an *abnormal* rate – the normal, in other respects, tendency towards greed. Gall's craniologies on convicted criminals inaugurated the medical explanation and interpretation of a crime and provided a scientific guide for the legal treatment of criminals. The path to Cesare Lombroso (born Ezechia Marco Lombroso; 1835 – 1909) was royally opened and the latter's "born criminal" (*reo nato*) could make his first steps.⁴

Nonetheless, there was a scientific path that was plotted in a parallel line. Psychiatry and its scientific discourse had already begun to fight against the primacy of legal discourse in the field of justice, as the case of farmer Pierre Rivière eloquently shows. Let us remind ourselves that in 1972 Foucault in his annual seminar at the Collège de France with a small group of attendants, including Robert Castel and Gilles Deleuze,⁵ discovered and studied the archives of an extraordinary case, where on 3 June 1835, the 23-year old Rivière premeditatedly and cold-bloodily murdered his mother, who was six months pregnant, as well as his sister and his brother and then surrendered himself to police, and there he wrote his memoir, in which through a remarkable style of writing he confesses and describes his crimes with no remorse or regret. Rivière's trial became a scene where the confrontation between the judicial and the

⁴ Cesare Lombroso, *The Criminal Man*, (New York and London: G. P. Putnam, 1911).

⁵ David Macey, *The Lives of Michel Foucault*, (New York: Vintage Books, 1993), p. 248.

medical discourse concerning its case took place. Foucault and his collaborators managed to find and published Rivière's own hand-written account of the case and Foucault stated simply: "I think the reason we decided to publish these documents was to draw a map, so to speak, of these combats, to reconstruct these confrontations and battles, to rediscover the interaction of those discourses as weapons of attack and defence in the relations of power and knowledge".⁶

These combats, these confrontations and battles had already begun in 1825, as Jean-Étienne Dominique Esquirol's (1772 – 1840) student, Etienne-Jean Georget (1795 – 1828), based his ideas on Philippe Pinel's (1745 – 1826) concept of "manie sans délire" (*insanity without delusion*), in order to bring into question certain judicial verdicts concerning homicides and to suggest a more scientifically appropriate explanation and interpretation of the "homicidal monomania", that is, of a situation where there is the certain existence of "a single pathological preoccupation in an otherwise sound mind".⁷ In Britain, James Cowles Prichard (1786 – 1848) was referring to "moral insanity", emphasizing the fact that "there is scarcely an act in the catalogue of human crimes which has not been imitated . . . by this disease".⁸ Finally, in 1832 the concept of "extenuating circumstances" was introduced into the penal code, although since 1810, in terms of the famous Article 64, the penal code allowed that in the case when the individual is in a state of dementia while the crime is committed, then there is no crime or offense. According to Michel Foucault (1926 – 1984), "thus, there is the gradual elaboration of that kind of medico-judicial continuum whose effects and principal form of institutionalization are seen in expert medico-legal opinion".⁹

Nevertheless, we should mention that this medico-legal continuum, which seems to emerge rather abruptly in the first decades of the nineteenth century has deep and strong historical roots in western societies, as it replaced the political order and function of power in the Middle Ages – coded as *Pax et Justitia* – with a more complicated schema that included in the first place, between the fifteenth and seventeenth centuries, the maintenance of order and the organization of enrichment, while on the next level, during the eighteenth century "we find a further function emerging, that of a disposition of society as a milieu of physical well-being, health, and optimal longevity. The exercise of these three latter functions – order, enrichment, and health – is assured less through a single apparatus than by an ensemble of multiple

⁶ See Michel Foucault (ed.), *I Pierre Rivière, having slaughtered my mother, my sister, and my brother: A case of parricide in the 19th century*, tr. F. Jelinek, (New York: Random House, 1975), p. xi.

⁷ Richard F. Wetzell, *Inventing the Criminal. A History of German Criminology, 1880-1945*, (Chapel Hill and London: The University of North Carolina Press, 2000), p. 19.

⁸ Wetzell, *Inventing the Criminal*, p. 20.

