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THE RHETORIC OF DEVIANCE: CRIMINALS, OUTLAWS, AND DEVIANTS IN HISTORY (IDEOLOGIES, HISTORY, LAW, LITERATURE, ICONOGRAPHY...)

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ABSTRACT

How were the concepts of deviance and crime defined through the course of centuries? Being characterized by broad margins allowing for ambiguity, their definitions reflected both the need of the society for the preservation of security levels considered to be acceptable and the respect for predominant moral and religious values.

The rhetoric describing deviant behaviour has significant value for historical research. Not only does it indirectly reveal the importance attributed to predominant cultural values but also the role played by the political and cultural elite.

The definition of criminal stereotypes is primarily reflected in normative and doctrinal texts. However, in the light of a complex series of social and political variables, it is most clearly manifest by repressive practices.

Literature, iconography, and cinematography have unveiled the fragility of some among these stereotypes and disclosed different readings *through which these are perceived by their audiences. Repressive as well as mild ideologies are thus contradictorily juxtaposed, resulting in the emergence of a complex array of social characters (such as the bandit and* brigante*), traditionally relegated to the darkest and most negative corners of the past.*

Key words: rhetoric, stereotypes, crime, deviance, process

The history of crime and criminal justice is the long history of a series of often protean and conflicting representations (be they social, symbolic, literary, or otherwise), which reveal the complex and contradictory relationship that every society establishes on the basis of the definition of criminal stereotypes.* Synchronic and diachronic comparisons help to grasp, more than the *nature* and definition of crimes, the ambiguity of penal systems that fluctuate between abstract normative definitions, actual repressive practices, and the numerous social pushes fated to leave their mark.

As Lawrence Friedman has observed, the term *criminal justice* is vague or endowed with multiple meanings:

"It is not easy to describe or define this system. In fact, there is no single meaning; the criminal justice system is an umbrella label for certain people, roles and institutions in society. What these have in common is this: they all deal in some significant way with crime – they define crime; or they detect crime; or they prosecute or defend people accused of crime; or they punish crime." (Friedman, 1993, 4).

A good basis for measure, comparison and understanding is undoubtedly formed by the diverse forms of rhetoric by means of which crimes and criminals are *described* in distinct social and historical frameworks. Such rhetoric is aimed at persuading, but also describing, listing, separating, and sanctioning the legitimate behaviour of those *inside* with respect to those *outside*. It is such rhetoric that very often suggests the nature and aspects of the ambiguity underlying any penal system and, above all, the vast and uncertain social phenomenon known as *criminality* or deviance.

As Lawrence Friedman has observed in the introduction to his *Crime and Punishment in American History*, the history of crime is mainly aimed at capturing the changes that occurred throughout the various ages on the social, economic, and political levels. This is much more evident if we consider that the behaviour identified as crime or deviance can be defined by the social rules of the relative age:

"Crime is behaviour; and its roots must lie somewhere in the personality, character, and culture of the people who do the acts we condemn. People commit crimes, not "the system". This much is obvious. It seems equally obvious that behaviour reflects what society makes out of people, or fails to make. Committing a crime means that some message was aborted or ignored, some lesson unlearned, some order countermanded, or, at times, some small piece of social rebellion committed. But messages of deviance and misbehaviour came from somewhere, too; they were not inborn. And much the same sort of thing can be said about reactions to crime; they, too, occur in individuals, though socially structured and shaped." (Friedman, 1993, 11).

* The papers presented at the international scientific meeting *Rhetoric of Deviance* (Koper, 6th–8th October 2005) and published in this volume also treat these questions.

The link between ideology and criminality in itself reveals how decisive is the issue of the representation of deviance in order not only to define the specificity of the crime and the criminal, but also to characterize its interrelationship with society and institutions.

A few years ago, when underscoring the *ambiguous continuity* between historians and judges, Carlo Ginzburg observed:

"The nowadays fashionable reduction of history to rhetoric cannot be rejected by maintaining that the relationship between the two has always been weak and of little relevance. In my opinion, this reduction can and must be rejected by rediscovering the intellectual richness of the tradition that goes back to Aristotle, starting from his central thesis, namely that evidence, far from being incompatible with rhetoric, form its fundamental core" (Ginzburg, 2000, 67).

This statement is certainly pertinent and persuasive. However, it is precisely the theme of the *rhetoric of deviance*, which presents us with some questions inherent in judicial sources that render very complex the relationship between the historian and the judge. On the latter subject, Ginzburg himself dwelt at length, noticing how both the historian and the judge turn their attention to the search for facts and "have in common the search for evidence." However, this double convergence is belied by divergence on two fundamental points. Judges issues sentences, historians do not; and Judges are interested only in events implying individual responsibility while historians do not have this limitation (Ginzburg, 2000, 66).

But in reality, these divergences are more apparent than real. Although historians formulate prudent and non-definitive judgments, they make precise choices and if, certainly, they are not called to express themselves on events implying individual responsibility, their interpretations are inspired by the way events are reconstructed and inserted in historical analysis.

On the theoretical level we could maintain that there is no substantial difference between the two *truths*. It is probably the theme of evidence itself that suggests the only seeming difference between historians and judges: the reconstruction of the controversial relationship between *judicial* (or historical) *truth* and *factual truth* is entrusted to the *conventions* imposed on them or on which they nourish themselves.

