

About the Concept of the “Dangerous Individual” in 19th-Century Legal Psychiatry

Michel Foucault*

(translated by Alain Baudot** and Jane Couchman***)

I would like to begin by relating a brief exchange which took place the other day in the Paris criminal courts. A man who was accused of five rapes and six attempted rapes, between February and June 1975, was being tried. The accused hardly spoke at all. Questions from the presiding judge:

“Have you tried to reflect upon your case?”

–Silence.

“Why, at twenty-two years of age, do such violent urges overtake you? You must make an effort to analyze yourself. You are the one who has the keys to your own actions. Explain yourself.”

–Silence.

“Why would you do it again?”

–Silence.

Then a juror took over and cried out, “For heaven’s sake, defend yourself!”

Such a dialogue, or rather, such an interrogatory monologue, is not in the least exceptional. It could doubtlessly be heard in many courts in many countries. But, seen in another light, it can only arouse the amazement of the historian. Here we have a judicial system designed to establish misdemeanors, to determine who committed them, and to sanction these acts by imposing the penalties prescribed by the law. In this case we have facts which have been established, an individual who admits to them and one who consequently accepts the punishment he will receive. All should be for the best in the best of all possible judicial worlds. The legislators, the authors of the legal codes in the late 18th and early 19th centuries, could not have dreamed of a clearer situation. And yet it happens that the machinery jams, the gears seize up. Why? Because the accused remains silent. Remains silent about what? About the facts? About circumstances? About the way in which they occurred? About the immediate cause of the events? Not at all. The accused evades a question which is essential in the eyes of a modern tribunal, but which would have had a strange ring to it 150 years ago: “Who are you?”

*Professeur d’Histoire et des Systèmes de Pensée, Collège de France, Paris, France.

**Chairman, Département d’Etudes pluridisciplinaires, Glendon College, York University, Toronto, Canada.

***Associate Dean, Glendon College, York University, Toronto, Canada.

Note: Ms. Carol Brown of the French Consulate in Toronto generously agreed, at the request of the organizers of the Law and Psychiatry Symposium, to make an initial translation of this paper for public reading, under extreme pressure of time. We have made a new translation, but we did refer at times to Ms. Brown’s version. We wish to acknowledge our debt to her – *Alain Baudot and Jane Couchman*.

And the dialogue which I just quoted shows that it is not enough for the accused to say in reply to that question, "I am the author of the crimes before you, period. Judge since you must, condemn if you will." Much more is expected of him. Beyond admission, there must be confession, self-examination, explanation of oneself, revelation of what one is. The penal machine can no longer function simply with a law, a violation and a responsible party. It needs something else, a supplementary material. The magistrates and the jurors, the lawyers too, and the department of the public prosecutor, cannot really play their role unless they are provided with another type of discourse, the one given by the accused about himself, or the one which he makes possible for others, through his confessions, memories, intimate disclosures, etc. If it happens that this discourse is missing, the presiding judge is relentless, the jury is upset. They urge, they push the accused, he does not play the game. He is not unlike those condemned persons who have to be carried to the guillotine or the electric chair because they drag their feet. They really ought to walk a little by themselves, if indeed they want to be executed. They really ought to speak a little about themselves, if they want to be judged. The following argument used recently by a French lawyer in the case of the kidnapping and murder of a child clearly indicates that the judicial stage cannot do without this added element, that no judgment, no condemnation is possible without it being provided, in one way or another.

For a number of reasons, this case created a great stir, not only because of the seriousness of the crime, but also because the question of the retention or the abolition of the death penalty was at stake in the case. In his plea, which was directed against the death penalty more than in favor of the accused, the lawyer stressed the point that very little was known about him, and that the nature of the man had only barely been glimpsed at in the interrogations and in the psychiatric examinations. And he made this amazing remark (I quote approximately): "Can one condemn to death a person one does not know?"

This is probably no more than one illustration of a well-known fact, which could be called the law of the third element, or the Garofalo principle, since Garofalo was the one who formulated it with complete clarity: "Criminal law knew only two terms, the offense and the penalty. The new criminology recognizes three, the crime, the criminal and the means of repression." In large part, the evolution, if not of the penal systems, at least of the day to day penal practice in many countries, is determined by the gradual emergence in the course of the 19th century of this additional character. At first a pale phantom, used to adjust the penalty determined by the judge for the crime, this character becomes gradually more substantial, more solid and more real, until finally it is the crime which seems nothing but a shadow hovering about the criminal, a shadow which must be drawn aside in order to reveal the only thing which is now of importance, the criminal.

Legal justice today has at least as much to do with criminals as with crimes. Or more precisely, while, 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 which signals the existence of a dangerous element – that is, more or less dangerous – in the social body.

From the very beginning of this development, resorting to the criminal over and above the crime was justified by a double concern: to introduce more rationality into penal practice, and to adjust the general provisions of laws and legal codes more closely to social reality. Probably, it was not realized, at least at first, that to add the notion of psychological symptomatology of a danger to the notion of legal imputability of a crime was not only to enter an extremely obscure labyrinth, but also to come slowly out of a legal system which had gradually developed since its birth during the medieval inquisition. It could be said that hardly had the great eighteenth-century legal reformers completed the systematic codification of the results of the preceding evolution, hardly had they developed all its possibilities, when a new crisis began to appear in the rules and regulations of legal punishment. "What must be punished, and how?" That was the question to which, it was believed, a rational answer had finally been found; and now a further question arose to confuse the issue: "Whom do you think you are punishing?"

In this development, psychiatry and psychiatrists, as well as the notion of "danger," played a permanent role. I would like to draw attention to two stages in what one might call the psychiatrization of criminal danger.