⁹ Michel Foucault, *Abnormal, Lectures at the Collège de France, 1974-5*, tr. Gr. Burchell (New York: Picador, 2003), p.32.

regulations and institutions which in the eighteenth century take the generic name of ‘police’. Down to the end of the ancient régime, the term ‘police’ does not signify (at least, not exclusively) the institution of police in the modern sense; ‘police’ is the ensemble of mechanisms serving to ensure order, the properly channelled growth of wealth, and the conditions of preservation of health “in general”.¹⁰ Foucault reminds us that the emergence, formation, and establishment of this ensemble of mechanisms, known under the term ‘police’, began as a utopia in 1611 via Louis Turquet de Mayerne (1550?– 1618) with his work *Aristo-democratic Monarchy* (*La monarchie aristodemocratique, ou Le gouvernement composé et meslé des trois formes de legitimes republicques*), and continued as a political program via Nicolas Delamare’s (1639 – 1723) *Treatise of the Police* (*Traité de la Police*, 1705 - 1738), in order to end up as an academic discipline with Johann Heinrich Gottlob Justi (1717 - 1771), one of the leading German political economists and founder of Cameralism, the writer of *Elements of Police* (*Grundsätze der Polizeywissenschaft*, 1756), where he describes *Polizeywissenschaft* “as at once an art of government and a method for the analysis of a population living on a territory”.¹¹ Of course, Justi was not only one of the leading German political economists and founder of Cameralism, but was also the director of police in Gottingen in 1755. Thus, he had definitely paved the way to the formation and the establishment of the power–knowledge nexus, as “[w]hile he was arresting beggars and chasing down rowdy students, Justi also founded a periodical, the *Göttingische Policy-Amts Nachrichten*. He dedicated it to the improvement of the *Nahrungsstand*, a term he used to denote society’s productive classes—its miners, farmers, manufacturers, merchants, and shopkeepers. It was the central organizing category of his police–cameralist program”.¹² As Wakefield observes concerning Justi and the so-called “police–science”: ‘Police–Science’ (*Polizeywissenschaft*), the carrying card of every universal cameralist, involved the ‘knowledge and ability to maintain and increase the total wealth of the state.’ Everything followed from this. It went without saying, of course, that every true cameralist kept meticulous books and observed tireless diligence. ‘Forgetfulness, mistakes, errors, the usual excuses of disorderly and careless people, have no place in fiscal affairs’.¹³ The similarities in structure, function and order between this police–science belonging in the field of German Cameralism and the apparatus of Panopticon, which belongs to the spirit of British Utilitarianism, are striking, as Foucault showed in *Discipline and*

¹⁰ Michel Foucault, “The Politics of Health in the Eighteenth Century”, in Michel Foucault, *Essential Works, 1954-1984*, vol. 3, Power, (ed.) J. D. Faubion, tr. by R. Hurley, (London: Penguin, 2002), p. 94.

¹¹ Michel Foucault, “Omnes et Singulatim”, in Michel Foucault, *Essential Works, 1954-1984*, vol. 3, Power, p. 323.

¹² Andre Wakefield, *The Disordered Police State, German Cameralism as Science and Practice*, p. 74.

¹³ Wakefield, *The Disordered Police State*, p. 92.

Punish: “This enclosed, segmented space, observed at every point, in which the individuals are inserted in a fixed place, in which the slightest movements are supervised, in which all events are recorded, in which an uninterrupted work of writing links the centre and periphery, in which power is exercised without division, according to a continuous hierarchical figure, in which every individual is constantly located, examined and distributed among the living beings, the sick and the dead – all this constitutes a compact model of the disciplinary mechanism”.¹⁴ Furthermore, from a *philosophical* perspective the plain, explicit and predicative remarks concerning police made in 1797 by one of the most famous representatives and founding figures of German Idealism, that is, Johann Gottlieb Fichte (1762 – 1814), who at least for once abandoned his notorious obscure and perplexed prose, are *historically* illuminating: “The principal maxim of every well-constituted police power must be the following: every citizen must be readily identifiable, wherever necessary, as this or that particular person. Police officers must be able to establish the identity of every subject”. Chamayou very aptly and astutely remarks that the difference between the disciplinary model of Panopticon and the model of control, that is, the difference between *discipline* and *security*, that Fichte seems to propose through the obligatory use of passports: “Everyone must always carry a passport with him, issued by the nearest authority and containing a precise description of his person; this applies to everyone, regardless of class or rank. [...] Since merely verbal descriptions of a person always remain ambiguous, it might be good if important persons (who therefore can afford it as well) were to carry accurate portraits in their passports, rather than descriptions”.¹⁵

Consequently, these historical transformations and mutations that took place on the point of convergence of power and knowledge, of politics and science, were inscribed in a telling and significant concept: “The concept of *Medizinschepolizei*, medical police, which appeared in 1764, implied much more than a simply mortality and birth census”.¹⁶ Police-science is coextensive with the rise of mercantilism, the market town and industrial capitalism. As Foucault remarks, ‘To police’, ‘to urbanize’: (...) to police and to urbanize is the same thing. (...) Police and commerce, police and urban development, and police and the development of all the activities of the market in the broad sense, constitute an essential unity ... [T]he market town became the model of state intervention in men’s lives. I think this is the fundamental fact of the seventeenth century, at any rate the fundamental fact characterizing the birth of police in

¹⁴ See Michel Foucault, *Discipline and Punish, The Birth of the Prison*, tr. A. Sheridan, (London: Penguin, 1991), p. 197.

