



Revealing criminal motives: Legal cognition between science, rhetoric and criminology

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Abstract

If crime is the most reprehensible betrayal of social bonds and expectations, and therefore deserves the most severe legal sanction (punishment), the assessment of criminal responsibility must be exceptionally accurate. At trial, jurists must evaluate not only the rational dimension of conduct, as expressed through the defendant's (presumed) intention; they are also required to address and, as far as possible, to reveal the defendant's underlying motives, no matter how "irrational" these may appear, since they arise from emotions, feelings, passions, and moods. In doing so, jurists should be aware that such motives are grasped through the interplay between the conceptualisations provided by criminal law, as elaborated and systematised by legal doctrine in the form of criminal science, and the set of arguments discovered, developed and discussed by forensic rhetoric on the basis of common sense, as filtered and organised through a criminological approach grounded in criminal types. Yet, as far as concerns us here, these "irrational" motives – complementary to the rational intention first addressed at trial – make particularly clear how the application of criminal law in the end relies on otherwise implicit forms of social knowledge, precisely as conveyed by criminal science, forensic rhetoric, and criminology.

Key words

Criminal motives; criminal responsibility; intention; criminal science; forensic rhetoric; criminology

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Resumen

Si el delito es la traición más reprensible a los vínculos y expectativas sociales y, por lo tanto, merece la sanción legal más severa (pena), la evaluación de la responsabilidad penal debe ser excepcionalmente precisa. En el juicio, los juristas deben evaluar no solo la dimensión racional de la conducta, tal y como se expresa a través de la intención (presunta) del acusado, sino que también deben abordar y, en la medida de lo posible, revelar los motivos subyacentes del acusado, por muy “irracionales” que puedan parecer, ya que surgen de emociones, sentimientos, pasiones y estados de ánimo. Al hacerlo, los juristas deben ser conscientes de que dichos motivos se comprenden a través de la interacción entre las conceptualizaciones proporcionadas por el derecho penal, elaboradas y sistematizadas por la doctrina jurídica en forma de ciencia penal, y el conjunto de argumentos descubiertos, desarrollados y discutidos por la retórica forense sobre la base del sentido común, filtrados y organizados a través de un enfoque criminológico basado en los tipos penales. Sin embargo, en lo que aquí más interesa, estos motivos “irracionales” —complementarios a la intención racional abordada en primer lugar en el juicio— dejan especialmente claro cómo la aplicación del derecho penal se basa en última instancia en formas de conocimiento social que, de otro modo, permanecerían implícitas, precisamente tal y como las transmiten la ciencia penal, la retórica forense y la criminología.

Palabras clave

Motivos delictivos; responsabilidad penal; intención; ciencia criminal; retórica forense; criminología

Table of contents

1. Introduction	666
2. Hocus pocus? On how to (try to) reveal criminal motives.....	667
2.1. The criminal science of motives.....	670
2.2. The rhetoric of criminal motives.....	671
2.3. Criminology's approach to the motives of conduct.....	672
3. Cutting to the chase (by way of conclusion)	674
References.....	676

‘He alone knows his motives’ — that is an expression of the fact that we ask him what his motives are. — If he is sincere he will tell us them; but I need more than sincerity to guess his motives. This is where there is a kinship with the case of knowing.

(Wittgenstein 1986, § 11 - p. 224)

... truth may be stretched, but cannot be broken, and always gets above falsehood, as oil does above water.

(Cervantes 2008, II, 10 - p. 523 f.)

1. Introduction

It can be challenging to clearly distinguish criminal law from other branches of law (if such a distinction is possible at all). For this reason, jurists generally accommodate by resorting to *formal* criteria: criminal law is thus identified as the branch of law that links certain classes of sanctions, called “punishments”, to certain classes of conducts, called “crimes”.¹ From a *substantive* point of view, however, punishments must be regarded as the most severe sanctions prescribed by the legal system,² *because* the conducts to which they refer — the crimes — *supposedly* constitute the most reprehensible form of behaviour in terms of betrayal of social bonds and expectations.³

