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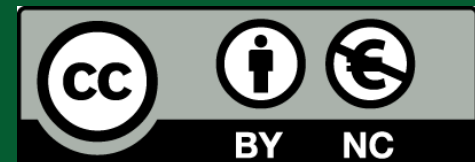



recognise  
Legal Reasoning  
& Cognitive Science

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# Free will and responsibility in Italian criminal law

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# Free will and criminal responsibility

- A highly debated question in Italian legal thought btw. approximately the mid-1800s and 1930

The central bone of contention btw. Classical school and Positive school of criminal law:

The so-called «Struggle btw. criminal law Schools»

# Classical school of criminal law

# Classical school of criminal law

**People have  
free will**

their actions are not necessarily determined either by external or by internal compelling factors

In principle, not like animals, driven by irresistible natural forces: on the contrary, rational subjects capable of freely choosing between different possible courses of action

## Classical school of criminal law

- «Men have the faculty to determine themselves in their actions, by choosing to act or not to act as they please, based on their intellect's calculations. This power is what constitutes their *free will* [*libertà di elezione*]. It is by virtue of this power that they are asked to account for the acts to which they determine themselves» (Francesco Carrara, *Programma del corso di diritto criminale*, Lucca, 1859, § 191)

# Classical school of criminal law

The Classical school  
of criminal law  
is the direct  
descendant of  
the Enlightenment  
penal philosophy



Basically, the same  
simplistic and  
stereotyped  
psychological  
premises

## Classical school of criminal law

- Man (more an abstract entity than a concrete subject) conceived as a perfectly rational being, endowed with calculative rationality and freedom of choice ("*spontanea scelta*": Beccaria, *Dei delitti e delle pene*, Cap. 26)



# Classical school of criminal law

- **Refutation of determinism:**

men's behavior as a choice freely made between alternative courses of action, all of which could in principle have been equally chosen by them

for any given action performed by a given subject, there were alternative possible courses of action that she could have chosen if only she had wanted to

## Classical school of criminal law

- In normal circumstances, persons are responsive to reasons, perfectly able to exercise self-control:

exceptional cases apart (e.g., immaturity, mental illness), they are responsible subjects

# Classical school of criminal law

- People's choices may be influenced either by external factors or by their own internal preferences;

it may also be the case that they are not properly responsible for both their preferences and the external situations (social and familial conditions, wealth, etc.) in which they happen to find themselves:

notwithstanding, their being human entails that they will be **able to rise above** these **circumstances** and freely choose how to act

## Classical school of criminal law

- Same considerations apply to the criminal subject:

**not an abnormal individual**, morally and psychologically fragile (unless affected by except. incapacitating factors);

rather, a **perfectly normal, rational actor** who, under favorable conditions, may choose to commit a crime to satisfy her desires

## Classical school of criminal law

- **Crime** is not an exceptional event, an extreme and abnormal behavior, but **a normal opportunity for action** that a rational actor takes in order to attain her goals

# Classical school of criminal law

## Liberal socio-political view

Anthropological/jusnaturalistic  
assumption

*Men possess natural freedoms*

Political consequence

*Societies' constitutive task:  
making liberties compatible  
with each other  
(hence frequently contractarianism)*

# Classical school of criminal law

## The role of criminal law

A means through which society seeks to achieve the goal of making individual liberties coexist

Crime as an expression of individual freedom

Criminalizing ways of exercising individual freedom that go beyond the limits set by society for the purpose of protecting the individual freedoms of others



# Classical school of criminal law

## Theory of punishment

Retributivism frequently supplemented by general-prevention

Punishment is only justified as the legal consequence of a morally reprehensible act, criminals deserve to be punished qua moral agents, to the extent that their moral responsiveness has shown up in their conduct

Through criminalization (threat of punishment or actual infliction thereof), societies try to direct addressees' conduct, so that they do not use their freedom in order to violate the freedoms of others:  
«The law [*can direct*] men only insofar as they are morally free subjects» (Carrara)



Positive school of  
criminal law

## Positive school of criminal law

- Unlike the Classical school, the Positive school shifts the **focus** of its attention from the abstract characteristics of human action and agency to the **concrete characteristics** of the **individual agent**