¹⁵ See Grégoire Chamayou, (2013). “Fichte’s Passport: A Philosophy of the Police”, tr. A. Kieran, *Theory and Event* 16(2).

¹⁶ Michel Foucault, “The Birth of Social Medicine”, in Michel Foucault, *Essential Works, 1954-1984*, vol. 3, Power, p. 140.

the seventeenth century”.¹⁷ However, as we hope to show in what follows, Foucault does not simply or diametrically oppose *discipline* to *security*; rather, he tries to show the historical interrelation and interdependence of these two modes of power: “So we should not see things as the replacement of a society of sovereignty by a society of discipline by a society, say, of government. In fact we have a triangle: sovereignty, discipline, and governmental management, which has population as its main target and apparatuses of security as its essential mechanism”.¹⁸ Moreover, Foucault does not simply or diametrically oppose *law* to the *norm*, but attempts to show their interrelation and correlation: “I do not mean to say that the law fades into the background or that the institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and that the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory”.¹⁹ The consequences in both epistemological and political level were unprecedented.

In 1833 the Section of Statistics of the British Association for the Advancement of Science was founded under the guidance of a Belgian mathematician and astronomer named Lambert Adolphe Jacques Quetelet (1796 – 1874), known as the “patriarch of statistics”. Quetelet following the famous philosopher, mathematician and early political scientist Marie Jean Antoine Nicolas de Caritat, marquis de Condorcet known as Nicolas de Condorcet (1743 – 1794) and his suggestion that society is consisted of homogeneous individuals, equal under the law and consequently subject to the mathematical laws that govern any social mechanism, set off to apply mathematical analyses on the demographic data that were presented by the first census of Parisian Population, which took place in 1817. The main target for this census was the recording and the construction of an archive concerning the causes of death. This census took place under the auspices of the Royal Medical Academy and the guidance of an ex-military physician named Louis René Villermé (1782 – 1863), who used to make statistical surveys in the prisons all over France.²⁰ These data and this series of information proved to be extremely useful for Quetelet, as they were going to be the raw material of his mathematical analyses of the social phenomena through the curve of normal frequency distribution and the concept of the

¹⁷ Michel Foucault, *Security, Territory, Population, Lectures at the Collège de France, 1977-8*, tr. G. Burchell, (New York: Palgrave Macmillan, 2007), pp. 337-8. Also, Andrew Johnson (2014), “Foucault: Critical Theory of the Police in a Neoliberal Age”, *Theoria*, 141 (4), pp. 5-29.

¹⁸ Foucault, *Security, 1977-8*, pp. 107-8.

¹⁹ Michel Foucault, *The History of Sexuality: Volume 1: An Introduction*, trans. R. Hurley, (New York: Vintage Books, 1978) p. 144.

²⁰ See Dorothy Porter, *Health, Civilization and the State. A History of Public Health from ancient to modern times*, (London: Routledge, 1999), pp. 64-66.

“average man” (*home moyen*). The latter coincided with the statistical average, in regard with both its mental and its physical characteristics. As Quetelet eloquently and rather clearly put it, “the determination of the average man is not merely a matter of speculation; it may be of the most important service to the science of man and the social system... The average man, indeed, is in a nation what the centre of gravity is in a body”.²¹ Any behaviour or conduct in the field of sexual relationships or delinquency diverged from the statistical mean was, on the one hand, condemnable and, on the other hand, could be predicted or foreseen with the same level of accuracy as in the case of the planetary motions.²² The fact that the number of committed suicides varied each year from 1826 to 1831, between a minimum of 1,542 and a maximum of 2,048, the number of homicides 205 and 266, respectively, and the number of crimes against individuals varied from 1,666 to 2,046, has given the chance to Quetelet to write: “Sad condition of humanity! The share of prisons, chains, and the scaffold appears fixed with as much probability as the revenues of state. We are able to enumerate in advance how many individuals will stain their hands with the blood of their fellow creatures, how many will be forgers, how many poisoners, pretty nearly as one can enumerate in advance the births and deaths which must take place.”²³ Conviction rates of criminals were equally predictable, with guilty verdicts varying between a low of 54% in 1826 and a high of 62% in 1831.²⁴ As Ian Hacking suggests, “the avalanche of numbers after 1820 revealed an astonishing regularity in statistics of crime, suicide, workers’ sickness, epidemics, biological facts. Mathematicians attempted an analysis of such phenomena. The great applied mathematician Siméon Denis Poisson (1781 – 1840) invented the term ‘law of large numbers’ in 1835 as the name of a mathematical fact that irregularities in mass phenomena would fade out if enough data were collected. Although the term ‘law of large numbers’ is standard in probability mathematics, Poisson’s first usage was in connection with the analysis of jury trials”.²⁵ This fetishism of numbers, especially of those concerning the calculation and assessment of criminality or mortality, and which was institutionalised by and through the state censuses, which during the