I do not intend here to address the fundamental questions of crime and punishment (who, when, how, and why to punish: see, *e.g.*, Hassemer 2012), nor the complexity inherent in the very notion of criminal responsibility, given the multifaceted character of the concept of “responsibility” itself (Hart 2008, ch. 5). Rather, my aim is to resume and further develop a line of inquiry initiated in an earlier study (Velo Dalbrenta 2013b), by outlining one way in which criminal experience enhances the social cognition of human behaviour as “seen” from the inside out, while also engaging our own legal cognition.⁴

Against this background, the analysis may begin by observing that assessing criminal responsibility at trial — understood as a lens through which the specific facts of a case are ultimately brought into focus — demands careful examination, within the constraints

¹ Concrete legal systems are profoundly complex and somewhat irrational, especially in our time, so the boundaries between the various branches of law are blurry. According to G. Delitala (1964), it is not possible to escape a certain nominalism in distinguishing criminal law, and so we must be content with the fact that “criminal” are those rules that provide punishment for conduct that is then to be considered a crime (a stance that, in fact, amounts to a kind of *petitio principii*).

² The present analysis does not aim to examine system-specific legal or institutional arrangements — save for some illustrative references to contemporary Italian law — but rather to address a problem that cuts across legal systems belonging to the traditions of Common Law and Civil Law: the configuration of the subjective element of crime. This problem is approached through analytical tools that, notwithstanding undeniable differences, remain broadly comparable across the Western legal tradition. After all, Common Law and Civil Law share a common matrix in Roman law (Stein 1991-1992) and have long been converging through processes commonly described as legal globalisation.

³ Criminal law concerns every human conduct incompatible with the reasons for coexistence incorporated in the legal system (as a legacy of past legal systems and of morality). In this regard, a legislator is not supposed to exercise full arbitrariness, so it is also worth recalling the distinction between conducts deserving punishment because they would constitute *mala in se* and conducts undeserving of punishment in themselves (but, at most, of another legal sanction — *e.g.*, administrative), the so-called *mala quia prohibita*. See Husak 2008, Duff *et al.* 2015.

⁴ As defined in Cominelli 2018, p. 2: “the complex of activities by which we each perceive and analyze the law and make decisions in connection with it”.

of established procedural rules, of any insight into the accused's conduct that proves illuminating. This includes its (attributed) motives, which in legal practice often function as a decisive marker of criminal responsibility, although reliance on them can introduce cognitive biases (Liefgreen *et al.* 2021).

Yet, despite their theoretical importance in principle, motives have remained marginal, scattered, and uneven within contemporary criminal law theory (Veneziani 2000, Chiu 2005, Hessick 2006, Husak 2010, ch. 2) — a relative lack of interest that appears paradoxical, at least when viewed in light of their enduring prominence in literature and cinema (Allan *et al.* 2020, pt. 2).

This appears all the more striking when one considers a basic doctrinal distinction that structures the assessment of crime at trial in most Western legal systems: crime is reconstructed on the basis of two elements, an objective and a subjective one, the latter calling — in principle — for as complete an assessment as possible.

Now, there is little difficulty, then, with the objective element, which corresponds to the empirical dimension of the offence and is reconstructed through the establishment of a set of facts of criminal relevance, traceable to the conduct at issue and sufficient to clarify its dynamics. The subjective element, by contrast, no less essential insofar as it concerns the mental dimension of the offence, is likewise considered accessible to judicial reconstruction, but has been largely construed in terms of intention, which frames conduct primarily as a means-end relationship: that is, in terms of instrumental rationality. Motives, instead, refer to a different — affective — dimension of conduct, in the form of deeply personal impulses bearing on conduct (Malinverni 1955): a dimension that nonetheless remains amenable to rational consideration and, as such, to epistemic access within legal practice.

It is precisely this configuration of the subjective element — and the marginalisation of motives that follows from it — that the present contribution seeks to question. Rejecting the assumption that motives are either scarcely relevant or even unknowable, it maintains that they can, under certain conditions, be meaningfully investigated and that they play a significant role in the reconstruction of criminal responsibility.