## Positive school of criminal law

- Adherence to the **etiological model** proper to natural sciences and the idea that this model should be applied to **all areas of knowledge**, including knowledge about crime and criminality

## Positive school of criminal law

**Science** only provides us with *true knowledge*

If one really wants **to know criminality**,  
one must apply to it the same cognitive model  
of scientific knowledge

## Positive school of criminal law

And since the assumption is that scientific knowledge is characterized by application of **causal paradigm** to empirical explanation of facts

it follows that true knowledge of criminal phenomena only conceived as a **search for its causes**

## Positive school of criminal law

Positivism views **criminality** in terms of **causes to be explained**

**Criminology**: explanation of the causes of criminality

## Positive school of criminal law

This quite naturally leads to **determinism**

People have  
no free will

both their choices  
and their actions are  
inextricable part of  
one and the same reality  
to which all natural phenomena belong

## Positive school of criminal law

Emphasis on the – individual and social – **factors** seen as capable of explaining human action:  
**causal factors**

Identification of **types of agents**, depending on the individual characteristics they possess and the way in which they allegedly affect their behavior



# Positive school of criminal law

## Subjective paradigm of reference

a set of individual (and social) characteristics whose combination entails that, given a certain set of conditions, those who possess them will predictably act in a certain way

the **criminological type** of agent



# Positive school of criminal law

the idea of criminal responsibility  
based on a person's moral capacity  
is thus abandoned,  
and replaced with the key-concept of  
**social dangerousness**

criminalization justified,  
not by the fact that  
the offender deserves  
to be punished,  
but by the necessity  
to correct or to neutralize  
her dangerousness

# Positive school of criminal law

the grounding reason for  
penal intervention lies  
not in what has been done  
(the crime), but in the  
individual person herself  
(her **social dangerousness**)

criminal intervention  
would not even require  
the prior commission of a crime  
  
merely symptomatic value

# Positive school of criminal law

## Theory of punishment

not retributive punishment,  
responding to evil with evil,  
but

special-preventive measure  
oriented to neutralize  
the dangerousness of the agent  
and, if possible, to cure it

not punishment, but cure, treatment, security measures

# The Italian criminal code and the double track system

# The Italian criminal code and the double track system

The code incorporates the contents of this debate by adopting a so-called "**double track**" **penalty system**:

a system of criminal sanctions that articulates itself around **two** fundamental **categories**

punishment

security measures

# The punishment track

# The punishment track

Punitive criminal sanctions (*pene in senso stretto*)  
with **retributive foundation** (and **general-preventive aim**)

infliction made **conditional** upon  
the **culpable** commission of an act  
qualified as “**crime**”  
by a (previously existing) law



# The punishment track

- A. the commission of a criminal act is the **intentional object** of punishment (the basic reason why an individual can be punished)
- B. a **necessary condition** of punishment, however, is that the offender be imputable

# The punishment track

## Fundamental meaning of the **imputability condition**

closely linked to  
the assumption of  
moral responsibility  
and free will

imputability =  
“capacità di intendere e di volere”  
(art. 85: capacity to understand and to will)

punishment is only justified insofar as it is inflicted on a  
morally responsible/responsive subject

## The punishment track

The paradigm of the **imputable subject**:

an individual **able to act of her own free will**,  
who **correctly understands** what happens  
around her and **freely chooses** how to act

## The punishment track

**“Freely choosing how to act”** means:

not being affected by **abnormal factors**  
(mental illness, intoxication, minor age)  
that may **distort** the subject’s  
decision-making process

## The punishment track

Character and emotional peculiarities of the subject,  
i.e., the **structure of her personality**,  
do not exclude imputability

the offender's character and emotions,  
and other external situations that may have led her to act,  
can only be taken into account at the **sentencing stage**

The security  
measures track

## The security measures track

The *security measures track*

(e.g., assignment to a farming colony  
or to a workhouse,

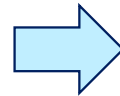
hospitalization in judicial psychiatric hospital)

rests on **principles closely attuned**  
to the views of the **Positive school**

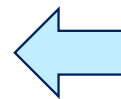
# The security measures track

The **underlying logic** is not moral culpability, but **social dangerousness**

but completely **irrespective** of whether they were **imputable** (thus, free willing) at the time of their act



SM apply to **socially dangerous persons**



provided that they have committed a **criminal act**



## The security measures track

An individual who  
having **committed**  
a **criminal act**  
will **probably** commit  
**other criminal acts**  
in the **future**

Who is the  
socially  
dangerous?