²¹ Quoted in A. M. Davis, “Tailoring and the normal body”, in E. Waltraud (ed.), *Histories of the Normal and the Abnormal. Social and Cultural Histories of Norms and Normativity*, (New York: Routledge, 2006), p. 143.

²² Ian Hacking, “How should we do the history of statistics?”, in Graham Burchell, Colin Gordon & Peter Miller (ed.), *The Foucault Effect, Studies in Governmentality*, (Chicago: The University of Chicago Press, 1991) pp. 181-195. Also, Ann F. La Berge, *Mission and Method, The early nineteenth-century French public health movement*, (New York: Cambridge University Press, 1992), pp. 55-7.

²³ Wetzell, *Inventing the Criminal*, p. 21.

²⁴ See W. G. Rothstein, *Public Health and the Risk Factor. A History of an Uneven Medical Revolution*, (New York: University of Rochester Press, 2003), p. 23.

²⁵ Ian Hacking, “How should we do the history of statistics?”, pp. 187-8.

1820s had swept Western Europe and the U.S.A., is fully and clearly expressed in all its splendour in the face of the lawyer André Michel Guerry (1802 – 1866), who during 1832–1864 analysed 21,132 cases of homicides and classified them in 4,478 classes of motives that were adopted by the police.²⁶ Moreover, on 2 July 1832, Guerry presented statistical maps of France, where criminality was divided according to region, age, gender, and season of year and was depicted, introducing the use of the contemporary methods of geographical profiling of criminals by Scotland Yard or FBI.²⁷ In order to give an idea of the width and amplitude of the statistical and mathematical scan of population, it suffices to say that whereas in 1870 the census data of the U.S.A. were published in three volumes, the immediate next, that took place just a decade later, were published in 22 volumes consisting of 21,000 pages.²⁸

However, let us leave aside for the moment the field of medical theories and mathematics and turn our attention to the field of the more palpable and tangible technical discoveries. At least, this was the choice made by the editors of *The Edinburgh Philosophical Journal*, and definitely they were rewarded, as in 1836 the chemist James Marsh (1794 – 1846) discovered and published an effective technique for the detection of the most popular or “trendy” poison, from the perspective of murderers, namely, of arsenic. The Marsh test, as it has been called ever since, could detect a quantity equal to the 1/50 of the milligram in a specimen taken from the hair or the bones of the dead, if there was any suspicion of poisoning. After several vociferous and deafening judicial and police successes thanks to the Marsh test, the frequency of use of arsenic was significantly reduced and the basic principles of the test are in use and considered valid up till now. Under these circumstances, we can easily understand the non-philosophical enthusiasm and the frivolous eagerness shown by the editorial board of the *Pharmaceutical Journal*, when in an issue that appeared in 1841, they exulted at the good news by claiming that the kind of murder that seemed to “threaten the destruction of the very bonds of society”, had now, “happily been vanished from the world” and that arsenic instead of threatening the public now “there is none so dangerous to the criminal”, as the dead “are now become the witnesses whom poisoners have most to fear”.²⁹

Why did we call the haste reaction of the *Pharmaceutical Journal* non-philosophical? If we pay attention and take a closer look to the three aforementioned events of the nineteenth

²⁶ Hacking, “How should we do the history of statistics?”, p. 192.

²⁷ Wetzell, *Inventing the Criminal*, pp. 22-3. Also, E. McLaughlin & J. Muncie (ed.), *The Sage Dictionary of Criminology*, (London: Sage, 2001), pp. 132-3.

²⁸ Rothstein, *Public Health*, p. 28.