2. Hocus pocus? On how to (try to) reveal criminal motives

Assessing criminal responsibility at trial is a particularly demanding task. Without dwelling on the inherently problematic reconstruction of the facts deemed legally relevant, the focus here is on the difficulties involved in establishing the subjective element. As noted above, contemporary criminal law theory accords a privileged role to intention, construing it as the organising principle of the subjective element. However, this theoretical privileging rests on an assumption of coherence and linearity in human conduct that real agents cannot fully sustain insofar as it unfolds under the contingencies and constraints of the real world — only partially known to them in advance from their standpoint, and sometimes unexpected, if not unpredictable.

An exclusive focus on intention, in fact, by confining legal cognition to an immanent finality in conduct, risks obscuring the broader subjective landscape that underlies human behaviour. In other words, by placing intention at the centre of criminal conduct, one may overlook those seemingly “irrational” impulses that constitute the underlying

springs of conduct and that surface in *motives*: the emotions, feelings, passions, and moods that constitute the affective components of conduct and that we experience daily as accompanying, shaping, and sometimes disrupting our deliberative processes.⁵ Put succinctly, intention serves to explain *what* conduct was carried out, in terms of its rational form, whereas motives serve to render comprehensible *why* the agent acted — or did not act — in that way rather than another.⁶

This expanded perspective is crucial, since the trial proceedings call for a comprehensive assessment of both the rational and affective components of conduct, and only their integration allows access to its mental core.

The difficulty, rather, lies in the fact that motives — despite being indispensable to a comprehensive understanding of the subjective element of the offence — remain structurally opaque. Unlike intention, which provides a rational explanation of the structure of conduct and can be more or less readily abstracted from it, motives emerge only indirectly and, so to speak, elusively through conduct and are therefore, to some degree, resistant to evidentiary reconstruction at trial.

At this point, the fundamental premise — obvious, yet too often neglected — is that the subjective element of the offence is inextricably linked to conduct (the objective element), and that treating the two as separable is largely the product of a doctrinal choice (one that has at times been explicitly criticised: see, e.g., Smith 1978). On these grounds, it is also intuitively evident that the subjective element must be consistent with the empirical basis provided by the conduct whose criminal relevance is at issue, and that the two must therefore be regarded, in some sense, as continuous.

That said, as discussed before, the subjective element is composite: while intention teleologically structures conduct as it unfolds within a given situational context, motives emerge only indirectly through conduct, essentially as expressions of the agent's personality.

Within this line of argument, it is fairly safe to assume — drawing on analytical philosophy of action (see, for an overview, Paul 2020) — that the configuration of the subjective element of the offence is typically brought into view in the confrontation with the reasons adduced to justify conduct, by referring to intention as well as by appealing to motives. It is precisely in engaging with such reasons — through the representation of the facts that constitute their presupposition — that the epistemic problem of knowing the subjective element of conduct emerges as coinciding with the problem of the description of the facts at trial.

Nonetheless, as Elizabeth Anscombe observes (Anscombe 1963, p. 37 ff.), any human behaviour may be described either as a single act or as a sequence of actions and

⁵ The plural is deliberate: motives present themselves as impulses that variously combine, overlap, or conflict with one another, thereby imparting a direction to conduct that is never fully “rational” in the finalistic sense of the term — not least because the very sense of purpose to which the agent may refer can itself be constituted, modified, or obscured by them.

⁶ This remark clearly recalls a traditional epistemological distinction—namely, that between explaining (*Erklären*), characteristic of the nomothetic sciences, and understanding (*Verstehen*), proper to the idiographic sciences—here construed in a contemporary, complementary sense (De Regt 2017).

omissions, each of which can in turn be viewed as unitary or as a stage in the development of a broader intentional “trajectory”.

With this in mind, in the absence of any single, definitive perspective from which conduct can be described at trial, we must first and foremost consider the reasons advanced by the agent, while maintaining a certain distance from them. In particular, leaving aside the issue of confession (too wide-ranging to address here; see Brooks 2001), caution is required when confronting the agent’s supposedly “privileged” point of view, since such an account generally functions to exclude or mitigate criminal responsibility, even when offered in good faith.