In principle, we could say that in reality "there is no conceptual difference between judicial evidence and that of any other realm of experience" in that the probationary outcomes essentially depend on the attitude of the judge (and of the historian) toward probationary statements that are declared proven (Ferrer-Beltrán, 2004, 81–84).[1]

1 This scholar maintains in fact that "the only thing that can be proven is the statement maintaining the existence of the desk in my office, not the desk itself [...]. If the object of the proof is represented by the statements on facts which are formulated by the parties, it seems clear that the conviction, certainty, or any other mental outlook of the judge that we want to indicate as finality of the proof, will

Whereas the former is profoundly influenced by the ritual paths that it is sometimes forced to go through, revealing the presence of the power structure of which it is expression, the latter – although it seems to resort to logical arguments – is often bridled by prejudices and a hierarchical structure.[2]

As Luigi Ferrajoli has noticed, both the judge and the historian have to deal with the sensitive problem of the *subjectivity* of many sources of evidence. This is a much more relevant problem for the judge, in that unlike the historian who works prevailingly with documentary evidence formed before his or her research, the judge works with judicial sources which are generated in light of the investigation and not beforehand.[3]

In this respect, *deviance* – above all if captured when it is under coercion and repression – widely mirrors the ambiguity of the *rhetorical* discourse that describes and marginalizes it.[4] We mentioned how fundamental are the links between ideology and criminality in order to grasp a few important aspects of this question.

In this regard, a decisive turning point is represented by the early penal ideology of modernity that in the course of the eighteenth century defined itself antithetically to previous penal doctrines.

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have to be referred to these statements [...]. Therefore, the proof as activity has the function to prove the production of these conditioning facts or, which is the same, to determine the value of truths of statements that describe their occurring. The success of the institution of the legal proof is engendered when the statements which are declared proven are true, so that one can maintain that the function of the proof is the determination of the truth of facts." (Ferrer-Beltràn, 2004, 81–84). This is an evaluation with which we can only agree. In reality, the distinction between the truth of the trial and the material truth, elaborated by the German doctrine at the end of the nineteenth century, finds its raison d'être in a sceptical perspective and in the conviction that rules and procedures are such as to produce an outcome which is substantially distant from the factual truth.

2 In this regard, see for instance the broad examination by Damaska, 1991, on the relationship between trial and power structures, in which he compares common law and civil law systems. The theoretical proximity between the historian's and the judge's positions is then modified by the contextual reality according to the hierarchical position in which both are situated. Obviously, their location has an influence on the evaluation of the probationary data, independently from the theoretical system of proofs adopted by the various political and social systems. You can see an example in Povolo, 2006: the rigid Austrian system of proofs can also be pushed in view of the goals of punitive justice.

3 Ferrajoli observes: "All that the judge experiences are not the criminal facts, which is object of judgment, but their proofs. Similarly to historians, he cannot examine the fact that he has the task to judge that which escapes his direct observation, but only its proofs that are experiences of current events although they can be interpreted as signs of past events [...]. As in all inductive inferences, in the historiographic and judicial inferences as well the conclusion has therefore only the value of a probabilistic hypothesis in relation to the causal link between the fact assumed as proven and the whole of facts indicated as probationary. And his truth is not proven as a logical consequence of its premise, but it is only proven as probable or reasonably plausible in accordance with one or more principles of induction." (see Ferrajoli, 2004, 26–27).

4 I have examined these questions in Povolo, 2006.

The philosophers of the Enlightenment and the so-called classic legal school, one of the most significant protagonists of which was Cesare Beccaria, elaborated a decidedly negative view of the past and brought forward the contradictions of the previous penal system.

The eighteenth-century penal ideology defined a new concept of crime and criminality. Undoubtedly, its observations are of great interest to those who intend to dwell on the overall formulation of *rhetoric* aimed at describing deviant behaviour and, in the end, at circumscribing ideologically the stereotypes intended to single out the *minority* that placed itself (or was placed) outside the boundaries of what was deemed licit or morally acceptable.

It is well known that Enlightenment thinkers indicted the previous penal system; according to them, the latter was characterized by the uncertainty of the law, the arbitrariness of the penalties, the repression of individual rights, and inquisitorial and secret procedures. The oppressive penal system of the past was besieged by a series of observations and proposals that would find favour in subsequent penal reforms initiated by enlightened sovereigns and by the early codifications.

The linchpin of the Enlightenment thinkers' observations was the supremacy of law and its absolute prerogative to define offences and to make the penalty correspond to the gravity of the offence. In theory no room was left for retroactive legislation or for the judge's discretionary powers. Furthermore, he who broke the law was deemed responsible in any case since he was able to rationally assess his actions.