The intervention of psychiatry in the field of law occurred in the beginning of the nineteenth century, in connection with a series of cases whose pattern was about the same, and which took place between 1800 and 1835.

Case reported by Metzger: a retired officer who lives a solitary life becomes attached to his landlady's child. One day, "with absolutely no motive, in the absence of any passion, such as anger, pride, or vengeance," he attacks the child and hits him twice with a hammer, though not fatally.

Selestat case: in Alsace, during the extremely hard winter of 1817, when famine threatens, a peasant woman takes advantage of her husband's being absent at work to kill their little daughter, cuts off her leg and cooks it in the soup.

In Paris in 1827, Henriette Cornier, a servant, goes to the neighbor of her employers and insists that the neighbor leave her daughter with her for a time. The neighbor hesitates, agrees, then, when she returns for the child, Henriette Cornier has just killed her and has cut off her head which she has thrown out the window.

In Vienna, Catherine Ziegler kills her illegitimate child. On the stand, she explains that her act was the result of an irresistible force. She is acquitted on grounds of insanity. She is released from prison. But she declares that it would be better if she were kept there, for she will do it again. Ten months later, she gives birth to a child which she kills immediately, and she declares at the trial that she became pregnant for the sole purpose of killing her child. She is condemned to death and executed.

In Scotland, a certain John Howison enters a house where he kills an old woman whom he hardly knows, leaves without stealing anything and does not go into hiding. Arrested, he denies the fact against all evidence; but the defense argues that it is the crime of a madman since it is a crime without material motive. Howison is executed, and his comment to an official at the execution that he felt like killing him, was considered in retrospect as supplementary evidence of madness.

In New England, out in the open fields, Abraham Prescott kills his foster mother with whom he had always gotten along very well. He goes home and breaks into tears in front of his foster father, who questions him. Prescott willingly confesses his crime. He explains later that he was overcome by a sudden and acute toothache and that he remembers nothing. The inquiry will establish that he had already attacked his foster parents during the night, an act which had been believed to be the result of a fit of sleepwalking. Prescott is condemned to death but the jury also recommends a commutation. He is nevertheless executed.

The psychiatrists of the period, Metziger, Hoffbauer, Esquirol and Georget, William Ellis and Andrew Combe refer tirelessly to these cases and to others of the same type.

Out of all the crimes committed, why did these particular ones seem important; why were they at issue in the discussions between doctors and jurists? First, of all, it must be noted that they present a picture very different from what had hitherto constituted the jurisprudence of criminal insanity. In general terms, until the end of the eighteenth century, the question of insanity was raised under penal law only in cases where it was also raised in the civil code or in canon law; that is when it appeared either in the form of *dementia* and of imbecility, or in the form of *furor*. In both cases, whether it was a matter of a permanent state or a passing outburst, insanity manifested itself through numerous signs which were easy enough to recognize, to the extent that it was debated whether a doctor was really necessary to authenticate it. The important thing is that criminal psychiatry did not develop from a subtle redefining of the traditional question of *dementia* (e.g., by discussing its gradual evolution, its global or partial character, its relationship to congenital disabilities of individuals) nor through a closer analysis of the symptomatology of *furor* (its remissions, its recurrences, its rhythm). All these problems, along with the discussions which had gone on for years, were replaced by a new problem, that of crimes which are neither preceded, nor accompanied, nor followed by any of the traditional, recognized, visible symptoms of insanity. It is stressed in each case that there was no previous history, no earlier disturbance in thought or behavior, no delirium; neither was there any agitation, nor visible disorder as in *furor*; indeed, the crime would arise out of a state which one might call the zero degree of insanity.

The second common feature is too obvious to be dealt with at any length. The crimes in question are not minor offenses but serious crimes, almost all murders, sometimes accompanied by strange cruelties (cannibalism in the case of the woman from Selestat). It is important to note that the psychiatrization of delinquency occurred in a sense "from above." This is also a departure from the fundamental tendency of previous jurisprudence. The more serious the crime, the less usual it was to raise the question of insanity (for a long period, it was not taken into consideration in cases involving sacrilege or lèse-majesté). That there is a considerable area of overlap between insanity and illegality was readily admitted in the case of minor offenses – little acts of violence, vagrancy – and these were dealt with, at least in some countries such as France, by the ambiguous measure of internment. But it was not through the ill-defined zone of day to day disorders that psychiatry was able to penetrate penal justice in

full force. Rather it was by tackling the great criminal event of the most violent and rarest sort.

Another common feature of these great murders is that they take place in a domestic setting. They are family crimes, household crimes, and at most neighborhood crimes — parents who kill their progeny, children who kill their parents or guardians, servants who kill their employers' or their neighbors' child, etc. As we can see, these are crimes which bring together partners from different generations. The child-adult or adolescent-adult couple is almost always present. In those days, such relationships of age, of place, of kinship were held to be at the same time the most sacred and the most natural, and also the most innocent. Of all relationships, they were the ones which ought to have been the least charged with material motive or passion. Rather than crimes against society and its rules, they are crimes against nature, against those laws which are perceived to be inscribed directly on the human heart and which link families and generations. At the beginning of the nineteenth century, the form of crime about which it appeared that the question of insanity could properly be raised was thus the crime against nature. The individual in whom insanity and criminality met in such a way as to cause specialists to raise the question of their relationship, was not the man of the little everyday disorder, the pale silhouette moving about on the edges of law and normality, but rather the great monster. Criminal psychiatry first proclaimed itself a pathology of the monstrous.

