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## The reception of the positivist school in the Spanish criminal doctrine (1885-1899)\*

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### Abstract

This work describes the reception of the positivist school in the Spanish criminal law doctrine in the late nineteenth century. In doing so, the main authors, their works and mutual influences are critically analysed, giving a complete picture of the reception of the primary theory, the positivist or anthropological criminal one –leaving aside the correctionalist and the sociologist one– in a precise chronological context, from 1885 to 1899.

### Keywords

Criminal Law Science, Eclecticism, Positivist School, Criminology, Late Nineteenth Century, Spain, Europe

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### 1. Reception of the new theories in Spanish criminal law (1870-1898)

The Spanish criminal science of the nineteenth century remained generally faithful to an eclectic position until the end of that century. It placed itself halfway between the classical school (Beccaria, Lardizábal) and the new theories that emerged in the last third of the 19<sup>th</sup> century: the positivist (identified in Italy with Lombroso, Ferri, Garofalo; in France with Lacassagne, Aubry, Magnan, Feré; in Germany with Kurella, Baer, Naecke; in Belgium with Dallemagne, Moureau, Bidez, Semal), the sociological (in Italy with Poletti, Vaccaro; in France with Tarde, Durkheim, Letouneau, Fouillée; in Germany and Austria with Makarewick, Schaettle; in Belgium with Prins), and the correctionalist school originated in Germany (Krause and Röder).

The leading Spanish experts in criminal law of the nineteenth century (Joaquín Francisco Pacheco, Alejandro Groizard y Gómez de la Serna, Tomás María de Vizmanos, Cirilo Álvarez Martínez, and so forth), as well as the vast majority of professors and teachers who taught criminal law courses in Spanish universities at the end of that century, adhered to the postulates of the classical –or rather neoclassical– school, giving importance to certain aspects of utilitarianism, as some of the leading French experts in criminal law did, who defended this eclecticism, such as Rossi, Tissot,

and Ortolan<sup>1</sup>. The latter stated, for example, that “to demonstrate the social right to punish, it is indispensable to bring together two ideas: that of absolute justice, and that of the need for social utility”<sup>2</sup>.

The foundations of criminal law and penal sanction, and the right to punish, remained anchored in the free will, in a rational conception of moral and Law, in the principle of culpability and responsibility of the offender. This fact prevented the positivist theses from enjoying the hegemony that those who defended them so relentlessly would have wished.

That does not mean that Spanish criminal doctrine was not aware of the existence of these new theories and that they did not have their defenders. However, it is true that not all of them were received in the same way, and that their specific process of reception or introduction led to a greater or lesser transformation of the same doctrines. In this regard, while the sociological theses defended by Gabriel Tarde<sup>3</sup>, Durkheim<sup>4</sup> or even by Ferri were barely accepted in Spain<sup>5</sup>, as it was the case of the so-called *Terza*

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<sup>1</sup> See in this regard Sánchez-González, D. del M., “Historiografía penal española (1808-1870): la Escuela Clásica española”, *Estudios de historia de las ciencias criminales en España* (J. Alvarado Planas, A. Serrano Maíllo, eds.), Madrid: Dykinson, 2007, pp. 69-130; Iñesta-Pastor, E., “La interpretación del eclecticismo en la doctrina y en la legislación penal de la España del siglo XIX”, *Ius Fugit* 19 (2016), pp. 209-230; Masferrer, A., “The Role of Nature in the Secularization of Criminal Law in Europe (17<sup>th</sup>-19<sup>th</sup> Centuries): The Criminal Law of the Enlightenment Revisited”, *Criminal Law and Morality in the Age of Consent: Interdisciplinary Perspectives* (Aniceto Masferrer, ed.), Dordrecht-Heidelberg-London-New York, Springer (Collection ‘*Ius Gentium: Comparative Perspectives on Law and Justice*’), 2020 (in press).

<sup>2</sup> Ortolan, M., *Tratado de Derecho penal, según la ciencia racional, la legislación positiva y la jurisprudencia* (translated by Melquíades Pérez Rivas), Madrid: Librería de Leocadio López, 1878, book I, p. 23.

<sup>3</sup> This can be said of Gabriel Tarde, even though some of his works were well known, translated and prefaced in Spain: see, for example, G. Tarde, *Estudios penales y sociales*, Madrid: La España Moderna. Revista Ibero Americana, Año V, Colección de Libros Escogidos [undated] (the translator is not indicated); *La criminalidad comparada*, Preface and notes by Adolfo Posada, with a letter from the author written for the Spanish edition, Madrid: La España Moderna. Revista Ibero Americana, Año V, Colección de Libros Escogidos [undated, 1893?] (for a brief overview of Tarde’s work, see the one made by A. Posada, pp. 12-22); in the field of comparative Law, Adolfo Posada also translated the work of Franz von Liszt, *La legislación penal comparada*, published by agreement of the International Union of Criminal Law, book I: *El Derecho criminal de los Estados europeos* (translation from the French version by Adolfo Posada, Madrid-Berlín, 1896).