Enlightenment thinkers profoundly affected the representation of criminal stereotypes. With regard to this aspect, its influence on the early codifications is very significant: crime typologies are defined with regularity, apparent clarity, and explanatory confidence. The relation between crime and penalty was weighed carefully and objectively. Above all, the definition and understanding of the crimes excluded those considerations of a social and moral stamp that could help to grasp the relationship between the crime and the one who had committed it.[5]

The rhetorical emphasis of these elements (which we may elicit not only from the doctrinal writings, but also from the codifications themselves) was to clash with the practical need for judging actions concretely on the penal level. As Michel Foucault maintained, the image of the guilty was to surface over and over again so as to nullify the Enlightenment ideology that, on the contrary, had placed emphasis on the crime as defined by law rather than on the criminal.[6]

5 The bibliography on this topic is vast. I will limit myself to recall the observation of Resta, 1997.

6 "[…] the division between the permitted and the forbidden has preserved a certain constancy from one century to another. On the other hand, 'crime', the object with which penal practice is concerned, has profoundly altered: the quality, the nature, in a sense the substance of which the punishable element is made, rather than its formal definition. Undercover of the relative stability of the law, a mass of subtle and rapid changes has occurred. Certainly the 'crimes' and 'offences'on which judgement is passed are juridical objects defined by the code, but judgement is also passed on the passions, instincts, anoma-

The judge's discretionary power itself, which codification had meant to contain if not completely forbid, had an impact on the definition of the figure of the criminal through a wide range of extenuating and aggravating circumstances. This phenomenon was to become macroscopic by the end of the nineteenth century with the great Italian positivist who sought to define the nature and characteristics of the social deviant.

Certainly, the Enlightenment movement that led to codification marked a sharp rupture with the past: the definition of crimes shook off completely (although not entirely in some instances, such as in the Austrian Code)[7] the overlap of criminal and sinner; but above all, by reducing drastically the broad category of *victimless crimes*, it facilitated the shift toward the definition of more conventional crimes. In this transition, as we shall see, the sharp distinction made in the eighteenth and nineteenth centuries between the criminal (he who breaks the law) and the internal enemy (difficult do define on the ideological level in a fully sovereign state) figured prominently.

Clearly, all this had an indirect influence on the rhetoric describing any form of deviance; the influence was visible not only on the doctrinal, but also on the specifically penal and trial level, with broad implications also in the realm of literary representation, as we shall see. Transformations were accomplished not only on the semantic level and on the level of legal language, but also on the level of the content, above all in those instances where verbal technique served to define rationally perceivable and comprehensible social phenomena.

The transformations of the eighteenth and nineteenth centuries were also relevant because they marked a sharp rupture with previous centuries. The medieval and early modern penal system had been characterized by a substantial duality: on the one hand, secular power had taken on the task of punishing the behaviours deemed criminal by underlining, so to speak, the *outward* aspects of the violation of the establishment; on the other hand, ecclesiastical power that had set for itself the goal of regenerating the sinner's soul had prosecuted the transgression of divine precepts within the *inner* dimension (hence the distinction between inner and outward court, *foro interno* and *foro esterno).*

The close interconnections between crime and sin and the great relevance of *victimless crimes* justified the double dimension of penal repression. While public order was guaranteed by secular institutions (which, especially with the rise of *punitive justice*, had the goal of striking fear into and excluding those who were a threat to society), the salvation of the soul and redemption of the sinner were guaranteed by ec-

lies, infirmities, maladjustments, effects of environment or heredity; acts of aggression are punished, so also, through them, is aggressivity; rape, but at the same time perversions; murders, but also drives and desires." (see Foucault, 1977, 17).

7 On this, see CPUA, 1997.

clesiastical institutions. An analysis of the rhetoric employed to describe above all the crimes defined as being of *mixti fori* can help to define both the level of interconnections between the two powers and the specific importance attributed to the deviant behaviour (see Gros, 2001, 23–29).

The two poles of justice and penalty that were predominant in the medieval and early modern periods were mirrored in the description of crimes and deviance, ranging from the seemingly aseptic descriptions of the criminal treatises and jurists' observations to the depictions that, being closer to the repressive practice, outlined the criminal's profile and dwelt on his actions.

Criminal practice books and treatises, but also sentences and, more generally, judicial acts, defined both the types of deviance and the characteristics of those who broke *human and divine laws* (a popular expression in the sixteenth- and seventeenth-century legal practice).

The language and style adopted by the court clearly represent a relevant aspect of this issue. The same is true of the rise of the vernacular in the course of the sixteenth century as the predominant language used in the sentences issued by secular courts. This transformation probably occurred alongside the rise of the *punitive justice* that during the seventeenth century would significantly undermine the *communal* dimension of conflicts as manifested by the feud and the role taken by kinship groups (see Povolo, 2004).

From this perspective, it would be interesting to analyze the arguments employed by jurists not only when describing crimes and their double ideological dimension, but also when accurately listing the so-called *fatti giustificativi* that separated the *fact* (deemed detrimental to social order) from its personal and contextual implications.[8] This distinction brought into starker relief jurists' role of mediation and, at the same time, it also facilitated the shift of conflicts from a state of feud to a more strictly institutional and legal system. The examination of the long and diverse list of extenuating and aggravating circumstances enables us to grasp not only the dimension of crime in the medieval and early modern periods, but also its rhetorical implications. The different dimensions of space and time (public and private, sacred places, night time, etc.) intersected with the numerous implications owed to the attitudes and motives of those who broke the law (with snares, with treacherous actions, not keeping one's word, etc.).

Furthermore, the necessity of repression and redemption blended together in the definition of crimes such as blasphemy, bigamy, sodomy, and other similar crimes whose nature could stray into the realm of heresy, which was deemed much more dangerous.

8 On these questions see Carbasse, 1990.

The consolidation of state institutions already in the course of the eighteenth century encouraged the rise of a different view of penalty and punishment. The Enlightenment controversy over the death penalty and torture mirrored, in addition to other aspects, a public view of penalty that no longer centred on the criminal's body. After all, the definite success of the penalty of imprisonment expressed the request on the part of secular legal institutions to redeem and rehabilitate those who had placed themselves outside the boundary of civil society by breaking the law.