Finally, all of these crimes were committed without reason, I mean without profit, without passion, without motive, even based on disordered illusions. In all the cases which I have mentioned, the psychiatrists do justify their intervention by insisting that there existed between the two actors in the drama no relationship which would help to make the crime intelligible. In the case of Henriette Cornier, who had decapitated her neighbor's daughter, it was carefully established that she had not been the father's mistress, and that she had not acted out of vengeance. In the case of the woman from Selestat, who had boiled up her daughter's thigh, an important element of the discussion had been, "Was there or was there not famine at the time? Was the accused poor or not, starving or not?" The public prosecutor had said: "If she had been rich, she could have been considered deranged, but she was poverty-stricken; she was hungry; to cook the leg with the cabbage was interested behavior; she was therefore not insane."

At the time when the new psychiatry was being established, and when the principles of penal reform were being applied nearly everywhere in Europe and in North America, the great and monstrous murder, without reason, without preliminaries, the sudden eruption of the unnatural in nature, was the singular and paradoxical form taken by criminal insanity or pathological crime. I say paradoxical since there was an attempt to grasp a type of derangement which manifested itself only in the moment and in the guise of the crime, a derangement which would have no symptom other than the crime itself, and which could disappear once the crime had been committed. And conversely, it entailed identifying crimes whose reason, whose author, whose "legally responsible agent" so to speak, is that part of the subject which is beyond his responsibility; that is, the insanity which hides in him and which he cannot even control because he is frequently not even aware of it. Nineteenth-century psychiatry in-

vented an entirely fictitious entity, a crime which is insanity, a crime which is nothing but insanity, an insanity which is nothing but crime. For more than half a century this entity was called homicidal monomania. I do not intend to go over the theoretical background of the notion, nor to follow up the innumerable discussions which it prompted between men of the law and doctors, lawyers and magistrates. I simply want to underline this strange fact, that psychiatrists have tried very stubbornly to take their place in the legal machinery. They justified their right to intervene, not by searching out the thousand little visible signs of madness which may accompany the most ordinary crimes, but by insisting – a preposterous stance – that there were kinds of insanity which manifested themselves only in outrageous crimes, and in no other way. And I would also like to underline the fact that, in spite of all their reservations about accepting this notion of monomania, when the magistrates of the time finally accepted the psychiatric analysis of crime, they did so on the basis of this same notion, so foreign and so unacceptable to them.

Why was the great fiction of homicidal mania the key notion in the proto-history of criminal psychiatry? The first set of questions to be asked is probably the following: at the beginning of the nineteenth century, when the task of psychiatry was to define its specificity in the field of medicine and to assure that its scientific character was recognized among other medical practices, at the point, that is, when psychiatry was establishing itself as a medical specialization (previously it had been an aspect rather than a field of medicine), why then did it want to meddle in an area where so far it had intervened very discreetly? Why did doctors want so badly to describe as insane, and thus to claim, people whose status as mere criminals had up to that point been unquestioned? Why can they be found in so many countries, denouncing the medical ignorance of judges and jurors, requesting pardons or the commutation of punishment for certain convicts, demanding the right to be heard as experts by the tribunals, publishing hundreds of reports and studies to show that this criminal or that one was a madman? Why this crusade in favor of the “pathologification” of crime, and under the banner, no less, of homicidal mania? This is all the more paradoxical in that, shortly before, at the end of the eighteenth century, the very first students of insanity (especially Pinel) protested against the practice followed in many detention centers of mixing delinquents and the mentally ill. Why would one want to renew a kinship which one had taken such trouble to break down?

It is not enough to invoke some sort of imperialism on the part of psychiatrists seeking a new domain for themselves, or even the internal dynamics of medical knowledge attempting to rationalize the confused area where madness and crime mix. Crime then became an important issue for psychiatrists, because what was involved was less a field of knowledge to be conquered than a modality of power to be secured and justified. If psychiatry became so important in the nineteenth century, it was not simply because it applied a new medical rationality to mental or behavioral disorders, it was also because it functioned as a sort of public hygiene.

In the eighteenth century, the development of demography, of urban structures, of the problem of industrial labor, had raised in biological and medical terms the question of human “populations,” with their conditions of existence,

of habitation, of nutrition, with their birth and mortality rate, with their pathological phenomena (epidemics, endemic diseases, infant mortality). The social "body" ceased to be a simple juridico-political metaphor (like the one in the *Leviathan*) and became a biological reality and a field for medical intervention. The doctor must therefore be the technician of this social body, and medicine a public hygiene. At the turn of the nineteenth century, psychiatry became an autonomous discipline and assumed such prestige precisely because it had been able to develop within the framework of a medical discipline conceived of as a reaction to the dangers inherent in the social body. The alienists of the period may well have had endless discussions about the organic or psychic origin of mental illnesses; they may well have proposed physical or psychic therapies. Nonetheless, through all their differences, they were all conscious that they were treating a social "danger," either because insanity seemed to them to be linked to living conditions (overpopulation, overcrowding, urban life, alcoholism, debauchery), or because it was perceived as a source of danger for oneself, for others, for one's contemporaries, and also for one's descendants through heredity. Nineteenth-century psychiatry was a medical science as much for the societal body as for the individual soul.

One can see why it was important for psychiatry to prove the existence of something as extravagant as homicidal mania. One can see why for half a century there were continuous attempts to make that notion work, in spite of its meager scientific justification. Indeed, if it exists, homicidal mania shows:

First, that in some of its pure, extreme, intense manifestations, insanity is entirely crime, nothing but crime – that is, at least at the ultimate boundaries of insanity, there is crime;

Second, that insanity can produce not just behavioral disorders, but absolute crime, the crime which transgresses all the laws of nature and of society; and

Third, that even though this insanity may be extraordinarily intense, it remains invisible until it explodes; that for this reason no one can forecast it, unless he has considerable experience and a trained eye. In short, only a specialist can spot monomania. The contradiction is more apparent than real when the alienists eventually define monomania as an illness which manifests itself only in crime while at the same time they reserve the right to know how to determine its premonitory signs, its predisposing conditions.