<sup>4</sup> Durkheim, E., *Les regles de la méthode sociologique* (1895); it was not translated into Spanish (*Las reglas del método sociológico*) until 1984 (Madrid: ed. Morata) and two years later in Mexico (México: Fondo de Cultura Económica; available at [https://eva.fcs.edu.uy/pluginfile.php/45453/mod\\_resource/content/1/LAS\\_REGLAS\\_DEL\\_METODO\\_SOCIOLOGICO\\_-\\_EMILE\\_DURKHEIN\\_-\\_PDF.pdf](https://eva.fcs.edu.uy/pluginfile.php/45453/mod_resource/content/1/LAS_REGLAS_DEL_METODO_SOCIOLOGICO_-_EMILE_DURKHEIN_-_PDF.pdf)).

<sup>5</sup> Even though works characterised by their eclecticism did emerge, as some of them are described by Cristina Vara Ocón, *Criminalidad y orden penal. Estudio de la delincuencia en la Granada de la Restauración (1875-1902)*, Doctoral Thesis, Universidad de Granada, 2001, pp. 212-213 (available at <https://digibug.ugr.es/handle/10481/1682>).

*Scuola*, we cannot say the same thing regarding correctionalism, whose reception on the peninsula was remarkable, particular, and genuine.

Correctionalism did not arrive in Spain until the work of its principal defender, K.D.A. Röder<sup>6</sup>, disciple of K.Ch.F. Krause, was translated into Spanish and published in Spain<sup>7</sup>, a task that was carried out first by Vicente Romero Girón and later by Francisco Giner, one of the leading representatives –together with Julián Sanz del Río and Gumersindo de Azcárate– of Krausism in Spain<sup>8</sup>.

Constancio Bernaldo de Quirós, a Krausist and author of the most complete work on the new theories of criminality at the end of the 19<sup>th</sup> century<sup>9</sup>, deals with correctionalism in Spain. He admits that Röder introduced it, and points out that Krausism entered Spain with high intensity through Ahrens, permeating the entire atmosphere or air (“of the Academies, Athenaeums, the forum, the chair, the parliament, the meeting, the laws themselves, all our legal and political life”) with that particular aroma or “oxygen”<sup>10</sup>. According to Bernaldo de Quirós, in addition to the work of Romero Girón<sup>11</sup> and Giner de los Ríos<sup>12</sup>, who “poured their ideas into our language,”

<sup>6</sup> The first work of Karl David August Röder, entitled *An poenam malum esse debet* or *Commentatio de quaestione an poena malum esse debeat* (1839), was followed by many others, reported by Francisco Giner in his ‘Advertencia del traductor’ to the third edition of *Las doctrinas fundamentales reinantes sobre el delito y la pena. Ensayo crítico preparatorio para la renovación del Derecho penal*, by C.D.A. Röder, translated by Francisco Giner, Madrid: Printed by Victoriano Suárez, 1876 [third edition, revised and corrected by the author and enlarged with a Report by the same author ‘Sobre la necesaria reforma del sistema penal español mediante el establecimiento del régimen cedular’, pp. 321-363] (available at <http://fama2.us.es/fde//ocr/2006/doctrinasFundamentales.pdf>), ix-x, footnote no. 1.

<sup>7</sup> The first work of K.D.A. Röder, published in 1839, entitled *An poenam malum esse debet* or *Commentatio de quaestione an poena malum esse debeat*, translated into Spanish in 1862 under the title *La escuela del Derecho*; see in this regard V. Giner, “Carlos Röder”, *Revista de Legislación*, 1880, p. 129; in particular, Röder, *Las doctrinas fundamentales reinantes sobre el delito y la pena*, 3<sup>rd</sup> ed., where Francisco Giner mentions the translations of this work in his ‘Advertencia del traductor’ to the third edition of *Las doctrinas fundamentales reinantes sobre el delito y la pena*, vi-vii, footnote no. 2).