The new view of the law and penalty profoundly affected the definition of legal and criminal stereotypes. The comparison of classic and positivist legal schools is one of the most significant moments of this transformation.[9]

The abstract and rational model of penal law emphasized by the classic school entailed a perception of the criminal as a subject possessed of free will and understanding and, as such, legally and morally responsible (a good example is represented by the Zanardelli Italian Penal Code of 1889). As has been observed, it was in fact a theoretical-ideological instrument for the defence of the status quo hindering the achievement of claims of change (Ferrajoli, 1999).[10]

The abstract definition of some crimes and *criminal types* (such as infanticide and the infanticidal person) stemmed from a view of society strongly anchored to the past in which only the judges' discretionary powers could mediate and mitigate the penalty while becoming aware of the conspicuous social contradictions at the origin of the crime. From this perspective, it is extremely interesting to analyze the concept of *equity* by means of which the judge mediated the contrast between law and legal practice; on the theoretical level, the concept of equity reveals the arguments that had not only to justify the divide between theory and practice, but also to justify the ambiguous overlap of the culprit and the criminal.

With the positivist school, the relevant action as defined by penal law was to be mixed up with the criminal subject by introducing again the figure of the *culprit* onto the judicial scene: the delinquent man, as defined by Lombroso, and the criminal's personality clashed more generally with penal law. Moral accountability was replaced by legal responsibility. The concept of penalty as retribution was abandoned and replaced with pre-emptive sanction and the identification of the deviant and of the socially dangerous subject.

9 On the characteristics of the legal schools of the end of the nineteenth century see Grosso, 1997, 10–22.

10 The evaluation of the Zanardelli Code is more articulate in Sbriccoli, 1998; in particular see 510–512. In reality, as F. Grosso has underscored, the Zanardelli Code, in spite of its liberal formulation, "lent itself to authoritarian interpretations and enforcements" so that political-judicial authorities "against popular unrest of the 1890's have not hesitated to use the penal code by following the most rigorous interpretations or even by forcing its formal statements in order to achieve the goal of hitting political dissent" (see Grosso, 1997, 17).

The criminal stereotype (or stereotypes) became enormously relevant and exerted an ideological influence on the social and sociological notion of crime itself. It continued well beyond the short period of success enjoyed by the positivist school and endured, in certain aspects, into more recent times. If the identification of the subject, deemed socially dangerous, followed in certain aspects the notions of crime and the criminal widespread in the centuries preceding the Enlightenment, the resort to (alleged) scientific innovations rendered it completely new and thus apt to affect society as a whole.

This can be clearly deduced from the employment of rhetorical styles aimed at identifying criminal subjects (and *criminality* on the whole) as something *external* to society (although produced by it). Obviously, this is not the figure of the *internal enemy* (a criminal type re-proposed following the subversive phenomenon of terrorism) that the society of the Old Regime had identified in the ideological dimension of banditry. It is rather the figure of the criminal, a subject created and nourished by social contradictions. Whether the result of natural selection (as Lombroso maintained) or of voluntary and conscious selection on the part of the subjects themselves, *criminality* became the centre of extant social and class tensions.

The reading of the crime not only becomes *naïf* (it is criminality which generates necessary repression and the consequent restoration of order; or it is certain vices which encourage if not generate criminality), but also draws a veil over the disturbing intertwining of the well-ordered society and *criminality*.[11] For instance, suffice it to think not only of spontaneous or voluntary *involvement* of the victim (protagonist intentionally left in obscurity), but also of crimes of *symbiosis* such as prostitution in which the subject, perceived as deviant, would not exist without the *clients* who contribute actively to the definition of the deviant behaviour.

In fact, the rhetorical construction of deviance, strongly marked by a *negative semantics* has multiple goals. On the one hand, it aims at stigmatizing a destiny (that of the criminal) which has to be avoided; but, on the other hand, it aims at legitimizing paradoxically certain behaviours widespread within the elite. So, each inappropriate behaviour finds a corresponding and often complementary practice in tacitly appropriate behaviour. As has been observed, the identification of the thief justifies in a sense that of the speculator.

11 As E. Resta observed: "The entire discourse that social and legal sciences fuel on the penal system notes the detachment of principles from practices: the points of view can be different but the approach is the same. The abstract and impersonal nature of the penal mechanism is what it is said; what happens is something different and it depends on hidden processes of social, ideological, natural, anthropological selection that, more or less voluntarily, orient the penal control toward specific kinds of culprits, rather than toward neutral attribution of guilt." (see Resta, 1997, 127).

However, as we have already observed, a close analysis of the rhetoric of deviance also suggests the importance of factors of time and space. In this sense, police reports mirror not only the above-mentioned social proximity, but also some *protected* spaces within which certain behaviours, stigmatized on the legal and normative levels, take place entirely undisturbed.