Accordingly, the conduct’s putative reasons appear as something reconstructed and presented *ex post* — most typically through the agent’s own account — not merely to articulate the rational form of conduct, but also to give expression to the personality of the agent, as emerging out of life experience, relationships etc. In this sense, motives do not stand behind conduct, but operate within it, at a deeper level, as factors of mental causality, understood here in a non-deterministic, quasi-metaphorical sense.⁷

It is precisely here that, quite apart from criminal psychoanalytic inquiry (which is centrally concerned with motives; see Jiménez de Asúa 1982), the law proves capable of revealing motives and, through them, of apprehending conduct as an expression of the agent’s personality, thereby enabling a fuller assessment of the subjective element of the offence for the purposes of legal judgment.

In this respect, during the proceedings the parties may rely on any means of proof admitted by law and, increasingly, on forms of evidence grounded in scientific and technological expertise. Thus, one no longer speaks only — or primarily — of evidentiary means such as documents, witness testimony, and criminal records, but also of forensic police reports, genetic analyses, anatomical-pathological examinations, telephone interceptions, ballistic reports, video recordings, and the like (Jasanoff 1995, Carlizzi and Tuzet 2018).

Nonetheless, at first glance, such “revelation” may appear almost magical. Motives tend to remain blurred at trial, recondite in the agent’s personality (and at times inaccessible even to the agent), and can be brought to light — to the extent this is possible — fundamentally through the adversarial dynamic between prosecution and defence, itself often described as a kind of ancient ritual (Garapon 2001). Yet, the crucial point is that the “revelation” of motives, notwithstanding their non-rational character, takes place within a *rational* process: one that unfolds through a procedure intertwining three distinct domains of rational inquiry, each of which will be briefly examined in the following pages.

⁷ Consider, for example, the following statement: “That night I saw movement in the garden. We had already been burgled, and I fired a few shots high into the air solely as a warning. I did not see Peter Brown and had no intention of hitting him — only of scaring off whoever was moving in the dark.” In the face of this ambiguity, a rational intention expressed by the defendant — or otherwise presented at trial — as coherent and linear should prompt a complementary inquiry into the agent’s likely motives, so as to achieve a deeper characterisation of the conduct. Did the agent act impulsively, out of fear, or coldly, driven by bitterness? Or, in the heat of the moment, did the agent actually reflect on the “right” thing to do, perhaps failing to carry out the intention owing to excitement or inexperience in handling the weapon?

2.1. *The criminal science of motives*

For contemporary doctrine, what most clearly distinguishes criminal conduct from ordinary conduct at the mental level— thereby contributing to determine its social significance — is fundamentally linked to the agent’s intention. Yet it must be stressed that, despite this seemingly straightforward assumption, doctrine, while grounding the subjective element of crime in the concept of intention, tends to introduce a series of distinctions among different grades of intention, constructing, through a systematic interpretation of criminal-law norms, a scale of reproach intended to reflect the agent’s mental attitudes and, by this means, to modulate, as accurately as possible, the extent to which punishment is deserved.

As a result, when considering the subjective element of crime, doctrine is called upon to engage with a range of increasingly nuanced mental concepts subsumed under the label “intention”. This concentration on intention and its refinements makes the ordinary task of “producing” criminal science particularly onerous, since it involves bringing systematic order to the conceptual structure inherent in the subjective element of crime. The difficulty arises not only because mental attitudes are, by their very nature, elusive, but also because such an approach disregards motives, whereas, as noted above, only their consideration makes it possible to represent conduct as a plausible whole.

In this sense, doctrine could undoubtedly reintegrate motives more fully into criminal science , restoring their historical importance (Gatti 1931), and laying the appropriate theoretical foundations for their assessment at trial, even beyond the not negligible number of cases in which they are explicitly required by criminal law to qualify conduct (futile motive, profit motive, noble motive, etc.).

But let me clarify, at this point, that in the present contribution I am less concerned with the classic question of the epistemological status of legal science⁸ than with the specific task of criminal science: in fact, by elaborating and systematising the very mental concepts constitutive of the subjective element, doctrine serves to ensure that criminal law retains the capacity to render the *reality* to which it applies operationally “readable”⁹ from within.