<sup>8</sup> See, for example, the study of López-Morillas, J., *The Krausist Movement and Ideological Change in Spain, 1854-1874*, Cambridge University Press, 1981 (translation from the original version entitled *El Krausismo español*, México-Buenos Aires: Fondo de Cultura Español, 1956; 2nd ed., 1980); see also Capellán de Miguel, G., *La España armónica. El proyecto del krausismo español para una sociedad en conflicto*, Madrid: Biblioteca Nueva, 2006; more recently, Martín Martín, S., “La utopía krausista: autonomía del sujeto (individual y colectivo) en la polémica jurídica española (1870-1900)”, *Quaderni fiorentini per la storia del pensiero giuridico moderno* 43.1 (2014) (Copy dedicated to ‘Autonomia. Unità e pluralità nel sapere giuridico fra Otto e Novecento’), pp. 481-539.

<sup>9</sup> Bernaldo de Quirós, C., *Las nuevas teorías de la criminalidad*, Madrid: Hijos de Reus, 1898.

<sup>10</sup> Expression used by Nicolás Salmerón, Minister of Grace and Justice, when he refers to the work of Röder, K., *Las doctrinas fundamentales reinantes sobre el delito y la pena en sus interiores contradicciones* (Madrid, 1877) (collected by Bernaldo de Quirós, *Las nuevas teorías de la criminalidad* p. 161, footnote no. 2); Francisco Giner refers, for his part, in his ‘Advertencia del traductor’ to the third edition of *Las doctrinas fundamentales reinantes sobre el delito y la pena*, p. 321, footnote no. 1, by Vicente Romero Girón –*Estudios sobre Derecho penal y sistemas penitenciarios* (1875)–, that the Minister consulted with Mr. Röder, which led the German author to write a paper entitled ‘Sobre la necesaria reforma del sistema penal español mediante el establecimiento del régimen cedular’.

<sup>11</sup> *Estudios sobre Derecho penal y sistemas penitenciarios* (Madrid, 1875). Romero Girón also translated *Lecciones sobre el grado en la fuerza física del delito* (Carrara), as well as the Proyecto de Código penal italiano (Mancini) (collected in Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 161-162, footnote no. 3).

<sup>12</sup> Röder, C.D.A., *Las doctrinas fundamentales reinantes sobre el delito y la pena. Ensayo crítico preparatorio para la renovación del Derecho penal*, translated by Francisco Giner, Madrid: Printed by Biblioteca de Instrucción y Recreo, 1871; Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 162, footnote no. 1, collected the already mentioned 3<sup>rd</sup> edition, that is, *Las doctrinas fundamentales*

the work of Silvela, who “should be considered as the first truly serious treatise that our criminal literature can present”<sup>13</sup>, had on them an effect of adaptation to the environment, similar to that recognised in Ahrens on those of Krause. And he adds:

“Taught since then by Silvela himself in Madrid, by Aramburu in Oviedo, by Millet in Seville, by Rueda in Santiago, and so on, they have crossed the entire Peninsula, perhaps more as a platonic intellectual statement, than as a regenerative force. Furthermore, with Dorado, it can be stated that, having been accepted the bases of correctionalism, *in trying to develop particular theories, the meaning and demands of correctionalism have been left aside, making use of the modern ideas of penal sanction, evil and punishment.*”<sup>14</sup>

In short, the correctionalism of its intellectual author –the German Röder–, and the one introduced and spread in Spain –by Silvela (author of the “first truly serious treatise” on this matter)<sup>15</sup>, Aramburu, Dorado Montero, Millet, Rueda<sup>16</sup>, Lastres, Llopis<sup>17</sup>, and so on–, were quite different<sup>18</sup>. Moreover, sometimes it is not easy to set

*reinantes sobre el delito y la pena en sus interiores contradicciones*, 3<sup>rd</sup> ed., enlarged with a report by the same author on the reform of the Spanish criminal system (Madrid, 1877).

<sup>13</sup> Silvela, L., *El Derecho penal estudiado en sus principios y en la legislación vigente en España* (Madrid, 1874) (collected by Quirós, *Las nuevas teorías de la criminalidad*, p. 162, footnote no. 2).

<sup>14</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 161-162; the text in italics is by Dorado Montero, P., “Del Derecho penal represivo al preventivo”, *Revista de Legislación y Jurisprudencia*, t. 90, p. 567 (collected by Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 162, footnote no. 3); see Francisco Giner, ‘Advertencia del traductor’ to the third edition of *Las doctrinas fundamentales reinantes sobre el delito y la pena*, vii, footnote no. 2.