As the British scholar Dennis Chapman noticed, a set of variables defines the close relationship between criminal stereotypes (and their description) and social hierarchies; namely actor, action and corresponding objects, outcome, place, time, and the environment within which it takes place; observation and report of evidence; the resort to the court and the distinct phases of the lawsuit (of which, as we shall see, the trial is a significant part to observe). For instance, the identification of rhetorical expressions through which the *scapegoat* is described allows us to grasp the complex process of selection that institutions and social forces undertook with respect to criminal types.[12]

Obviously, rhetoric also lives on commonplaces that mass media help greatly to spread through the use of strong stereotypes (the semantics employed are significant: *monster*, *praying mantis*, etc.). The evident rhetorical assertion that each age singles out some rather than other *crimes* often results from a total lack of competence in matters concerning historical and sociological interpretation (suffice it to think of current instances of infanticide, seen as the degeneration of contemporary society). The current use of the terms *terrorist* and *pacifist* also seems to suggest a polarization on the level of rhetoric rather than content, a polarization that is hardly able to circumscribe adequately a phenomenon that has overcome the usual ideological and political boundaries.

Obviously, the distinction or blending together of the *criminal* and the *internal enemy* leads us not only to observe more generally the processes of identification of crimes of nineteenth-century states, but also to pay particular attention to the semantics employed. Starting from the eighteenth century, the shift from bandit (the person subject to the penalty of *bannum)* to brigand *(brigante)* clearly points out the distinct social danger of the enemy of the law, but the semantic use of these two terms reveals the ambiguity linked to the definition of types always present in history.[13]

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12 On these and the previous remarks see Chapman, 1971, in particular 30 and the following pages.

13 As Hobsbawm has observed, "one becomes a bandit, because one commits something that, although it is not considered criminal by the local popular conscience, it is so for the State and the local rulers [...] The state intervenes in the ‘legitimate' private disputes and, according to its consideration, the person in question is transformed into a criminal. The state shows interest for a peasant for a minor infringement of the law, and the same goes into hiding because he does not know what he will get from a system that ignores and does not understand peasants and that peasants in turn do not understand." Furthermore "the phenomenon is rural, not urban. Peasant societies in which it can be found, have the rich and the poor, the powerful and the weak, the ruling and the ruled, but they remain profoundly and tenaciously traditional, with a pre-capitalist structure" (see Hobsbawm, 1966, 22 and 31). Furthermore,

The rhetorical description of sexual practices deemed dangerous or subversive appears to be more evident. A history of sodomy could be undertaken even if one were to avail oneself only of the legal and judicial language used to describe a sexual attitude that, as anthropology has shown, was necessary to point out at the highest level to sharply underscore *normality.*

Likewise, the definitions of rape and abduction (distinguished as *voluntary* and *involuntary* during the medieval and early modern periods) suggests the dissonance of ideological criteria that dissolved over the centuries until these crimes were defined as offences against the person and marked by the lack of consent.[14]

The identification of specific rhetoric of deviance entails that we dwell on the institutions that produce them (police, courts, etc.) and on the stereotypes widespread in a variety of social settings. It is an extremely vast topic that could be approached from various perspectives.

The relation between society and institutions presupposes that we consider the ability on the part of the elites to impose their own cultural values on the rest of society over the centuries or, in any case, the actual possibility of manipulating from above widespread social values. From this perspective, it would be interesting to dwell on the ideological view that some marginal or *criminal* sectors are able to create for themselves, a kind of rhetorical counterpoint to the stereotypes that contributed to the drawing of their boundaries. In the end, every age has its *book of vagabonds* portraying a society willing or forced to live on the margins. A fascinating territory, although one difficult to examine, is the perception that the deviant has of the so-called *normal* world. With this regard, it will be fruitful to consider those studies that, by combining the topics of geographical (and social) mobility and deviance, gather impressions and observations of those who grasp the characteristics of ordered and regular society from the *outside*.

If, from above, the criminal's recidivism reinforces consolidated stereotypes (such as the inveterate thief), the ideological process leading to the creation of ideal-types of the deviant often finds the dialectic opposite in the configuration of the popular hero. There is a very strong tension between the two, working on diverse levels. For instance, the openly negative features employed to describe the nineteenth-century Southern brigand were counterbalanced in another framework by the portrayal of the brigand as courteous and gentlemanly, willing to steal from the rich and give to the poor. The configuration of the outlaw, evidently not entirely identified with either the criminal or the internal enemy, played a strong role among the double and opposing characterizations. The criminal had at his disposal popular representations with liter-

in the Old Regime the definition of bandit was essentially linked to the penalty of banishment and above all, to its use following the assertion of central powers. For an example see Povolo, 2003.

14 On these aspects see Fiandaca, 1988 and Rosoni, 1993.

ary ramifications that were not allowed to surface in the case of the internal enemy (see Adorni, 1997).

If, in the end, penal justice is part of the institutional process aimed at labelling and distinguishing outsiders from insiders, deviants from those situated within the predominant trend, it also mirrors the most powerful and efficacious articulation of a specific process of social stratification. Penal justice avails itself (and manipulates) criminal stereotypes, but it is hardly able to be effective with closed *subsystems* with strong social roots (let us think of the controversial definition of *mafia)*. Conversely, it would also be interesting to consider the descriptive types of so-called white-collar crime (more so than the judicial outcomes that are often predictable).

Remaining at the institutional level, the rhetorical discourse of deviance becomes extremely interesting if analyzed within that real *theatre of power* that is the penal trial. The judicial drama represented by the trials is first and foremost a comparison between distinct institutional realities and their attitudes toward crime. Investigating magistrates, judges, lawyers, and defendants offer multi-faceted images of the *offence* from different perspectives (above all on the level of institutions and of their respective roles). And if the offence goes back first to all its legal prediction (drawn from what the American sociologist Lawrence Friedman has defined as a real *catalogue*, the Code, that prescribes what is deviant), the diverse rhetorical descriptions (of the judge, the defendant, and the lawyer), once they confront each other (often seemingly), reveal a search for *truth* that will determine in the end the defendant's innocence or guilt.