²⁹ James C. Whorton, *The Arsenic Century. How Victorian Britain was poisoned at Home, Work and Play*, (Oxford and New York: Oxford University Press, 2010), pp. 82-3.

century that were cited as quasi-nodal points, we could find out that a thread links them despite the differences between the scientific fields where their emergence occurred. Not only the medical discourse that was articulated by phrenology and psychiatry, but also both the statistical recordings and analyses that were developed by the rising bureaucratic machine and the technical discovery of the arsenic's retention, had a theoretical perspective in common and shared the same historical landscape. Shortly, this perspective was that of the concept of the Norm and the landscape was shaped by the concepts of the Population and the Individual.

How is this concept of the Norm defined? Let us listen to Georges Canguilhem (1904 - 1995): "Littré and Robin's *Dictionnaire de médecine* defines the normal as follows: normal (*normalis*, from *norma*, rule): that which conforms to the rule, regular. The brevity of this entry in a medical dictionary does not surprise us given the observations we have just made. Lalande's *Vocabulaire technique et critique de la philosophie* is more explicit. Since *norma*, etymologically, means a T-square, normal is that which bends neither to the right or left, hence that which remains in a happy medium; from which two meanings are derived: (1) normal is that which is such that it ought to be; (2) normal in the most usual sense of the word, is that which is met with in the majority of cases of a determined kind, or that which constitutes either the average or standard of a measurable characteristic".³⁰ Consequently, the medical perspective should be combined with the technical and critical perspective, if we want to see the emergence of the genealogical formation of the concept of the Norm: that is, the T-square, the tool of the professor of mathematics at high school, of the most iron-handed scientist in the secondary education, but also the tool of the carpenter, of the technician who has to square and set right what is by nature skewed, deviated and diverged from the mean, that is, pathological. In fact, the pathological, not only as the absolute Other of the Normal, but also as the mathematically and quantitatively abnormal, is the perspective under which the sciences that paved the way for criminology, put themselves. For, the penalty by including a double reference, not only judicial (Law), but also physical (Norm), not only cultural but also biological, attempted to attain and express the maximum "objectivity".³¹ Both the psychiatric discourse that discovered in the brains of – in other respects – normal individuals temporary states of insanity, which could lead to crime and the cranioscopies conducted by Gall that discovered the deviance either towards high or low of – in other respects – normal tendencies, immanent to all people, or the statistical analyses of the average mean that set limits of high and low, had as their goal the discovery of

³⁰ Georges Canguilhem, *The Normal and the Pathological*, tr. C. R. Fawcett & R. S. Cohen, (New York: Zone Books, 1991), p. 125.

³¹ Foucault, *Discipline and Punish*, pp. 170-184.

the normal inside the abnormal or pathological. As Canguilhem claims, at the beginning of the eighteenth and towards the nineteenth century we can see the formation, the constitution and establishment of a medical theory concerning “the relations between the normal and the pathological, according to which the pathological phenomena found in living organisms are nothing more than quantitative variations, greater or lesser according to corresponding physiological phenomena”.³² Suffice it to remind ourselves that the innovation of the Marsh test in regard to the scan of arsenic abuts on the continuity between normality and abnormality, for arsenic exists in the healthy human body as a trace element under normal circumstances. That is, if its existence is too high, namely in abnormal quantities, this would predicate an abnormal death.

Therefore, we could easily understand the epistemological causes and reasons that pushed Lombroso to photograph, both literally and metaphorically, the criminals that he visited inside the cells not only of the prisons but also of the statistical tables with which his books are filled. After all, Lombroso was clear and unambiguous enough, and according to Hegel, very concrete: “The fundamental proposition undoubtedly is that we ought to study not so much the abstract crime as the criminal”,³³ confirming the significance that Foucault attributed to the shifting emphasis of judicial and punitive power from the question concerning the circumstances of the crime (“What must be punished and how?”) to the question concerning the nature of the criminal (“Whom do you think you are punishing?”): “Legal justice today has at least as much to do with criminals as with crimes. Or, more precisely, though for a long time the criminal had been no more than the person to whom a crime could be attributed and who could therefore be punished, today the crime tends to be no more than the event that signals the existence of a dangerous element – that is, more or less dangerous – in the social body”.³⁴ For the crime breaks the *law*, but not the *norm*. On the contrary, the committed crime conforms to a certain normality. If we would like to explain and prevent it, we should turn our attention to the main *causa causans*, according to Lombroso and his followers, of this normality, that is to the abnormal individual, to the “born criminal”, who by his/her own nature cannot be a subject of law but only an object of control. Following not the logic of Law but that of the Norm, Lombroso classified into the category of abnormal everyone that was not a “born criminal” but were “passionate criminals”, like the political criminals and especially anarchists; the anarchists,

³² Canguilhem, *The Normal and the Pathological*, p. 42.