<sup>15</sup> Francisco Giner, in his ‘Advertencia del traductor’ to the third edition of *Las doctrinas fundamentales reinantes sobre el delito y la pena*, vii, footnote no. 2, indicates that “[e]n 1870 y 1872 salieron a la luz la 1<sup>a</sup> y la 2<sup>a</sup> edición, respectivamente, de este libro; y en 1874 publicó el Sr. D. Luis Silvela la importante obra que, con el título de *El Derecho penal estudiado en principios*, é inspirada en la doctrina de Röder constituye el primer tratado verdaderamente serio que puede presentar nuestra literatura jurídico-penal” (vi, footnote no. 1); however, historiography has not always recognized it, as shows the study by Quisbert, E., *Historia del Derecho penal a través de las escuelas penales y sus representantes*, La Paz (Bolivia): Centro de Estudios de Derecho, 2008, pp. 56-59 (available at [https://www.sijufor.org/uploads/1/2/0/5/120589378/historia\\_del\\_derecho\\_penal\\_a\\_traves\\_de\\_las\\_escuelas\\_penales\\_-\\_quisbert\\_ermo.pdf](https://www.sijufor.org/uploads/1/2/0/5/120589378/historia_del_derecho_penal_a_traves_de_las_escuelas_penales_-_quisbert_ermo.pdf)): when dealing with the correctional school, the author mentions, as its main representative figures, K.D.A. Röder (correctionalism), F. Giner de los Ríos (‘tutela criminal’ or criminal protection) and P. Dorado Montero (‘Derecho protector del delincuente’ or Protective law of the offender), but entirely overlooks L. Silvela.

<sup>16</sup> Rueda Neira, R.R., *Elementos de Derecho penal, con arreglo al programa de esta asignatura en la Universidad de Santiago*, Santiago: Printed by José M. Paredes, 1886; *Parte artística del Código penal vigente. Estudio teórico y práctico de las reglas de aplicación de penas*, Santiago: Printed by José M. Paredes, 1890 (work that shows the complexity of the Criminal Code 1870 for a correct application of penalties); about Ramón Ramiro Rueda Neira, see [http://portal.uc3m.es/portal/page/portal/instituto\\_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/rneira](http://portal.uc3m.es/portal/page/portal/instituto_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/rneira)).

<sup>17</sup> Llopis Domínguez, J.M., *Apuntes de Derecho penal ó breve sumario de las explicaciones del profesor de esta asignatura (...) en el Curso de 1884 á 1885*, Valencia: Printed by Casa Beneficencia, 1885 (available at <https://bvpb.mcu.es/es/consulta/registro.do?control=RAJ2009000363>); among the 38 lessons, only lesson 6 (pp. 43-51) is devoted to the science of Criminal Law from Greece to the 18th century, and lesson 7 (pp. 53-62) is devoted to the origin and the foundation of the penal sanction, in which he briefly deals with the diversity of systems and theories (revenge, social agreement, reparation, social defence, utilitarianism and spiritualism of absolute justice or remuneration).

<sup>18</sup> The correctionalist school envisages the law as a set of norms that are fulfilled according to the free will of man and considers that the penalty must justly modify the immoral will. Therefore, this school pursues the internal correction of the offender, considering that the best sentence is that of deprivation of liberty and that it should be possible to issue an indeterminate sentence regarding the duration and content of the sentence. In Spain this school presented a considerable variety of forms of correctionalism that were defended by authors as different as Francisco Giner de los Ríos, Luis Silvela or Concepción Arenal,

out the boundaries between the new theories, such as, for example, between correctionalism and the positivist school (or Criminal Anthropology), as Bernaldo de Quirós acknowledged when dealing with this issue<sup>19</sup>, especially when some authors are present in several of them. It is the case of Pedro Dorado Montero, who not only contributed –as we will see in the following section– to the development of Criminal Anthropology but also made his contributions to correctionalism and criminal sociology. That is why Bernaldo de Quirós said that Dorado Montero<sup>20</sup> holds, concerning Sociology, “the first place, for the quantity of his scientific production, the originality, and independence of his theory and the solid procedure with which he has been able to develop it, all of which have made him favourably known throughout Europe”<sup>21</sup>.

It would be wrong to think that Bernaldo de Quirós’ statement, which stated it is not easy to distinguish between the correctionalist and the positivist school, was a misperception or misinterpretation on his part, especially since he knew the work and the teachers of the professor from Salamanca<sup>22</sup>. A clear evidence of his success is the explicit testimony of Dorado Montero, who –in the Prologue to his *Problemas de Derecho penal*– recognised unequivocally the convenience of uniting the correctionalist school with the positivist one, combining or “widening” the metaphysics with the experimental method<sup>23</sup>.

There is no doubt that Spain was the recipient of the new schools, the positivist or anthropological criminal school, the correctionalist school, and the sociological criminal school, more intensely and extensively regarding the first one<sup>24</sup>. From our point of view, the first stage of this reception process goes from 1870, the year of publication of the first Spanish version of the work of Röder, to 1898, the year – called the “Disaster” due to the loss of the last Spanish colonies in America (Cuba, Puerto Rico, the Philippines, and Guam)– of the publication of the work of Bernaldo de Quirós (praised by Dorado Montero)<sup>25</sup>.