The search for *judicial truth* flows through adversarial or inquisitorial rites that can be manipulated, but that in any case require the respect of certain rules. The adversarial rite is more faithful to procedural rules while the inquisitorial rite, as often happens, pursues political finalities. The search for truth is in any case influenced by the conventional system of proof. In continental Europe, the dialectic between the system of legal proof and the free conviction of the judge represents the perception of the ambiguity underlying the search for an effectual truth undertaken according to procedures that compel the protagonist of the judicial rite to take on a well-defined role.[15]

The discourse concerning the defendant's innocence or guilt (and its rhetorical developments) seems to be conditioned by considerations that draw their legitimacy *a priori* from stereotypes or legal formulations that mirror predominant values and well-established social hierarchies. From this perspective, the *descriptions* of deviance, as they unfold within the trial framework, suggest in particular the tensions breaking at the moment when penal justice tends to present itself as the privileged place for the ascertainment and verification of social fact.[16]

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15 The different perception of the various process procedures have been examined by Sapignoli, 1999.

16 These aspects have been well examined by Garapon, 1996.

This is fascinating ground that has been explored especially in the Anglo-American world in which the penal trial is compared to an *arena* more than a theatre of power: *law's stories* elaborated by different subjects, hinged on their institutional roles (aimed at punishment, defence, and self-defence), but also in turn their sensitivity to the pressure of the most popular stereotypes. In this regard, the judicial responsibility entrusted to the jury enters into a political and rhetorical dialectic in which institutions and social forces seem to engage in dialogue in a way different from what happens (or happened) in continental Europe (Brooks, Gewirtz, 1996).[17]

A comparison of current legal rites with those of the Old Regime suggests that the rhetorical discourse on deviance and criminality follows the thin thread (often elusive and indecipherable to the observer's perception) between the push of social pressures and the will to impose certain rules, but it also winds on the outlining of criminal stereotypes of which – according to historians and anthropologists as well – instrumental use is ideologically and rhetorically made.

The inquisitorial trial of the Old Regime is very eloquent when showing how the *trial discourse* is shaped in light of rules that bridle factual truth. For instance, the so-called *self-defence* of the accused – although written in reality by the lawyer who cannot appear formally at the trial – often has the amusing implications resulting from the judge's strong decision-making power. However, the self-defence written by a court-appointed counsel becomes over the course of the eighteenth century a real act of accusation of the inquisitorial rite that blocks the free confrontation of the parties.[18] By way of contrast, the explicit inquisitorial role of the Austrian trial that forbids the presence of the defence lawyer and entrusts the investigating judge with the defence, shows the strong pretension to represent factual truth on the part of the judicial truth.[19]

Indirectly, these last observations reveal the importance of the literary discourse for the identification and description of types of deviance. Literature offers greatly significant portrayals of the world of deviance, a boundless territory. The detective novel (and *noir)* seems to push its way through the seemingly endless front of criminal stereotypes, often representing a description of deviance in possible accordance with the readers' sensitivity[20] and with an ambiguous involvement that seems to redeem the prosaic and more widespread representation of crime.

17 As Taruffo, 2002, 165, has observed, it is above all in the cross-examination that "the fundamental dynamics of the trial seems to be [...] the dialectical opposition of conflicting stances, of hypothesis and counterhypothesis, of thesis and antithesis, of assertion and dispute of what the opponent asserts. Instead in the European trial procedures seem to be less characterized by polycentrism and it is preferable to speak of interpretations, rather than stories and narrations.

18 On these aspects see Cozzi, 2000, 149–230.

19 Ettore Dezza has dwelt on the Austrian trial more than once; in particular, I bring to the reader's attention the recent Dezza, 2006.

20 On the detective novel see Rambelli, 1979.

It must be said, however, that readers who are familiar with nineteenth-century crime accounts often notice how the firm search for truth on the part of the investigating magistrate suggests interesting analogies with the concomitant development of the detective novel.[21] They also remain disconcerted when, glancing through the voluminous sixteenth- and seventeenth-century trials, they see the judicial truth flowing in vain under the judge's eyes without being grasped.[22] Certainly historians who can avail themselves of a well-established tradition of detective novels find themselves in a privileged position. Not accidentally, the publication of *famous trials* began in the course of the eighteenth century. Although it aims at satisfying the curiosity of the audience, it also mirrors the *literary* perception of the penal trial underscoring the strong assertion of punitive justice, which with its role has also imposed some of the most popular stereotypes.[23]

By way of contrast, the historical novel very often (and uncritically) seems to condense the most resilient parts of the stereotypes and represent them in a rhetorical and symbolic way in light of the tensions and fears of the society that is reinterpreting or still experiencing them.[24] In particular, the nineteenth-century historical novel seems to turn to the past by resorting to strongly anachronistic rhetorical models. This is a vast sector that often borders on the popular serial novel with the goal to revive strongly negative images such as the *bravo* and the *bandit*, or characters surfacing from the past for their exemplary brutality or depravity.[25] In some instances, non-existent behaviours or legal situations are entirely invented (a very widespread example is the so-called *ius primae noctis* that is identified and negatively pointed out as a characteristic of medieval society) (see Boureau, 1995).