So, homicidal mania is the danger of insanity in its most harmful form; a maximum of consequences, a minimum of warning. The most effects and fewest signs. Homicidal mania thus necessitates the intervention of a medical eye which must take into account not only the obvious manifestations of madness but also the barely perceptible traces, appearing randomly where they are the least expected, and foretelling the worst explosions. Such an interest in the great crimes "without reason" does not, I think, indicate on the part of psychiatry a desire to take over criminality, but a desire to justify its functions: the control of the dangers hidden in human behavior. What is at stake in this great issue of homicidal mania is the function of psychiatry. It must not be forgotten that in most western countries psychiatry was then striving to establish its right to impose upon the mentally ill a therapeutic confinement. After all, it had to be shown that madness, by its nature, and even in its most discrete manifestations, was haunted by the absolute danger, death. The functioning of modern

psychiatry is linked to this kinship between madness and death, which was not scientifically established, but rather symbolically represented in the figure of homicidal mania.

However, there is another question to be asked, this time from the point of view of the judges and the judicial apparatus. Why indeed did they accept, if not the notion of monomania, at least the problems that it entailed? It will probably be said that the great majority of magistrates refused to recognize this notion which made it possible to transform a criminal into a madman whose only illness was to commit crimes. With a great deal of tenacity and, one might add, with a certain degree of good sense, they did everything they could to dismiss this notion which the doctors proposed to them and which lawyers used spontaneously to defend their clients. And yet, through this controversy about monstrous crimes, about crimes "without reason," the idea of a possible kinship between madness and delinquency became acclimatized even within the judicial institution. Why was this accomplished, and relatively easily at that? In other words, why did the penal institution, which had been able to do without medical intervention for so many centuries, which had been able to judge and condemn without the problem of madness being raised except in a few obvious cases, why did this penal institution so willingly have recourse to medical knowledge from the 1820s on? For there is no mistaking the fact that English, German, Italian, and French judges of the time quite often refused to accept the conclusions of the doctors. They rejected many of the notions which the doctors proposed to them. After all, the doctors did not take them by force. They themselves solicited — following the laws, the rules, the jurisprudence which vary from country to country — the duly formulated advice of psychiatrists, and they solicited it especially in connection with those famous crimes "without reason." Why? Was it because the new codes written and applied at the beginning of the nineteenth century took into account psychiatric expertise or gave a new emphasis to the problem of pathological irresponsibility? Not at all. Surprisingly enough these new laws hardly modified the previous situation. Most of the codes based on the Napoleonic model incorporated the old principle that the state of mental disorder is incompatible with legal responsibility and thus is immune from the usual legal consequences. Most of the codes also incorporate the traditional notions of *dementia* and *furor* used in the older legal systems. Neither the great theoreticians like Beccaria and Bentham, nor those who actually wrote up the new penal laws, tried to elaborate upon these traditional notions, nor to establish new relationships between punishment and criminal medicine, except to affirm in a very general way that penal justice must cure this illness of societies, i.e., crime. It was not "from above," by way of legal codes or theoretical principles, that psychiatric medicine penetrated the penal system. Rather, it was "from below," through the mechanics of punishment and through the interpretation given to them. Among all the new techniques for controlling and transforming individuals, punishment had become a system of procedures designed to reform lawbreakers. The terrifying example of torture or exile by banishment could no longer suffice in a society where exercise of power implied a reasoned technology applied to individuals. The forms of punishment to which all the late eighteenth-century reformers, and

all the early nineteenth-century legislators rallied — that is, imprisonment, forced labor, constant surveillance, partial or total isolation, moral reform — all this implies that punishment bears on the criminal himself rather than on the crime, that is on what makes him a criminal, on his reasons, his motives, his inner will, his tendencies, his instincts. In the older systems, the horror of the punishment had to reflect the enormity of the crime; henceforth, the attempt was made to adapt the modalities of punishment to the nature of the criminal.

In these circumstances, one sees why the great unmotivated crimes posed a difficult problem for the judges. In the past, to impose a punishment for a crime one had only to find the author of the crime, and it was enough that he had no excuse and that he had not been in a state of *furor* or *dementia*. But how can one punish someone whose reasons are unknown, and who keeps silent before his judges, except to admit the facts and to agree that he had been perfectly conscious of what he was doing? What is to be done when a woman like Henriette Cornier appears in court, a woman who has killed a child whom she hardly knew, the daughter of people whom she could neither have hated nor loved, who decapitates the girl but is unable to give the slightest explanation, who does not try for a moment to hide her crime, and who had nonetheless prepared for her act, had chosen the moment, had procured a knife, had eagerly sought an opportunity to be alone for a moment with her victim? Thus, in a person who had given no sign of madness, there arises an act which is at once voluntary, conscious, and reasoned — that is, all that is necessary for a condemnation according to the terms of the law — and yet nothing, no reason, no motive, no evil tendencies, which would have made it possible to determine what should be punished in the guilty woman. It is clear that there should be a condemnation, but it is hard to understand why there should be a punishment, except of course for the external but insufficient reason of setting an example. Now that the reason for the crime had become the reason for the punishment, how could one punish if the crime was without reason? In order to punish, one needs to know the nature of the guilty person, his obduracy, the degree of his evilness, what his interests or his leanings are. But if one has nothing more than the crime on one hand and the author on the other, pure and simple judicial responsibility formally authorizes punishment, yet does not allow one to make sense of it.