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among others; on the connection between correctionalism and prison reformism, see Lithner, K., “Pioneers in Criminology: Karl Roeder—A Forgotten Prison Reformer”, 59 *J. Crim. L. Criminology & Police Sci.* 219 (1968) (available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5517&context=jclc>).

<sup>19</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 162-163.

<sup>20</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 163-168, where he deals with the professor from Salamanca.

<sup>21</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 163-164; and it includes in footnote no. 1 all the scientific production of Dorado Montero on criminal sociology.

<sup>22</sup> The pages that Bernaldo de Quirós dedicates to Dorado Montero show that he knew his work well, and not only the titles (see the two previous footnotes); about the Salamanca teacher, see Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 164-165.

<sup>23</sup> Dorado Montero, P., *Problemas de Derecho penal*, t. I, Prólogo; collected by Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 165-166, footnote no. 1.

<sup>24</sup> In this regard, see the study by Sánchez-González, D. del M., “La influencia de los escritores italianos en el pensamiento jurídico-penal español del siglo XIX”, *Italia-España-Europa: Literaturas comparadas, tradiciones y traducciones: XI Congreso Internacional de la Sociedad Española de Italianistas* [held from 11 to 13 May at La Cartuja de Sevilla] (M. Arriaga Flórez, J.M. Estévez-Saá, M.D. Ramírez Almazán, L. Trapassi, C. Vera Saura, coords.), 2005, vol. I, pp. 659-670.

<sup>25</sup> Dorado Montero, P., Review of the book “*Las nuevas teorías de la criminalidad* (Madrid: Hijos de Reus, 1898), by Constancio Bernaldo de Quirós”, *Revista general de legislación y jurisprudencia* 46 (93) (1898), pp. 377-378, 377; in this regard, see also the study by Dorado Montero, published in the journal *La Scuola Positiva* (1894), under the eloquent title “Los correccionistas españoles y la escuela positiva”.

The present work deals with the reception of the primary theory, the positivist or anthropological criminal one –therefore leaving aside the correctionalist and the sociologist one–, and in an exact chronological context, from 1885 to 1899<sup>26</sup>. After a brief description of the different ways of reception of this new school, we will deal with the leading authors, analysing their particular contribution and work. The limit of space prevents us not only from covering a broader chronological period but also from limiting ourselves to the study of the most noteworthy aspects of each author, especially since many of them have been –or could be– the object of a particular study, an article or a monograph.

## 2. Main ways of reception of the Positivist School (1885-1899)

The positivist school arrived in Spain slightly later than the correctionalist school<sup>27</sup>. If the latter started in 1870, the former arrived at the end of the seventies or even in the eighties. The conferences given by Félix de Aramburu y Zuloaga in 1887 could be considered the first public presentation of the Lombroso's theories in Spain<sup>28</sup>.

This may be true, but it is undeniable that the positivist school had already been giving a significant contribution to Spanish scientific knowledge for more than five years with the creation of some academic institutions' creation, by implementing their activities or by fostering some Spanish scientists. Institutions and people, or, if preferred, people and institutions, was the pairing that allowed the reception and development of the positivist school in Spain at the end of the 19<sup>th</sup> century. Some people created academic institutions in order to cultivate and develop the knowledge of the new currents, and these, in turn, influenced those people who, as they worked in them, became 'apostles' or spreaders of those new schools. The close connection between the creation and activity of individual institutions and the contribution of some authors makes it advisable to devote a brief section to them before delving into the study of the principal authors.

### 2.1. Academic institutions and activities

#### 2.1.1. *Bulletin of the Free Institution of Education*

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<sup>26</sup> These two years, neither arbitrary nor chosen at random, reflect the period of the positivist school's particularly great reception in the Spanish doctrine. It is from its definite beginning –with the publication of the first work by Isidro Pérez Oliva in 1885 (see the reference in the footnote no. 150)–, until the last year of the 19<sup>th</sup> century, with the publication of an essential work by Constante Amor y Naveiro (see its reference in the footnote no. 203), although –as we will see– one of its channels of reception was earlier). (*Boletín de la Institución Libre de Enseñanza*, created on 7 March 1877).

<sup>27</sup> In this regard, see the works of Puig-Samper, M.A. & Galera Gómez, A., *La Antropología española del siglo XIX*, Madrid, 1983; Galera Gómez, A., “La antropología criminal en España: su proceso de asimilación y evolución”, *Asclepio. Revista de Historia de la Medicina y de la Ciencia* 39.1 (1988), pp. 273-289; for a brief historical approach to criminology, see Serrano Maíllo, A., *Introducción a la Criminología*, Madrid: Dykinson, 2003, pp. 79-131; on the Italian positivist school and its reception in Spain, pp. 95-105.