The literary discourse, however, suggests a perspective on deviance that mere legal and judicial representation (with their criminological and sociological implica-

21 On the relationship between the method employed in scientific investigations and that adopted in police investigations (specifically based on Conan Doyle's novels), see the various contributions in Eco, Sebeok, 2000.

22 The passive trajectory of the judicial investigation counterbalances in a sense the rigid system of legal proofs, essentially centred on the testimony and confession. With the rise of the so-called moral evidence and the judge's free conviction, the preliminary investigation and hearing becomes more fluid and the truth of the trial aims directly at representing the factual truth as much as possible. On the moral evidence see Alessi Palazzolo, 1979 and Rosoni, 1995. As we have already recalled, Ferrajoli, 2004, has examined the controversial relationship between the truth of the trial and the factual truth.

23 Recently, Luigi Lacché has examined the phenomenon of the so-called famous trials in Lacché, 2006, in particular 459–468.

24 On this topic, I bring to the reader's attention the long essay by Pezzini, 1997. Hence the rhetoric of the trial is closely correlated to the system of proofs and both descend directly from the power structure held by the judicial investigation, as Damaska, 1991, has well emphasized.

25 An example, recently reproposed in Gasparini, 2002, is the novel written by S. R. Marchesi in 1891 on the canon Marcantonio Brandolini, who lived between the sixteenth and seventeenth centuries.

tions) is not able to develop for its evident political and social implications. More generally, this perspective regards the relationship between history and literature and in the end, the potential for both to represent the past adequately and realistically.

History, law, and literature are thus fields in which the rhetoric of deviance seems to present more dissonances than similarities, revealing however the thread linking them: the ambiguity of the phenomenon *criminality* and its evident interdependence with society and its institutions.

Iconography is another, extremely interesting field in which the rhetoric of deviance seems to avail itself of interpretive expressions. It is a vast area ranging from the representations of death sentences to the stigmatization of deviants, to the diverse production of *ex-votos*. In the latter, the rhetorical representation of criminality on the part of the popular world alongside the theme of *grace* and personal honour, suggests multiple reading strategies, although the well-established presence of widespread stereotypes created from above goes back to the inability or impossibility of offering an autonomous view of *criminality* (Di Bella, 2004).

Starting with the nineteenth century, the invention of photography opens a new dimension of judicial and social rhetoric. As Peter Burke has noticed, in the early photographs one can trace a kind of *imitation* of paintings and engravings (Burke, 2002, 27). Within their use for purposes of repression and control, photographs reveal at the same time an alleged objectivity and a marked rhetorical dimension**.** The identification photographs of the *criminals* that start to appear in the trial dossiers of the courts in the mid-nineteenth century *complement* the pitiless images of the Southern brigand killed and then photographed. Identification photographs aimed at providing the *objective* representation of the criminal's identity and to fix definitively the stereotype. In reality, as often happens such photographs reveal more about the institutions in charge of maintaining public order than the personality of the photographed subject.

The rhetorical violence of the images suggests the hidden dialectic existing between the pitiless action of the military and police forces and the popular myth of the brigand. The lifeless gaze of the cadaver of Domenico Tiburzi, famous brigand of the Maremma, whose image stands out in a renowned Tuscan restaurant, seems to perpetuate the memory of the myth of a brigand who has taken revenge on his killers in this way.[26] However, that gaze also suggests that the criminal stereotype is able to

26 Domenico Tiburzi's renown is testified to by a broad bibliography by local scholars who have documented his life and tragic death. In particular, I bring to the reader's attention Baggiossi, 1989. The vast phenomenon of the brigandage in Maremma has also been broadly studied; see for instance Mattei, 1981, Cavoli, 1983 and Mugnai, 1992. This bibliography could turn out to be very useful in order to place this phenomenon in its complex context. A similar bibliography can be found in another area that produced famous bandits, Corsica; for instance, see Molinelli-Cancellieri, 1994; or the autobiography of the brigand Jerome Monti, printed for the first time in 1901; see Monti, 1997. As for southern brigandage, I limit myself to mentioning Adorni, 1997. The figure of David Lazzaretti who spread his

establish itself (in this case in a blend of popular rhetoric and gastronomic tradition) out of any historical and social contextualization.

BIBLIOGRAPHY

Adorni, D. (1997): Il brigantaggio. In: Violante, L. (ed.): Storia d'Italia, Annali 12, La criminalità. Torino, 283–319.

Alessi Palazzolo, G. (1979): Prova legale e pena. La crisi del sistema tra evo medio e moderno. Napoli.

Baggiossi, I. (1989): Il brigante. Storia e storie di Domenico Tiburzi. Firenze.

Boureau, A. (1995): Le droit de cuissage. La fabrication d'un mythe, XIII–XIX siècles. Paris.

Brooks, P., Gewirtz, P. (1996): Law's Stories. Narrative and Rhetoric in the Law. Yale.

Burke, P. (2002): Testimoni oculari. Il significato storico delle immagini. Roma.

Carbasse, J. M. (1990): Introduction historique au droit penal. Paris.

Cavoli, A. (1983): Briganti in Maremma. Storie e leggenda. Pistoia.