One can see why these great unmotivated crimes, which the psychiatrists had good reason to emphasize, were also, but for very different reasons, such important problems for the judicial apparatus. The public prosecutors obstinately referred to the law: no *dementia*, no *furor*, no recognized evidence of derangement; on the contrary, perfectly organized acts; therefore, the law must be applied. But no matter how hard they tried, they could not avoid the question of motivation, for they knew very well that from now on, in practice, the judges would link punishment, at least in part, to the determination of motives. Perhaps Henriette Cornier had been the mistress of the girl's father, and sought revenge; perhaps, having had to abandon her own children, she was jealous of the happy family living near her. All the indictments prove that in order for the punitive mechanism to work, the reality of an offense and a person to whom it can be attributed are not sufficient; the motive must also be established, that is,

a psychologically intelligible link between the act and the author. The Selestat case, in which a cannibalistic woman was executed because she *could* have been hungry, seems to me to be very significant.

The doctors who were normally called in only to certify cases of *dementia* or of *furor* began now to be called upon as "specialists in motivation"; they had to evaluate not only the subject's reason but also the rationality of the act, the whole system of relationships which link the act to the interests, the plans, the character, the inclinations, and the habits of the subject. And even though the judges were often reluctant to accept the diagnosis of monomania so relished by the doctors, they were obliged to entertain willingly the set of problems raised by the notion: that is, in slightly more modern terms, the integration of the act into the global behavior of the subject. The more clearly visible this integration, the more clearly punishable the subject. The less obvious the integration, the more it seems as if the act has erupted in the subject, like a sudden and irrepressible mechanism, and the less punishable the responsible party appears. And justice will then agree that it cannot proceed with the case since the subject is insane, and will commit him to psychiatric confinement.

Several conclusions can be drawn from this:

First, the intervention of psychiatric medicine in the penal system starting in the 19th century is neither the consequence nor the simple development of the traditional theory of the irresponsibility of those suffering from *dementia* or *furor*.

Second, it is due to the regulating of two phenomena arising necessarily, one from the functioning of medicine as a public hygiene, the other from the functioning of legal punishment as a technique for transforming the individual.

Third, these two new demands are both bound up with the transformation of the mechanism of power through which the control of the social body has been attempted in industrial societies since the eighteenth century. But in spite of their common origin, the reasons for the intervention of medicine in the criminal field and the reasons for the recourse of penal justice to psychiatry are essentially different.

Fourth, the monstrous crime, both anti-natural and irrational, is the meeting point of the medical demonstration that insanity is ultimately always dangerous, and of the court's inability to determine the punishment of a crime without having determined the motives for the crime. The bizarre symptomatology of homicidal mania was designed at the point of convergence of these two mechanisms.

Fifth, in this way, the theme of the dangerous man is inscribed in the institutions of psychiatry as well as of justice. Increasingly in the nineteenth and twentieth century, penal practice and then penal theory will tend to make of the dangerous individual the principal target of punitive intervention. Increasingly, nineteenth-century psychiatry will also tend to seek out pathological stigmata which may mark dangerous individuals: moral insanity, instinctive insanity, and degeneration. This theme of the dangerous individual will give rise on the one hand to the anthropology of criminal man as in the Italian school, and on the other to the theory of social defense first represented by the Belgian school.

Sixth, another important consequence is that there will be a considerable

transformation of the old notion of penal responsibility. This notion, at least in certain respects, was still close to civil law. It was necessary, for instance, in order to impute a violation to someone, that he be free, conscious, unafflicted by *dementia*, untouched by any crisis of *furor*. Now responsibility would no longer be limited only to this form of consciousness but to the intelligibility of the act with reference to the conduct, the character, the antecedents of the individual. The more psychologically determined an act is found to be, the more its author can be considered legally responsible. The more the act is, so to speak, gratuitous and undetermined, the more it will tend to be excused. A paradox, then: the legal freedom of a subject is proven by the fact that his act is seen to be necessary, determined; his lack of responsibility proven by the fact that his act is seen to be unnecessary. With this untenable paradox of monomania and of the monstrous act, psychiatry and penal justice entered a phase of uncertainty from which we have yet to emerge; the play between penal responsibility and psychological determinism has become the cross of legal and medical thought.

I would now like to turn to another moment which was particularly fertile for the relationship between psychiatry and penal law: the last years of the nineteenth century and the first few of the twentieth from the first congress on Criminal Anthropology (1885) to Prinz's publication of his *Social Defence* (1910).

Between the period which I was recalling previously and the one I would like to speak about now, what happened? First of all, within the discipline of psychiatry in the strict sense of the term, the notion of monomania was abandoned, not without some hesitations and reversions, shortly before 1870. Abandoned for two reasons: first because the essentially negative idea of a partial insanity, bearing on only one point and unleashed only at certain moments, was gradually replaced by the idea that a mental illness is not necessarily an affliction of thought or of consciousness, but that it may attack the emotions, the instincts, spontaneous behavior, leaving the forms of thought virtually intact. (What was called moral insanity, instinctive insanity, aberration of the instincts, and finally perversion, corresponds to this elaboration, whose favored example since about the 1840s has been the deviations in sexual conduct.) But there was another reason for abandoning monomania; that is, the idea of mental illness, whose evolution is complex and polymorphous, and which may present one particular symptom or another at one stage or another of their development, not only at the level of the individual but also at the level of several generations; in short, the idea of degeneration.

Because of the fact that these great evolutive ramifications can be defined, it is no longer necessary to make a distinction between the great monstrous and mysterious crimes which could be ascribed to the incomprehensible violence of *insanity* and minor delinquency, which is too frequent, too familiar to necessitate a recourse to the pathological. From then on, whether one had to deal with incomprehensible massacres or minor offenses (having to do with property or sexuality), in every case one might suspect a more or less serious perturbation of instincts or the stages in an uninterrupted process. Thus there appear in the field of legal psychiatry new categories, such as necrophilia around 1840.

kleptomania around 1860, exhibitionism in 1876, and also legal psychiatric annexation of behavior like pederasty and sadism. There now exists, in principle, a psychiatric and criminological continuum which permits posing questions in medical terms at any level of the penal scale. The question is no longer confined to some great crimes; even if it must have a negative answer, it is to be posed across the whole range of infractions.