However, in doing so, criminal science is not meant to constitute a definitive or closed body of knowledge; rather, through doctrine, it “functions” as a continuous process of revision and recalibration of concepts, regularly readjusting them in response to the reality to which criminal law applies, within the “fixity” of the legislative datum.¹⁰

In this way, when doctrine relates the concept of “criminal motives” to reality, on the one hand, it derives the parameters for their assessment from the social meaning of conduct as “rationalized” in the various cases brought to the attention of jurisprudence; on the other hand, it contributes to reframing the very social knowledge of motives by taking into account and disseminating, including through jurisprudence, scientific achievements. In this latter regard, it is worth noting that contemporary doctrinal engagement with cognitive neuroscience, a particularly salient example, exerts a

⁸ See, most recently, Salvi 2024.

⁹ Constituting a kind of “bridge” between them: see Gimbernat Ordeig 2020.

¹⁰ This process is necessary because the legislative datum, although subject to change, remains relatively stable at any given point in time.

profound impact both on public opinion and on the criminal field, where it appears to invite jurists to rethink the foundational concepts of criminal responsibility (see, among many others, Eastman and Campbell 2006, Di Giovine 2013).¹¹

In short, as previously stated, doctrine is called upon to “produce” criminal science also with respect to the subjective element of conduct by “opening” the mental concepts formalised in criminal law to both social and scientific perspectives and articulating the relation between these two levels.

Such an approach requires doctrine not to be “satisfied” merely with the coherent and linear explanation of conduct provided by the concept of “intention”, however graduated, and also to search for its motives, in order to configure a more encompassing mental causality relevant in the criminal sphere: a kind of causality whose density would be meaningfully cognisable and demonstrable in the context of a trial — to an extent that proves to be, in some sense, comparable to natural causality (Flor 2021).

In order to further explore this kind of causality, informing the concept of “criminal motives”, we now move from the general and abstract cognitive function of doctrine to the particular and concrete cognitive function of rhetoric, so as to reach, at least at trial, an indisputable representation of conduct.

2.2. *The rhetoric of criminal motives*

Rhetoric may be understood as a broader framework of rationality through which argumentative processes are implemented and oriented towards the adequate cognition of concrete cases with respect to their relevant features, mostly for the sake of decision-making (essentially in the political and juridical spheres). More specifically, within this traditional framework, argumentation proceeds by identifying its premises through topical reasoning, by testing and confronting them with other premises — whether expressed or simply possible — through dialectical discussion, and by orienting the resulting reconstruction toward persuasion. Such processes do not develop through strictly separable or temporally ordered stages, but rather result from the constant interplay of distinct functions that are always, to some degree, co-present.

Considered with specific reference to the law,¹² and thus with the trial as its ultimate focus, rhetoric provides jurists with a unifying rationale for their argumentative processes insofar as it is concerned with the facts of a specific case, with reference to the conduct that allegedly gave rise to them and to the ensuing normative treatment. Within the formalised context of the trial, these processes unfold through the dialectical confrontation of the parties by advancing and challenging competing perspectives on the overall reality of the facts, until — under the procedural constraints governing such confrontation — one perspective emerges as *preferable* to the others, because it proves *persuasive*.

¹¹ In fact, a cognitive neuroscience perspective could perhaps complement the explanation of criminal conduct clarifying its motivational processes, by recognising both biological and environmental elements as determinants of crime (Raine 2013). Furthermore, with specific reference to our topic, cognitive neuroscience seems to ascribe the status of (visualisable) motives to neural correlates of conduct, shedding a different light on those intrapsychic processes underlying all human conduct (Lumer 2019).

¹² Compare, *ex plurimis*, and with different approaches: Perelman 1980, Berteau 2003, Atienza 2005, Frost 2005, Cavalla 2007, Manzin *et al.* 2015.