³³ Cesare Lombroso, *Crime, Its Causes and Remedies*, tr. H. P. Horton, (London: W. Heinemann, 1911), p. 365.

³⁴ Foucault, “About the concept of ‘Dangerous Individual’”, in Michel Foucault, *Essential Works, 1954-1984*, vol. 3, Power, pp. 178-9.

according to Lombroso, are characterized “on the one hand of an *extreme* sense of honesty and on the other of an *hyper-sensitivity*”.³⁵ For those who tend to consider Lombroso as an extremely controversial figure in the scientific field of criminology, we should remember Wetzell’s useful remark concerning the foundation of the *Archiv für Kriminal-Anthropologie und Kriminalistik* by the Austrian judge Hans Gross in 1898: “That Gross used the term ‘criminal anthropology’ in the journal’s title, even though he rejected Lombroso’s theory of the born criminal as an anthropological type, reflected the continuing influence of Lombrosian terminology”. Or that in 1913 Gross himself “recommended the most extensive program of sterilization and castration with the argument that society was in a desperate situation”.³⁶

Law and Norm

Therefore, in order to fully understand this epistemological turn to the logic of the Norm, we should see on which historical ground and horizon the scientific discourses that we have cited at the beginning of this paper were rooted and fruited. Additionally, we should keep in mind the fact that already since the eighteenth century both the population and the individuals were objects of state providence par excellence. Besides, the term “statistics” owes its very existence to the German Professor of Philosophy and Law Gottfried Achenwall (1719-1772), who coined this term (*Staatistik*), meaning statecraft, in order to describe “catalogues and surveys illustrating ‘the condition and prospects of society’ ”.³⁷ Thus, it is not surprising that “when the University of Heidelberg celebrated its 400th anniversary in 1786, it was the new school of state administration {*Staatswirtschaft*} that captured much of the attention”.³⁸ However, what is it that a state really and actually needs to know, so as to be capable of setting out and establishing a policy based on scientific knowledge of the condition and prospects of a society? If we make an attempt to listen once again – perhaps more carefully or more concretely this time – to Hegel and his remarks, the state should know everything that concerns the individual. If we then take into consideration Foucault’s remarks we could see that the scientific knowledge of the individual presupposes and is founded upon the non-abstract knowledge of the population forming a *circulus vitiosus*: “The final objective is the population. The population is pertinent as the objective, and individuals, the series of individuals, are no longer pertinent as the objective,

³⁵ Cesare Lombroso, *The Anarchists*, tr. T. Bouzanis, (Ioannina: Isnafi, 2011), p. 80. See Wetzell, *Inventing the Criminal*, pp. 61 and 104.

³⁶ See Wetzell, *Inventing the Criminal*, pp. 61 and 104.

³⁷ Porter, *Health, Civilization and the State*, p. 49.

³⁸ Wakefield, *The Disordered Police State*, p. 131.

but simply as the instrument, relay, or condition for obtaining something at the level of population”.³⁹ Consequently, “the population is not, then, a collection of juridical subjects in an individual or collective relationship with a sovereign will. It is a set of elements in which we can note constants and regularities even in accidents, in which we can identify the universal of desire regularly producing the benefit of all, and with regard to which we can identify a number of modifiable variables on which it depends”.⁴⁰

Crime, therefore, was the missing link between the knowledge of the individual and the knowledge of population. Thus, it should not surprise us that in 1838 the French Academy of Sciences awarded the prize of the best treatise to Honoré-Antoine Frégier (1789 – 1860), the Police Administrator of the region of Seine, who gave the eloquent title *Des classes dangereuses de la population dans les grandes villes, et des moyens de les rendre meilleures* (*On dangerous classes of population in the great cities and on the mediums of their amelioration*) to a content that does honour to the best moments of the French spirit, at least, as it was expressed during the infamous “Great Confinement” (1656). Let us remind ourselves that the Foucauldian term “Great Confinement”, which has its origin in his groundbreaking and seminal work on the history of madness (1961), describes “the structure most clearly visible in the classical experience of madness, and because it is that practice of confinement that would suddenly seem so scandalous when the experience came to disappear from European culture”. More precisely, “[a] single date serves as a reference point here. In Paris in 1656, the Hôpital Général was set up by a royal decree”. This structure, according to Foucault, represents at the *historical* level the exclusion of madness by reason, which had taken place in 1647 at the *philosophical* level by the “holy figure” of modern philosophy, René Descartes in his *First Meditation*. Thus, madmen are now the target of a confinement, since confinement is a generalized practice against every individual that fails to conform to the social norms: prostitutes, vagrants, blasphemers, etc. Given that during the seventeenth century, 1% of the population in Paris is confined, as “[t]he 1656 edict addressed a quite undifferentiated mass made up of a population with no resources and no social moorings”, Foucault claims that “[t]he practice of confinement demonstrates a new reaction to poverty and indigence, a strange, novel form of pathos, a different relationship between mankind and all that can be inhuman in his existence. In the course of [the] sixteenth century, the figure of pauper, and those who could not be responsible for their own existence, gradually