<sup>28</sup> This is stated by Maristany, L., *El gabinete del doctor Lombroso. Delincuencia y fin de siglo en España*, Barcelona: ed. Anagrama, 1973, p. 33 (collected by Vara Ocón, *Criminalidad y orden penal*, p. 196); it should be noted, however, that it was Isidro Pérez Oliva who, two years earlier, had published the first work on the Italian positivist school (on this subject, see the reference in footnote no. 160).

Krausism was not a strictly academic institution, but it strongly contributed to the promotion of the positivist school<sup>29</sup>, with the creation of the *Free Institution of Education*, from which the *Bulletin of the Free Institution of Education* emerged four months later, on 7 March 1877. The *Bulletin* had as its director two distinguished representatives of the school –who were also Krausists– Francisco Giner de los Ríos in two different periods (in its first stage, 1877-1881, and another long period, 1890-1904) and Adolfo Posada (1910-1917). In other words, except for nine years (1882-1889), Giner was the director of this influential publication, from its creation (1877) until 1904.

From there, it began the promotion of the study, elaboration, and publication of works in the Criminal Anthropology line. Some of the most outstanding students participated, such as Pedro Dorado Montero, Constancio Bernaldo de Quirós, and Adolfo Posada, all Krausists. Between 1882 and 1887, several published works were related directly to the theories of the Italian school (Lombroso, Ferri, and Garofalo)<sup>30</sup>.

### 2.1.2. Specialised journals

Some journals contributed significantly to the cultivation and dissemination – both scientific and educational– of Criminal Anthropology. In this regard, it is worth mentioning, in particular, the *Revista de Antropología criminal y Ciencias Médico Legales*, founded in Valladolid in April 1888 by Ángel María Álvarez Taladríd, a criminal lawyer and Professor of Law and director of the University of Alava –the first year together with Rafael Salillas–. With a monthly periodicity, it enjoyed an international character from the beginning, reflected in some members of its editorial board (with professor Lacassagne, University of Lyon, and professor Puglia, University of Messina). The journal was created to disseminate the advances in Criminal Anthropology, although the contributions came mostly from foreign scholars than from Spaniards. The publication was able to establish contacts and be present in the European sphere and was even selected as the official body in Spain of the *International Congress of Criminal Anthropology* (Paris, 1899) and the *Forensic Medicine Conference* (New York). The journal's life lasted only a few years: in 1890, its publication was interrupted for a while, then resumed, but in 1899 it stopped. In any case, it served as a “communication media, both internal and external, for the national criminal anthropological movement, like the *Archives de L'Antropologie criminelle* or any other European publication”<sup>31</sup>.

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<sup>29</sup> Several scholars, translators or spreaders of the positivist school were Krausists, such as Francisco Giner de los Ríos, one of its most representative figures –or the most representative one–, and others (Adolfo Posada, Pedro Dorado Montero, Constancio Bernaldo de Quirós, and so on).

<sup>30</sup> Sama, J., “La criminalidad de los animales” (1882); Dorado Montero, P., “Sobre el estado de la ciencia jurídica italiana en los momentos presentes” (1886); Calderón, A., “Teorías penales contemporáneas” (1887); summary of a conference by prof. Benedickt on “Biología y criminología” (1887); Arenal, C., “Psicología comparada del delincuente y Clínica criminal” (1887); conclusions of the 1st Conference on Criminal Anthropology, Rome, November 1885; for a complete description of the contents of the Bulletin during those years, see Galera Gómez, A., *Ciencia y delincuencia*, Sevilla: CSIC, 1991, pp. 26-36 (collected by Vara Ocón, *Criminalidad y orden penal*, pp. 196-197).

<sup>31</sup> In this regard, see Galera Gómez, “La antropología criminal en España: su proceso de asimilación y evolución”, pp. 287-288.

In 1892 another journal was created, *La Nueva Ciencia Jurídica*, in which Rafael Salillas collaborated. It emerged to spread Lombroso's theories (1892), but it only lasted two years<sup>32</sup>.

The journal *Revista de Legislación y Jurisprudencia* also included works with a criminal anthropological content. Thus, for example, since 1886, the publication of a series of articles on this subject signed by Rafael Salillas, which would later be published jointly in his well-known work *La vida penal en España* (1888)<sup>33</sup>.