More specifically, forensic rhetoric aims to persuade regarding the dynamics of the facts at issue by producing their most *verisimilar* representation, allowing for the application of criminal provisions. In so doing, it engages, in concrete cases, with the core of the conceptual issues framed by criminal science, bringing about a structured argumentative examination of the facts of the case and, at the same time, rendering intelligible the mental dimension of the conduct at stake, in terms of the interplay between those rational (teleological) factors that revolve around the concept of intention and those “irrational” (affective) factors that revolve around the concept of motive.¹³

Accordingly, the very process of applying criminal law to the facts of the case is possible only by apprehending those facts as manifestations of human conduct through the assessment of their mental dimension as the source of their agential meaning under given circumstances. Such application, by necessity, is never entirely deductive, that is to say, never confined to criminal law with its concepts elaborated by doctrine, but rather also relies on the rhetorical consideration of the facts in the light of what normally occurs in experience — in other words, on the common sense shared by legal practitioners (Cochran 2017, Bombelli 2023).¹⁴

In this way, rhetoric succeeds in conveying into legal practice those elements of social experience that would otherwise remain dispersed and under-theorised, rendering operative the concepts elaborated by criminal science, while in turn allowing legal provisions to be understood, rearticulated, and integrated in view of the specific circumstances at hand.

In this perspective, the technical-interpretive questions raised by doctrine in relation to the conceptual configuration of agents’ mental attitudes, explicitly or implicitly embedded in criminal law, may be reabsorbed into an argumentative treatment of the motivational sphere, reconfiguring the very sense of the intentionality of conduct, as anchored to the concrete case. This takes place through a series of inferential steps oriented towards the dialectical confrontation regarding a specific mental “causality”, in the context of the conduct at issue (illustrated, *inter alia*, by the evaluation of coercive pressure and the probable consequences of conduct analogous to the conduct alleged).

However, at this point it becomes necessary to turn to the final component of the procedure for revealing (criminal) motives, which ultimately brings together the scientific component (general and abstract) with the rhetorical one (particular and concrete), thereby securing their integration within legal practice: the criminological component.

2.3. *Criminology’s approach to the motives of conduct*

As is well known, a conduct assumed to constitute a criminal offence can be essentially considered as an expression of personality, and as such is susceptible not only to a direct

¹³ In this latter respect, reference may be made to what common sense designates as “resentment”, “jealousy”, “affection”, “dependence”, “fear”, and similar motivational impulses, all of which may have decisively influenced the alleged conduct in its presumed degree of intention.

¹⁴ It is worth recalling that judges themselves are often authorised by the legal system to resort independently to common sense as the basis on which the trial is grounded. In the Italian legal system, this typically occurs through reference to maxims of experience, which may be regarded as shared by the community at large.

psychiatric assessment (which may cast doubt on the agent's capacity to make decisions at the time of the conduct) but also to a criminological assessment. However, the latter does not refer merely to the possibility of criminological expert testimony, which is not always permitted (Ashworth and Zedner 2014, ch. 6),¹⁵ but first and foremost to the need, for the jurist, to rigorously gather and integrate into a coherent whole all possible facts related to the crime, while keeping in the background those criminological types of offenders that make it possible to implement criminal provisions in a given case (Calvi 1967).¹⁶

To further elucidate the term "type", which derives from the ancient Greek *týpos* ("mould"), it can be understood as referring to a pattern that provides an almost intuitive parameter for an open reading of experience. Concepts elaborated by criminal science, even when implemented through forensic rhetoric, remain "rigid" because they are intended to grasp and bring together distinct features of experience within an abstract definition (the very term "concept" derives from the Latin *conceptum*, "taken together"¹⁷). Types, by contrast, allow us to recognise certain aspects of experience as forming a unity, despite their variability, without being resolved into an abstract definition.¹⁸

Above all, for the purposes of this contribution, it should be emphasised that, contrary to what one might be led to assume, recourse to type plays a fundamental role in criminal law no less than in law more generally (where it structures legal reasoning in its distinctive "hold" on reality at the descriptive, normative, and practical levels).¹⁹ The criminal type, in particular, by mediating between the abstract level of legal concepts elaborated by criminal science and the concreteness of the individual case as it unfolds in the trial setting through forensic rhetoric, makes it possible — so far as the procedural context allows — to bring to light the very motives underlying the conduct at issue. In

¹⁵ For example, it remains traditionally excluded as an autonomous form of expert evidence in the Italian legal system, notwithstanding important functional equivalents in the sentence enforcement phase and in juvenile justice.