Now this has important consequences for the legal theory of responsibility. In the conception of monomania, suspicions of pathology were aroused only when there was no reason for an act; insanity was seen as the cause which made no sense, and legal non-responsibility was established in consequence of this inconsistency. But with this new analysis of instinct and emotion it may be possible to provide a causal analysis for all kinds of conduct, whether frequent or not, and whatever their degree of criminality. Hence the intricate labyrinth in which the legal and psychiatric problem of crime found itself. If responsibility is determined by a causal nexus, can it be considered to be free? Does it imply responsibility? And is it necessary, in order to be able to condemn one, that it be impossible to reconstruct the causal intelligibility of his act?

Now, as background for this new way of posing the problem, I must mention several transformations which were, at least in part, the conditions of its becoming possible. First the intensive development of the police network, which effected a new mapping and closer surveillance of urban space and also to a measure a more systematic and efficient prosecution of minor delinquency. It must be noted that social conflicts, class struggles and political confrontations, armed and unarmed – from the machine-smashers of the beginning of the century to the strikes of the last few years of the century, including the violent strikes, the revolutions of 1848 and the Commune of 1870 – prompted those in power to classify political misdemeanors in the same way as ordinary crimes in order to punish them. Little by little an image was built up of an enemy of society who could equally well be a revolutionary or a murderer, since after all revolutionaries sometimes kill. Corresponding to this, throughout the whole second half of the century, there developed a “literature of criminality,” and I use the word in the widest sense, including miscellaneous news items (and, even more, newspapers) as well as detective novels and all the romanticized writings which developed around crime – the transformation of the criminal into a myth. Perhaps, but, equally, the affirmation that ever-present criminality is a menace to the social body as a whole. The collective fear of crime, the identification with this danger which seems to be an inseparable part of society; thus perpetually inscribed in each individual consciousness.

Referring to the 9,000 murders then recorded annually in Europe and counting Russia, Garofalo said in the Preface to the first edition of his *Criminology* (1887): “Who is the enemy who has devastated this land? Its most serious enemy, unknown to history; his name is: the criminal.”

To this must be added another element: the continuing failure of the penitentiary system, which is very frequently reported. It was the dream of the eighteenth-century reformers, then of the philanthropists of the following period, that incarceration, provided that it be rationally directed, might constitute a true penal therapy. The result was meant to be the reform of the prisoner. It soon became clear that prison had exactly the opposite result, that it

the whole a school for delinquency and that the more refined methods of the police system and the legal apparatus, far from insuring better protection against crime, brought about a strengthening of the criminal milieu, through the medium of prison itself.

For all sorts of reasons, a situation existed such that there was a very strong social and political demand for a reaction to, and for repression of, crime. This demand had to do with a criminality which in its totality had to be thought of in judicial and medical terms, and yet, the key notion of the penal institution since the Middle Ages, that is, legal responsibility, seems utterly inadequate for the conceptualization of this broad and dense domain of medico-legal criminality.

This inadequacy became apparent, both at the conceptual and at the institutional level, in the conflict between the so-called school of Criminal Anthropology and the International Association of Penal Law around the 1890s. In attempting to cope with the traditional principles of criminal legislation, the Italian School (the Criminal Anthropologists) called for nothing less than a putting aside of legality – a true “depenalization” of crime, by setting up an apparatus of an entirely different type from the one provided for by the Codes.

For the Criminal Anthropologists this meant totally abandoning the judicial notion of responsibility, and posing as the fundamental question not the degree of freedom of the individual, but the level of danger he represents for society. Moreover, it meant noting that the accused whom the law recognized as not responsible because he was ill, insane, a victim of irresistible impulses, was precisely the most seriously and immediately dangerous. The Criminal Anthropologists emphasized that what is called “penalty” does not have to be a punishment, but rather a mechanism for the defense of society, and therefore noted that the relevant difference is not between legally responsible subjects to be found guilty, and legally irresponsible subjects to be released, but between absolutely and definitively dangerous subjects and those who can cease to be dangerous provided they receive certain treatment. They concluded that there should be three main types of social reaction to crime or rather to the danger represented by the criminal: definitive elimination (by death or by incarceration in an institution), temporary elimination (with treatment), and more or less relative and partial elimination (sterilization and castration).

One can see the series of shifts required by the anthropological school: from the crime to the criminal; from the act as it was actually committed to the danger potentially inherent in the individual; from the modulated punishment of the guilty party to the absolute protection of others. All these shifts implied quite clearly an escape from a universe of penal law revolving around the act, its imputability to a *de jure* subject, the legal responsibility of the latter and a punishment proportionate to the gravity of this act as defined by law. Neither the “criminality” of an individual, nor the index of his dangerousness, nor his potential or future behavior, nor the protection of society at large from these possible perils, none of these are, nor can they be, juridical notions in the classical sense of the term. They can be made to function in a rational way only within a technical knowledge-system, a knowledge-system capable of characterizing a criminal individual in himself and in a sense beneath his acts; a knowledge-system able to measure the index of danger present in an individual; a knowledge-system which might establish the protection necessary in the face of such

a danger. Hence the idea that crime ought to be the responsibility not of judges but of experts in psychiatry, criminology, psychology, etc. Actually, that extreme conclusion was not often formulated in such an explicit and radical way, no doubt through practical prudence. But it followed implicitly from all the theses of Criminal Anthropology. And at the second meeting of this Association (1889), Pugliese expressed it straightforwardly. We must, he said, turn around the old adage: the judge is the expert of experts; it is rather up to the expert to be the judge of judges. "The commission of medical experts to whom the judgment ought to be referred should not limit itself to expressing its wishes; on the contrary it should render a real decision."