³⁹ Foucault, *Security*, 1977-8, p. 42.

⁴⁰ Foucault, *Security*, 1977-8, p. 74.

assumed a role that the Middle Ages would have failed to recognize altogether”.⁴¹ Almost two centuries later, Frégier’s treatise on the dangerous classes resonates the transformations and the distinctions that Foucault described regarding madness. Let us cite only a phrase in which the author characterizes and categorizes as dangerous classes, “the gambler, the prostitutes, their lovers and their pimps, their madams, the vagabonds, the swindlers and the crooks, the twisters and the thieves, the shoplifters and the fences”.⁴² This treatise is recognized as a valuable work and a milestone in the preface of the *Crime Classification Manual* (CCM), FBI’s manual that in 1992 replaced the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), concerning the “classification system for serial sexual murder”.⁴³ However, it should be noted here, that DSM is still considered to be a valid – in scientific terms – a source of categorization and diagnosis of the criminal, that is, their anti-social or abnormal behaviour. As it is clearly and evidently expressed by contemporary criminologists when they face the problem of anti-social behaviour: “It is anticipated that the DSM-5 will be published in May 2013 so one will need to wait to see exactly how *antisocial* personality disorder is defined at that time and whether the traditional personality features of *psychopathy* will be prominently featured”.⁴⁴

Thus, the crime, that is, the criminal, as a factor not only of subversion of *law* and *justice* but also of the derangement and disturbance of *normality* and *normativity*, that is not only as an *illegal* but also as a *dangerous* agent, became the object of control by the modern relations of power and knowledge. In fact, this is a rupture in the confrontation with danger and its vehicle. Speaking rather schematically in regards to the control of individuals, whereas until the seventeenth century the prevailing model had been that of the leper and leprosy, namely, that of the control of the individual who is exiled, who should be excluded, driven out in order to purify the community, since the eighteenth century a model as old as the previous one has been reactivated and become prevalent: the model of the plague and the plague-infested towns. Whereas the model of leprosy is based on the exclusion and needs the Law in order to function properly, the model of plague is based on inclusion and needs other than the Law and the power of the Norm. Thenceforth, political and medical power are not confronted with the legal rights or the legal substance of the leper, in order to answer the question if he/she is or not a member

⁴¹ See Michel Foucault, *History of Madness*, J. Khalfa (ed.), tr. J. Murphy & J. Khalfa, (London & New York: Routledge), pp. 44 - 77.

⁴² Honoré Antoine Frégier, *Des classes dangereuses de la population dans les grandes villes, et des moyens de les rendre meilleures*, (Paris: B. Baillière, 1840), p. 44. Also Wetzell, *Inventing the Criminal*, pp. 27-8.

⁴³ John Douglas, Ann W. Burgess, Allen G. Burgess, & Robert K. Ressler (ed.), *Crime Classification Manual*, (Jossey – Bass, 2006), pp.3 and 98.

⁴⁴ See Gerben Bruinsma & David Weisburd (ed.), *Encyclopaedia of Criminology and Criminal Justice*, (New York, Heidelberg, Dordrecht, London: Springer, 2014) pp. 4124-5 (emphasis added).

of the community, but they are confronted with the norms of control and therapy of the plague victim in order to deal with the problem of how he/she could be healed inside the community without risking the latter's prosperity. The patient is no more excluded and expelled out of the town; on the contrary, he/she is included and confined in order to be under control more effectively. Instead of the distance that leprosy demanded, the plague demands proximity and stability of observation and control by the medical gaze. Instead of the permanent and definitive stigmatisation of leprosy, we can note the constant control of the plague-infested town according to the norms of health and to health regulations. From the exclusion of the individual aiming at the purification of the population we have passed to the care for the social body through the control of the individual's body.⁴⁵ Nonetheless, scarcely had the new model or mechanism – let us call it disciplinary – been established than one could already note the emergence of something different due to a new danger.