¹⁶ An early nucleus of criminological inquiry can be traced to Criminal Anthropology, which, in the second half of the 19th century, applied the modern scientific method to the penal field, challenging the moralised legal positivism later labelled as the "classical" school. Yet the novelty of this approach lay not merely in the application of scientific inquiry to crime, but in its distinctive typological reasoning: criminal conduct was "read" as the expression of a delinquent inclination attributed to certain individuals, characterised by specific traits — primarily biological, psychological, and social ones — organised around a basic type of offender and progressively articulated into further typologies. Such types were neither simply presupposed nor constructed independently of reality, but were drawn from empirical observation and deliberately kept open to it; their inherent instability stemmed precisely from the tension between this openness and the scientific ambition to stabilise them in fully abstract conceptual forms, inevitably detached from the variability of concrete reality. See Velo Dalbrenta 2013a.

¹⁷ However, over time, "concept" has been intended more as a logic "container", and nowadays, it almost exclusively refers to that terms-class that put together elements that present the same characteristics selected — by way of abstraction from experience — as essential (often resorting to specific disciplines). We thus speak of the concepts of "rule", "murder", "contract", "will" etc. but also of the concepts of "justice", "religion", "life", "disease", "therapy", "job", "house", "weapon", "life", "book", "chair", "football", "plant", "invertebrate", and so on, referring to classes to be (intended as) closed.

¹⁸ One might say: "Would you ever do something like that?", "That's a strange guy", "I don't agree with that kind of idea", "Tom is a Nordic guy", but also "A Gothic atmosphere", "A bohemian flat", "They remind me of AC/DC", "This city looks like Paris", etc. Indeed, in all of these cases, we are referring to a type, implicitly or explicitly.

¹⁹ See, respectively, Passerini Glazel 2016 and Hassemer 2014.

this way, the criminal type allows jurists to identify those facts that are relevant to the assessment of criminal responsibility by approaching the case from the standpoint of the acting subject, and, accordingly, to pose the “right” questions.²⁰

On this view, beyond linguistic barriers and categorical disparities between Common Law and Civil Law legal systems, we must acknowledge that types constitute widespread schemes for organising reality that enter the complex process of revealing criminal motives at trial.

More precisely, while criminal science operates at the level of concepts elaborated within criminal law, and forensic rhetoric engages those same concepts at trial by subjecting them to the test of the facts through argumentative practices, criminology draws upon the empirical elements of crime rooted in society (often encountered, in filigree, in circulating stereotypes). In particular, criminology seeks to read individual and group deviant behaviours as they manifest themselves in concrete forms of conduct, making available to jurists scientifically validated patterns of presumable motives and offender profiles relevant at trial. Within this line of thought, we could say that criminology reconfigures the trial as the (search for the) criminal type with which the court must reckon (even to exclude any criminal responsibility of the defendant), accordingly blending criminal science and rhetoric into a broader discussion on the “shadow” of any criminal norm at issue (that is, on its present social projection).²¹

However, the identification of the reference criminal type, through which criminal science’s concepts and rhetoric’s arguments merge in the reconstruction of the facts at trial, is only the tip of the iceberg with respect to the contribution of criminology. Indeed, this discipline provides a definitive *narrative* frame within which the judge is able to reveal criminal motives by “rationalising” the narratives of the parties, of the witnesses, and of the experts into a unified account, under the governing substantive and procedural law.²²

3. Cutting to the chase (by way of conclusion)

The difficulty of detecting criminal motives offers a compelling illustration of the classic “other minds problem” — the sceptical doubt concerning whether and how one can know the mental states of another, if such access is possible at all (Candeub 1994). Yet

²⁰ Rather, the motives substantiating criminal responsibility for specific conduct refer to a mental attitude found in the facts as the personal precipitate of a series of factors, whose clues lead to questions focused on the criminal type as a focus on a type of conduct. How does the thief behave as a thief? Is John’s conduct in the present case proper for a thief? Why did John not act with the circumspection proper to a thief in that circumstance?