It can be said that a point of break-down was being reached. Criminology, which had developed out of the old notion of monomania, maintaining a frequently stormy relationship with penal law, was in danger of being excluded from it as excessively radical. This would have led to a situation similar to the original one; a technical knowledge-system incompatible with law, besieging it from without and unable to make itself heard. As the notion of monomania could be used to overlay with madness a crime with no apparent reasons, so, to some extent, the notion of degeneration made it possible to link the most insignificant of criminals to a peril of pathological dimensions for society, and, eventually, for the whole human species. The whole field of infractions could be held together in terms of danger and thus of protection to be provided. The law had only to hold its tongue. Or to plug its ears and refuse to listen.

It is usual to say that the fundamental propositions of criminal anthropology were fairly rapidly disqualified for a number of reasons: because they were linked to a form of scientism, to a certain positivist naïveté which the very development of the sciences in the twentieth century has taken upon itself to cure; because they were related to historical and social evolutionism which was itself quickly discredited; because they found support in a neuropsychiatric theory of degeneration which both neurology and psychoanalysis have quickly dismantled; and because they were unable to become operational within the format of penal legislation and within legal practice. The age of criminal anthropology, with its radical naïvetés, seems to have disappeared with the 19th century; and a much more subtle psycho-sociology of delinquency, much more acceptable to penal law, seems to have taken up the fight.

It seems to me that, at least in its general outlines, criminal anthropology has not disappeared as completely as some people say, and that a number of its most fundamental theses, often those most foreign to traditional law, have gradually taken root in penal thought and practice. But this could not have happened solely by virtue of the truth of this psychiatric theory of crime, or rather solely through its persuasive force. In fact there had been a significant mutation within the law. When I say "within the law," I probably say too much, for, with a few exceptions (such as the Norwegian code, but after all it was written for a new state) and aside from some projects left in limbo (such as the Swiss plan for a penal code), penal legislation remained pretty well unchanged. The laws relating to suspension of sentence, recidivism, or relegation were the principal modifications somewhat hesitantly made in French legislation. This is not where I see the significant mutations, but rather in connection with an element at the same time theoretical and essential, namely the notion of responsibility.

And it was possible to modify this notion not so much because of the pressure of some internal shock but mainly because a considerable evolution had taken place in the area of civil law during the same period. My hypothesis would be that it was civil law, not criminology, which made it possible for penal thought to change on two or three major points. It was civil law which made it possible to graft onto criminal law the essential elements of the criminological theses of the period. It may well be that without the reformulation which occurred first in civil law, the jurists would have turned a deaf ear to the fundamental propositions of criminal anthropology, or at least would never have possessed the proper tool for integrating them into the legal system. In a way which may at first seem strange, it was civil law which made possible the articulation of the legal code and of science in penal law.

This transformation in civil law revolves around the notion of accident and legal responsibility. In a very general way, it is worth emphasizing the significance which the problem of accidents had, not only for law but also for economics and politics, especially in the second half of the nineteenth century. One could object that since the sixteenth century, insurance plans had shown how important the idea of risk had already become. But on the one hand, insurance dealt only with more-or-less individual risks and on the other, it entirely excluded the legal responsibility of the interested party. In the nineteenth century, the development of wage-earning, of industrial techniques, of mechanization, of transportation, of urban structures, brought with it two important things. First, risks were incurred by third parties (the employer exposed his employees to work-related accidents; transport companies exposed not only their passengers to accidents but also people who just happened to be there). Then, the fact that these accidents could often be linked to a sort of error – but a minor error (inattention, lack of precaution, negligence) committed moreover by someone who could not carry the civil responsibility for it nor pay the ensuing damages. The problem was to establish in law the concept of no-fault responsibility. It was the effort of Western civil legislators and especially German jurists, influenced as they were by the demands of Bismarckian society – a society characterized not only by discipline but also by security-consciousness. In this search for a no-fault responsibility, the civil legislators emphasized a certain number of important principles:

First, this responsibility must be established not according to the series of errors committed but according to the chain of causes and effects. Responsibility is on the side of cause, rather than on the side of fault. This is what German jurists meant by *Causahaftung*.

Second, these causes are of two orders which are not mutually exclusive: the chain of precise and individual facts, each of which has been induced by the preceding one; and the creation of risks inherent in a type of action, of equipment, of enterprise.

Third, granted, these risks are to be reduced in the most systematic and rigorous way possible. But they will certainly never be made to disappear; none of the characteristic undertakings of modern society will be without risk. As Saleilles said, "a causal relationship linked to a purely material fact which in itself appears as an adventurous fact, not in itself irregular, nor contrary to the customs of modern life, but contemptuous of that extreme caution which para-

lyzes action, in harmony with the activity which is imperative today and therefore defying hatreds and accepting risks, that is the law of life today, that is the common rule, and law is made to reflect this contemporary conception of the soul, in the course of its successive evolution.”

Fourth, since this no-fault liability is linked to a risk which can never entirely be eliminated, indemnity is not meant to sanction it as a sort of punishment, but to repair its effects and also to tend, in an asymptotic way, towards an eventual reduction of its risks. By eliminating the element of fault within the system of liability, the civil legislators introduced into law the notion of causal probability and of risk, and they brought forward the idea of a sanction whose function would be to defend, to protect, to exert pressure on inevitable risks.