### 2.1.3. Seminar of Criminology, precedent of the School of Criminology

In 1899, Francisco Giner de los Ríos created the *Laboratory or Seminar of Criminology*, counting on the collaboration of Rafael Salillas. Over two courses, Constancio Bernaldo de Quirós, José María Llanas Aguinaliedo, Luis Simarro Lacabra and Eugenio Cuello Calón, as well as Rafael Salillas took part under the direction of Giner de los Ríos. As Jiménez de Asúa said, this *Seminar* had a "limited life", but it was "the germ of the School of Criminology"<sup>34</sup>. Soon after, the *School of Criminology* was created, thanks to the Royal Decree of 12 March 1903, signed by Eduardo Dato, Minister of Grace and Justice. Rafael Salillas was the founder –together with others, such as Luis Simarro Lacabra–, director and one of its chief promoters until his death<sup>35</sup>. Although the *Seminar of Criminology* intended to train prison managers, it was also open to university students. Its first faculty was made up of professors Salillas, Cossío, Simarro, Olóriz, Aramburu, and Antón Ferrándiz, as well as the assistants Manuel Gullón, secretary of the School, and Anselmo González. It was closed on 1st January 1927<sup>36</sup>.

### 2.1.4. Congresses and conferences

The International Congresses were another way of developing and disseminating the new criminal schools in general<sup>37</sup>, and Criminal Anthropology in particular. At the end of the 19th century, several International Congresses on Criminal Anthropology were held: Rome (1895)<sup>38</sup>, Paris (1899)<sup>39</sup>, Brussels (1892)<sup>40</sup>, Geneva (1896)<sup>41</sup>. Forensic Medicine Congresses also started to be held during these years.

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<sup>32</sup> Bernaldo de Quirós states that the journal *Revista de Antropología criminal* was replaced by another, *Nueva Ciencia Jurídica*, directed by J. Lázaro, but it did not last long either (Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 94-95).

<sup>33</sup> Rafael Salillas started to publish them, as of 7 February 1886, in the newspaper *El Liberal*, and then continued in the journal *Revista de Legislación y Jurisprudencia* (collected by Vara Ocón, *Criminalidad y orden penal*, p. 203, footnote no. 231).

<sup>34</sup> Jiménez de Asúa, L., *Tratado de Derecho penal*, Buenos Aires: ed. Losada, 1964, I, p. 225.

<sup>35</sup> See in this regard Serrano Gómez, A. & Serrano Maíllo, A., "Centenario de la Escuela de Criminología", *Revista de Derecho Penal y Criminología*, 2ª Época, 14 (2004), pp. 181-289; therein, it is stated that the appointment of Rafael Salillas as director was made in the *Acta de Constitución* of 20 January 1906, and that he was in fact the true creator of the *School of Criminology*.

<sup>36</sup> Serrano Gómez & Serrano Maíllo, "Centenario de la Escuela de Criminología", p. 285.

<sup>37</sup> In this regard, the International Penitentiary Congresses held in the last third of the 19th century are worth mentioning: London, 1872; Stockholm, 1878; Rome, 1885; Saint Petersburg, 1890; Paris, 1895; Brussels, 1900.

<sup>38</sup> Held at the Palace of Fine Arts, this congress had two sections: biology, with Lombroso, and law, with Ferri and Garofalo. The first section dealt with the relationship between epilepsy, moral

The conferences or series of conferences contributed to the reception and dissemination of the New School, too, as in the case of the series of conferences mentioned above, given by Félix de Aramburu y Zuloaga in Oviedo in 1887<sup>42</sup>, or the conference given by Rafael Salillas in the Ateneo Mercantil in 1888, entitled “*La antropología en el Derecho penal*” (Anthropology in Criminal Law), which led some to consider him as “the introducer in Spain of Lombroso’s theories of Criminological Positivism”<sup>43</sup>.

### 2.1.5. The *International Union of Criminal Law*

The *International Union of Criminal Law* (U.I.D.P.) was created in Vienna by three great experts in criminal law –Franz Von Liszt, Gérard Van Hamel, and Adolphe Prins– “so that all men of good will, whether experts in criminal law or not, could fight together against crime with penalties, all possible legal institutions, and social actions, forgetting old dogmas and schools exclusivism.”<sup>44</sup> Although it was dissolved after the First World War –to be re-founded as the current *International Association of Criminal Law* (A.I.D.P.) in Paris on 14 March 1924–, it was an institution that also served as a means of reception or understanding of the New School in Europe in general and in Spain in particular. Specifically, many criminal law experts –most of them were scholars and disseminators of the positivist school– joined this academic institution. It is the case of Giner de los Ríos, Dorado Montero, Salillas, Azcárate, Lastres, Aramburu, Valdés, Maluquer, Montoro, Pérez Oliva, Taladriz, Torres Campos and Vida<sup>45</sup>.