²¹ For example, while criminal science knows only a class of conduct named “theft”, which is embedded in some rules, putting at stake some concepts, social experience, criminologically “filtered”, could allow us to glimpse a plurality of types of motives for the type of conduct roughly characterized as “theft” and, correspondingly, for the type of offender roughly characterized as “thief”: material deprivation, feelings of inferiority, desire for self-assertion or escape, affective immaturity, imitation, unawareness of the seriousness of the act, the myth of power, “sport”, revenge, eroticism, aggression, and self-punishment (Hesnard 1963, pt. II, ch. 1; see also Fletcher 2000, ch. 1). But, evidently, these types of motives lead to identify types of offenders that are not all “thieves” in the criminal sense (and therefore not necessarily punishable — e.g., under Italian criminal law system, for lack of imputability or “because the fact does not constitute a crime”, to adhere to the formal absolutory formula).

²² On the narrative dimension essential to the life of law, see, among others, Di Donato 2020.

the problem of other minds is, in a certain sense, foundational to the philosophy of mind, whereas the problem of motives seems to be epistemological in nature and of a different order altogether.²³

In any case, in the field of criminal law the problem of motives resists simple classification and instead invites legal scholars to reflect on the role of law within the wider domain of social cognition. In particular, scholars who acknowledge the inevitability of engaging with motives when assessing criminal responsibility must examine the rational — rather than any supposed “magical” — modes through which jurists endeavour to “reveal” motives by relying on socially shared knowledge of human behaviour. As we have seen, jurists are repeatedly called upon to confront the problem of motive, and they are expected, case by case, either to resolve it or at least to determine, on balance, whether the social need for punishment is satisfied in the circumstances.

The rational component of human conduct, expressed in the concept of intention, is as indispensable as its affective counterpart, expressed in the concept of motives. Only by integrating these two dimensions can jurists reconstruct the fuller meaning of a given instance of conduct. Jurists must therefore address the rational dimension of conduct, which rests upon a means-end analysis aimed at ascertaining an intention, while also grappling with the affective dimension of motives — the underlying spring of conduct — which, no less than intention, may be inferred at trial.

Ultimately, it is precisely within the trial setting — where jurists debate criminal-law concepts (elaborated by criminal science) through arguments (persuasively presented by rhetoric) and through types (structured by criminology) — that these two dimensions, the rational and the affective, are jointly scrutinised. Only in this integrated argumentative space can the mental core of conduct be disclosed: a core inextricably linked to the concrete person who performed the conduct and expressive of a human being embedded in a particular society and shaped by a life history.

I am not certain that I fully agree with Enrico Ferri when he writes: «Crime does not fall from the sky like lightning. It is the act of a man. Before judging the act, one must know and judge the man» (Ferri 1926, p. 620). Yet Ferri’s remark is instructive. Law, insofar as it operates at the level of general norms, cannot by itself reach the specificity of the agent who is said to have “embodied” the crime. At trial, law must be brought down into the concrete reality of the individual before the court: in the courtroom, we confront human beings, not abstract legal agents. Put differently, we punish the thief — someone with a name and a history — not the abstraction of “theft”.

The inquiry into motives is therefore not confined to the epistemology of trial reconstruction; it touches upon the very conditions under which an individual may be regarded as a responsible addressee of legal norms.

This observation leaves us face-to-face with fundamental questions concerning what it means to obey the law, and what constitutes the “real” certainty of law (Bertea 2013). The principal question, then, concerns the very foundation of obedience. It may be argued that obedience to law appears to involve a moral dimension, since the ultimate urge to follow or not to follow what the law seems to prescribe has an evaluative

²³ And could, if anything, lead us more towards the philosophy of action, especially with reference to the traditional theme of free will: cf., in general terms, De Caro 2018.

character (as Gustav Radbruch famously maintained, «In morals alone may the obligatory force of the law be grounded»: Radbruch 1950, p. 84). In light of the argument advanced in this paper, this claim aligns closely with Georg Simmel's position that human conduct inevitably reflects the totality of one's being.

Responsibility, in its most general sense, consists in the capacity to recognise and respond to norms as binding. Legal responsibility gives this capacity institutional form. Criminal responsibility, while at once paradigmatic and irreducible, makes no exception: it is borne by a concrete individual rather than by an abstract bearer of norms.

On this basis, if responsibility presupposes the very capacity to stand under a norm, then assessing criminal responsibility requires taking into account, on the basis of law and on behalf of society, what Simmel called the «law of the individual» (Simmel 2010, ch. 4). And this is, admittedly, a conclusion of some delicacy.

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