The smallpox epidemic was the greatest danger during the eighteenth century, as the 2/3 children were infected with a mortality rate of 1 in 7.782, that is, almost 1/8.⁴⁶ However, in 1718 Lady Mary Wortley Montagu (1689 – 1762), wife of the British Ambassador in Istanbul, Sir Edward Wortley Montagu (1678 - 1761), introduced to Europe from the Ottoman Empire the method of inoculation or variolisation for smallpox.⁴⁷ As Foucault eloquently and profoundly remarks, inoculation was characterized by four novice and significant elements: it is absolutely preventative, it has almost total certainty of success, it is in principle able to be extended to the whole population at low cost and, finally, but most importantly, inoculation was completely foreign to any medical theory, as it was “unthinkable in terms of medical rationality of this time”, as “it was a pure matter of fact, of the most naked empiricism, and this remained the case until the middle of the nineteenth century, roughly with Pasteur, when medicine was able to provide a rational understanding of the phenomenon”.⁴⁸ The new formation does not make a distinction between healthy and sick individuals; on the contrary, it addresses the whole population, for it is under threat on the basis of probabilities. Furthermore, in the interior of the population, this novice formation distinguishes groups of people with higher probable mortality, such as infants, and groups with lesser, adults, and thus attempts to bridge the distance between them in order to construct a normal mortality rate, that is, the Norm.⁴⁹ Whereas the disciplinary

⁴⁵ Foucault, *Abnormal*, 1974-5, pp. 43-5.

⁴⁶ Foucault, *Security*, 1977-8, p. 58.

⁴⁷ Porter, *Health*, p. 56.

⁴⁸ Foucault, *Security*, 1977-8, p. 58.

⁴⁹ Foucault, *Security*, 1977-8, pp. 62-3.

model is based more on the repression and the exclusion of the individual, the new model – let us call it the security one – displaces the emphasis onto the prediction and prevention of danger.

Conclusion

If someone keeps wondering what relationship do all the aforementioned cases have with Criminology and Law, we should remember that at the First International Conference of Criminal Anthropology, in Rome in 1885, the Belgian criminologist Adolphe Prins (1845 – 1919) introduced the concept of “social defence”, emphasizing the question not of the level of the criminal’s *responsibility*, but of the level of the *danger* that he/she constitutes for the society,⁵⁰ although the Italian jurist Giovanni Carmignani (1768 – 1847) had already made the same movement since 1831.⁵¹ Thus, before Nazism became the synonym of racism, western rationality through its scientific discourse under the pretext of “social defence” had already called for the sterilization of people with a “pronounced criminal disposition” and of all who suffered from incurable, supposedly hereditary, diseases including epilepsy, tuberculosis, cancer, syphilis, and alcoholism.⁵² Also, we should remind ourselves that in 1887 Sherlock Holmes, the most famous *detective*, came into existence through the typewriter of the *physician* Sir Arthur Conan Doyle (1859 – 1930). Holmes’ character was based on the characters, on the one hand, of the Professor of *Medicine* Joseph Bell (1837 – 1911) and on the other of the Professor of *Forensics* and *police doctor* Sir Henry Duncan Littlejohn (1826 – 1914),⁵³ as a literal incarnation of the historical substitution of penalty for the crime, according to the Law, by the scientific knowledge of the criminal, according to the Norm, in the context of a discourse, which is simultaneously both medical *and* judicial, both about security *and* about justice, both about *norm* and about *right*. If someone takes a critical and careful look at the history of western societies, he/she might say in turn: “Elementary, my dear *Watchon*”.

⁵⁰ Foucault, “About the concept of ‘Dangerous Individual’”, in Michel Foucault, *Essential Works, 1954-1984*, vol. 3, Power, p. 190.

⁵¹ E. McLaughlin & J. Muncie (ed.), *The Sage Dictionary of Criminology*, p. 272-4. Also, P. Pasquino, “Criminology: The Birth of a special Knowledge”, in G. Burchell, C. Gordon & P. Miller (ed.), *The Foucault Effect, Studies in Governmentality*, pp. 235-50.

⁵² Wetzell, *Inventing the Criminal*, p. 104.

⁵³ E. J. Wagner, *The Science of Sherlock Holmes. From Baskerville Hall to the Valley of Fear. The real Forensics behind the great detectives cases*, (Wiley, 2006), pp. 54-60.