## The security measures track

- A.** the **intentional object** of security measures (the reason why they should be applied) is social dangerousness, not crime committed
  
- B.** the commission of a crime is a **necessary condition** for applying security measures

The security measures track

The **focus** of security measures is on the offender *per se*

her crime is only relevant as a **symptom**,  
an evidence, of the agent's social dangerousness

## The security measures track

**Special-preventive** vocation, to be achieved

«through the **moral and social adaptation** of the individual **to society** or through the **elimination** of the individual **from society**»

(Rocco, *Le misure di sicurezza e gli altri mezzi di tutela giuridica*, in Id., *Opere giuridiche*, 1933, p. 744)

The double track  
system in pills

## The double track system in pills

**1) agents** who were *imputable* at the time of their crime should be *punished*, irrespective of whether they also are socially dangerous at the time of their conviction

The double track system in pills

2) **agents** who are *socially dangerous* at the time of their conviction should be subjected to a security measure, irrespective of whether they also were imputable at the time of their crime

## The double track system in pills

3) **agents** who *neither* were imputable  
at the time of their crime  
*nor* are socially dangerous at the time  
of their conviction  
*should neither* be punished  
*nor* subject to a security measure



## The double track system in pills

4) **agents** who *both* were imputable at the time of their crime and are socially dangerous at the time of their conviction should be subject to *both* punishment and a security measure

First punished and then  
subjected to security measure

# The double track system: an evaluation

# The double track system: an evaluation

**Not** a true **compromise** btw. Classical and Positive school

The classicist **free will approach** and  
the positivist **no-free will  
approach** are **contradictory** to each other

A vs. non-A

The double track system embodied in the It. crim. code  
**not** a **juxtaposition** of these A and non-A paradigms

## The double track system: an evaluation

Italian criminal norms on security measures **do not deny** the paradigm idea of a **free willing offender**

They **merely neglect** the question of moral responsibility, being it beside their point

Their point is  
social dangerousness

Social dangerousness  
not in conflict  
with the classicists' views

## The double track system: an evaluation

Positivists **radically deny** free will,  
hence the relevance of imputability  
as a justification for coercive state intervention.

The existence of a punishment track  
in the Italian criminal code  
is **in contrast** with their doctrine

## The double track system: an evaluation

Classicists have no problem  
with the idea of **social dangerousness**,

but rather with using it as  
an alternative to moral culpability  
as **exclusive legitimating ground**  
for coercive state intervention

## The double track system: an evaluation

While a concession to some tenets of Positive school,  
**security measure track is not incompatible**  
with the Classical school approach.

On the contrary, **punishment track** is  
utterly **incompatible**  
with the positivists' principles

## The double track system: an evaluation

**Systematization** of the principles of the Classical school, only supplemented by the **explicit thematization** as a specific criminal law problem of the fact that, in some cases, the commission of a **criminal act** can be read as a **symptom of social dangerousness**, that needs to be dealt with by the state



# The contemporary criminal theoretical debate

# Free will and criminal responsibility in the contemporary criminal law debate

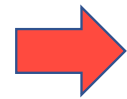
- Is the **relationship** btw. criminal responsibility and free will **well-settled** within the Italian legal thought?

Are **Italian criminal lawyers** unanimously **accepting** the **classicist thesis** that men are equipped with free will and that therefore they can be blamed for committing a crime and punished accordingly?