In a rather strange way, this depenalization of civil liability would constitute a model for penal law, on the basis of the fundamental propositions formulated by criminal anthropology. After all, what is a “born criminal” or a degenerate, or a criminal personality, if not someone who, according to a causal chain which is difficult to restore, carries a particularly high index of criminal probability, and is in himself a criminal risk? Well, just as one can determine civil liability without establishing fault, but solely by estimating the risk created and against which it is necessary to build up a defense (although it can never be eliminated), in the same way, one can render an individual responsible under law without having to determine whether he was acting freely and therefore whether there was fault, but rather by linking the act committed to the risk of criminality which his very personality constitutes. He is responsible since by his very existence he is a creator of risk, even if he is not at fault, since he has not of his own free will chosen evil rather than good. The purpose of the sanction will therefore not be to punish a legal subject who has voluntarily broken the law; its role will be to reduce as much as possible – either by elimination, or by exclusion or by various restrictions, or by therapeutic measures – the risk of criminality represented by the individual in question.

The general idea of the *Social Defence* as it was put forward by Prinz at the beginning of the twentieth century was developed by transferring to criminal justice formulations proper to the new civil law. The history of the conferences on Criminal Anthropology and conferences on penal law at the turn of the century, the chronicle of the conflicts between positivist scholars and traditional jurists, and the sudden détente which occurred at the time of Liszt, of Saleilles, of Prinz, the rapid eclipse of the Italian School after that, but also the reduction of the jurists’ resistance to the psychological approach to the criminal, the establishment of a relative consensus around a criminology which would be accessible to the law, and of a system of sanctions which would take into account criminological knowledge – all of these seem indeed to indicate that at that moment the required “shunting switch” had just been found. This “switch” is the key notion of *risk* which the law assimilates through the idea of a no-fault liability, and which anthropology, or psychology, or psychiatry can assimilate through the idea of imputability without freedom. The term, henceforth central, of “dangerous being,” was probably introduced by Prinz at the September 1905 session of the International Union of Penal Law.

I will not list here the innumerable legal codes, rules, and memoranda which carried into effect, in one way or another, this notion of the *dangerous*

state of an individual in penal institutions throughout the world. Let me simply underline a couple of things.

First, since the great crimes without reason of the early 19th century, the debate did not in fact revolve so much around freedom, even though the question was always there. The real problem, the one which was in effect throughout, was the problem of the dangerous individual. Are there individuals who are intrinsically dangerous? By what signs can they be recognized, and how can one react to their presence? In the course of the past century, penal law did not evolve from an ethic of freedom to a science of psychic determinism; rather, it enlarged, organized, and codified the suspicion and the locating of dangerous individuals, from the rare and monstrous figure of the monomaniac to the common everyday figure of the degenerate, of the pervert, of the constitutionally unbalanced, of the immature, etc.

It must also be noted that this transformation took place not only from medicine towards law, as through the pressure of rational knowledge on older prescriptive systems; but that it also operated through a perpetual mechanism of summoning and of interacting between medical or psychological knowledge and the judicial institution. It was not the latter which yielded. A set of objects and of concepts was born at their boundaries and from their interchanges.

This is the point which I would like to stress, for it seems that most of the notions thus formed are operational for legal medicine or for psychiatric expertise in criminal matters. But has not something more been introduced into the law than the uncertainties of a problematic knowledge – to wit, the rudiments of another type of law? For the modern system of sanctions – most strikingly since Beccaria – gives society a claim to individuals only because of what they do. Only an act, defined by law as an infraction, can result in a sanction, modifiable of course according to the circumstances or the intentions. But by bringing increasingly to the fore not only the criminal as author of the act, but also the dangerous individual as potential source of acts, does one not give society rights over the individual based on what he is? No longer, of course, based on what he is by statute (as was the case in the societies under the Ancien Régime), but based on what he is by nature, according to his constitution, character traits, or his pathological variables. A form of justice which tends to be applied to what one is, this is what is so outrageous when one thinks of the penal law of which the eighteenth-century reformers had dreamed, and which was intended to sanction, in a completely egalitarian way, offenses explicitly defined beforehand by the law.

It could be objected that in spite of this general principle, even in the nineteenth century the right to punish was applied and varied on the basis not only of what men do, but also of what they are, or of what it is supposed that they are. Hardly had the great modern codes been established when attempts were made to mitigate them by legislation such as the laws dealing with extenuating circumstances, with recidivism, and with conditional release. It was a matter of taking into account the author behind the acts that had been committed. And a complete and comparative study of the legal decisions would no doubt easily show that on the penal stage the offenders were at least as present as their offenses. A form of justice which would be applied only to what one does is probably purely utopian and not necessarily desirable. But since the eighteenth

century at least, it has constituted the guiding principle, the juridico-moral principle which governs the modern system of sanctions. There was therefore no question, there can still be no question, of suddenly putting it aside. Only insidiously, slowly, and as it were from below and fragmentally, has a system of sanctions based on what one *is* been taking shape. It has taken nearly one hundred years for the notion of "dangerous individual," which was potentially present in the monomania of the first alienists, to be accepted in judicial thought. After one hundred years, although this notion may have become a central theme in psychiatric expertise (in France psychiatrists appointed as experts speak about the dangerousness of an individual much more than about his responsibility), the law and the codes seem reluctant to give it a place. The revision of the penal code presently underway in France has just barely succeeded in replacing the older notion of *dementia* (which made the author of an act not responsible), with the notions of discernment and control which are in effect only another version of the same thing, hardly modernized at all. Perhaps this indicates a foreboding of the dreadful dangers inherent in authorizing the law to intervene against individuals because of what they are; a horrifying society could emerge from that.

Nonetheless, on the functional level, judges more and more need to believe that they are judging a man as he is and according to what he is. The scene which I described at the beginning bears witness to this. When a man comes before his judges with nothing but his crimes, when he has nothing else to say but "this is what I have done," when he has nothing to say about himself, when he does not do the tribunal the favor of confiding to them something like the secret of his own being, then the judicial machine ceases to function.