Chapman, D. (1971): Lo stereotipo del criminale. Componenti ideologiche e di classe nella definizione del crimine. Torino.

CPUA (1997): Vinciguerra, S. (ed.): Codice penale universale austriaco, 1803. Padova.

Cozzi, G. (2000): La società veneta e il suo diritto. Venezia.

Damaška, M. (1991): I volti della giustizia e del potere. Analisi comparatistica del processo. Bologna.

Dezza, E. (2006): Il nemico della verità. Divieto di difesa tecnica e giudice factotum nella codificazione penale asburgica (1768–1873). In: Miletti, M. (ed.): Riti, tecniche, interessi. Il processo penale tra Otto e Novecento. Milano, 13–77.

Di Bella, M. P. (2004): Fieldwork in the Archives. Tracing Rituals of Capital Punishment in Past and Present Italy. In: Velasco, H. M. (ed.): La antropologia como pasiun y como practica. Madrid, 161–177.

Eco, U., Sebeok, T. A. (2000): Il segno dei tre. Holmes, Dupin, Peirce. Milano.

Ferrajoli, L. (1999): La cultura giuridica nell'Italia del Novecento. Bari.

Ferrajoli, L. (2004): Diritto e ragione. Teoria del garantismo penale. Bari.

Ferrer-Beltrán, J. (2004): Prova e verità nel diritto. Bologna.

Fiandaca, G. (1988): I reati sessuali nel pensiero di Francesco Carrara: un onorevole compromesso tra audacia illuministica e rispetto per la tradizione. Rivista italiana di diritto e procedura penale, XXXI, 903–925.

belief among the peasants of the mount Amiata, is situated at the borders between the subversion of the establishment and claims of religious renewal. See his story in Petacco, 1978.

Foucault, M. (1977): Discipline and Punish. The Birth of the Prison. New York, Pantheon Books.

Friedman, M. L. (1993): Crime and Punishment in American History. New York.

Garapon, A. (1996): Bien juger. Essai sur le rituel judiciaire. Paris.

Gasparini, D. (2002): Premessa. In: Marchesi, S. R.: Marcantonio Brandolini, una belva umana. Treviso.

Ginzburg, C. (2000): Rapporti di forza. Storia, retorica, prova. Milano.

Gros, F. (2001): Le quatre foyers de sens de la peine. In: Garapon, A., Gros, F., Pech, T.: Et ce sera justice. Punir en démocratie. Paris, 11–138.

Grosso, C. F. (1997): Le grandi correnti del pensiero penalistico Italiano tra Otto-cento e Novecento. In: Violante, L. (ed.): Storia d'Italia. Annali, 12. La criminalità. Torino, 7–34.

Hobsbawm, E. J. (1966): I ribelli. Forme primitive di rivolta sociale. Torino.

Lacche', L. (2006): Una letteratura alla moda. Opinione pubblica, "processi infiniti" e pubblicità in Italia tra Otto e Novecento. In: Miletti, M. (ed.): Riti, tecniche, interessi. Il processo penale tra Otto e Novecento. Milano, 459–513.

Mattei, A. (1980): Brigantaggio sommerso. Storie di doppiette senza leggenda. Roma.

Molinelli-Cancellieri, L. (1994): Spada, dernier bandit corse. Nîmes.

Monti, J. (1997): Quand j'étais bandit. Ajaccio.

Mugnai, R. (1992): Il brigantaggio in Maremma tra Ottocento e Novecento. Grosseto.

Petacco, A. (1978): Il Cristo dell'Amiata. La storia di David Lazzaretti. Milano.

Pezzini, I. (1997): La figura criminale nella letteratura, nel cinema e in televisione. In: Violante, L. (ed.): Storia d'Italia. Annali, 12. La criminalità. Torino, 65–117.

Povolo, C. (2003): Storia di un uomo che divenne bandito. In: Manconi, F. (ed.): Banditismi mediterranei. Secoli XVI–XVII. Roma, 197–224.

Povolo, C. (2004): Retoriche giudiziarie, dimensioni del penale e prassi processuale nella Repubblica di Venezia: da Lorenzo Priori ai pratici settecenteschi. In: Chiodi, G., Povolo, C. (eds.): L'amministrazione della giustizia penale nella Repubblica di Venezia (secoli XVI–XVIII). Vol. II. Verona, 19–170.

Povolo, C. (2006): La selva incantata. Delitti, prove, indizi nel veneto dell'Ottocento. Verona.

Rambelli, L. (1979): Storia del "giallo" italiano. Milano.

Resta, E. (1997): La secolarizzazione della colpa. Note sugli autori del reato. In: Violante, L. (ed.): Storia d'Italia. Annali, 12. La criminalità. Torino, 121–155.

Rosoni, I. (1993): Violenza (diritto intermedio). In: Enciclopedia del diritto, XLVI, 843–858.

Rosoni, I. (1995): Quae singula non prosunt collecta iuvant, La teoria della prova indiziaria nell'età medievale e moderna. Milano.

Sapignoli, M. (1999): Il processo penale nella percezione di magistrati e avocati. Padova.
Sbriccoli, M. (1998): Caratteri originari e tratti permanenti del sistema penale italiano (1860–1990). In: Violante, L. (ed.): Legge, diritto, giustizia. Storia d'Italia, Annali 14. Torino, 486–551.
Taruffo, M. (2002): Sui confini. Scritti sulla giustizia civile. Bologna.