# Free will and criminal responsibility in the contemporary criminal law debate

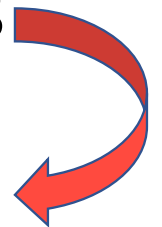
Art. 27 Const.: "criminal responsibility is personal"

Principle of culpability

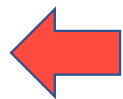


Culpability = blameworthiness

a set of conditions for a person



Power to act otherwise



to be properly blamed for having committed an offense

# Free will and criminal responsibility in the contemporary criminal law debate

- “The principle of culpability is[...] indispensable, precisely [...] in order to ensure the individual **the certainty of free choices of action**: that is, to guarantee him that he will be held **criminally liable only for actions controllable by him** and never for behavior that only fortuitously produces criminally prohibited consequences.”
- (It. const. court., no. 364/1988)

Free will and criminal responsibility in the  
contemporary criminal law debate

No criminal **liability**

without **culpability**

*(nullum crimen sine culpa)*

No **culpability** without  
the **power to act otherwise**

# Free will and criminal responsibility in the contemporary criminal law debate

However, no conscious endorsement of free-will

The syntagma “free will” barely appears  
in recent criminal law textbooks

Only in Bettiol (last edition 1986) a lengthy argument that culpability presupposes freedom of choice and that this is what the code refers to when it defines imputability as capacity to intend

# Free will and criminal responsibility in the contemporary criminal law debate

German scholars have discussed the issue at length

## Problem



is the "power to act otherwise" in the concrete situation demonstrable?

**NO**



# Free will and criminal responsibility in the contemporary criminal law debate

## **Social concept of culpability**

“Power to act otherwise” to be commensurate with a **model agent**, paradigm of a normal person, with normal capacity for self-direction



# Free will and criminal responsibility in the contemporary criminal law debate

The relevant question

**NOT** whether the **concrete** agent could behave differently,

**BUT** whether she falls **within the paradigm** of a normal person:

is she equipped with **normal capacity for self-direction**?

is she **normally responsive to reasons**?

is she **motivable through norms**?

# Free will and criminal responsibility in the contemporary criminal law debate

Culpability = evitability of the act by a normal agent

Individual culpability **replaced** with the power to conform to norms as a **general characteristic** of the subject, **not** as a **characteristic** of her actions **in the concrete situation**

# Free will and criminal responsibility in the contemporary criminal law debate

Back to Italian scholarship

freedom of the will not specifically thematized,  
nor are the more abstract philosophical issues  
involved in the concept of culpability

# Free will and criminal responsibility in the contemporary criminal law debate

Italian criminal lawyers more interested in the practical face of law, and how it impacts people's lives,

than in posing abstract legal-philosophical questions

# Free will and criminal responsibility in the contemporary criminal law debate

From this perspective

sufficient that the idea of  
an – albeit conditional – freedom of will  
is part of common sense

# Free will and criminal responsibility in the contemporary criminal law debate

"reality or fiction, everyone experiences as a psychological experience the feeling of freedom of self-determination in a way that conforms to choices and desires"  
(Fiandaca-Musco, PG<sup>7th</sup>, p. 343)

# Free will and criminal responsibility in the contemporary criminal law debate

It is precisely to **ordinary people** that criminal law must first and foremost **address** itself,

so as to correspond, without too much sophistication, to their **sense of justice**

# Free will and criminal responsibility in the contemporary criminal law debate

Justified for the criminal law to deal with its addressees by treating them as free willing subjects,

regardless of whether they actually are, in light of more sophisticated scientific considerations



# Free will and criminal responsibility in the contemporary criminal law debate

**Another reason**                      general **rejection of retribution**  
as a legitimating ground for criminal law  
and criminal punishment

identification of such a ground in **special-prevention**  
understood as **rehabilitation** and **resocialization**

# Free will and criminal responsibility in the contemporary criminal law debate

If punishment is conceived as **rehabilitative treatment**

to **correct** the offender's propensity to crime, seeking to inculcate in her the values of society

the **existential doubt** that the individual's choices of action are rigidly conditioned becomes **less dramatic**

# Free will and criminal responsibility in the contemporary criminal law debate

Rather, the possibility of **strongly conditioning** people's behavior is a **logical assumption** of this approach;

if people acted **arbitrarily** every time,  
it would make **no sense to expect to influence**  
their conduct through **punishment**