### 2.2. Main authors: their contribution and work

We now move from the Positivist School's reception to the people who contributed to its development in Spain. Logically, they knew each other well, and, in many cases, they were friends (as in the case of Dorado Montero and Bernaldo de Quirós). For example, in the 'Prologue' of his book *Las nuevas teorías de la criminalidad*, he pointed out that there were already two books that dealt with the same subject, *Antropología Criminal en Italia*, by Dorado Montero, and *Nueva Ciencia Penal*, by Aramburu y Zuloaga (although those works –published a decade earlier– had

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madness, and congenital delinquency; the second section analysed the possible application of the new school's theories in criminal legislation. That was a time when positivism was inspiring, both for treatise and scholars of crime.

<sup>39</sup> The French School strongly criticised the Positivist School, thus the Congress became a defeat for the *Nuova Scuola*.

<sup>40</sup> Lombroso’s section had been divided into many small schools: the second, the third, the metaphysical, the sociological, the positivist of criminal sociology, and so on. Discussions were held in a more peaceful and informed manner.

<sup>41</sup> It was a synthesis congress. It could be said that it was the origin of a more scientific and integrated criminology, more acceptable to the scientific community.

<sup>42</sup> See footnote no. 28 and its corresponding main text.

<sup>43</sup> See the biography Rafael Salillas in the Royal Academy of History (available at <http://dbe.rah.es/biografias/6145/rafael-salillas-y-panzano>); Vara Ocón, *Criminalidad y orden penal*, p. 203.

<sup>44</sup> Emilio Brusa, *Prolegómenos de Derecho penal, con un apéndice sobre el Derecho penal español (historia y fuentes)* [Turin, 1888], Madrid: Hijos de Reus, editores, 1897, p. 532.

<sup>45</sup> *Ibidem*.

only dealt with anthropological theory, and merely explained the development of the *Nuova Scuola*)<sup>46</sup>. Shortly after the publication of the work by Bernaldo de Quirós, Dorado Montero published a complimentary review of the book<sup>47</sup>.

Bernaldo de Quirós, when he presents criminal anthropology in Spain, points out that it has three stages: a first stage of presentation –with Pedro Dorado Montero–, a second stage of contribution –with Rafael Salillas– and a third stage of criticism –with Félix de Aramburu–<sup>48</sup>. Although it could serve to group together the different authors, this scheme poses particular difficulties for some authors, so we have chosen to reject it as a criterion for structuring this section.

### 2.2.1. Pedro Dorado Montero

The studies on the figure of Pedro Dorado Montero (1861-1919) do not fully reflect his relevance in the Spanish criminal doctrine of the late 19th and early 20th centuries<sup>49</sup>. Since the majority of his works were published between 1900 and 1915, and his contribution is still an object of today's studies<sup>50</sup>, we will only analyse his role in the reception of the positivist school in Spain at the end of the 19<sup>th</sup> century.

For Bernaldo de Quirós, Dorado Montero was the great exponent of Criminal Anthropology, and he is partly right, because the professor from Salamanca was, in part<sup>51</sup>, the first to study and present Lombroso's theories in Spain. In his first work in 1889 on *Antropología criminal en Italia*<sup>52</sup>, rewritten and extended two years later with a second work<sup>53</sup>, he presented the theses of the *Nuova Scuola* in Spain autonomously<sup>54</sup>. For Bernaldo de Quirós, Dorado has “his own personality, and his ideas are not measured or adjusted to the mould of the ideas of the Italian positivists,” hence “the criticism often accompanies the presentation”<sup>55</sup>. Although Dorado is not fully determinist, his anthropology reflects “the predisposition, propensity, or ‘secret inclination of the soul towards the crime’ of which Luis Silvela speaks. Moreover, this

<sup>46</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 8.

<sup>47</sup> Dorado Montero, P., Review of “*Las nuevas teorías de la criminalidad*”, cited in the footnote no. 25.

<sup>48</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 87-88 ff.

<sup>49</sup> See in this regard Petit, C., Voz “Pedro García Dorado y Montero”, *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, Universidad Carlos III (available at [http://portal.uc3m.es/portal/page/portal/instituto\\_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/gdorado](http://portal.uc3m.es/portal/page/portal/instituto_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/gdorado)), which includes a significant part of the bibliography on this author; see also the –already classic– study by Antón Oneca, J., *La utopía penal de Dorado Montero*, Salamanca: Universidad de Salamanca, 1951.

<sup>50</sup> José Franco-Chasán is currently preparing his doctoral thesis on this subject, entitled “The Reception of Positivism in Spain: Pedro Dorado Montero”.

<sup>51</sup> I add “in part” because, as we will see, two years earlier Félix de Aramburu had published his work (in this regard, see footnote no. 165).

<sup>52</sup> Dorado Montero, P., *La Antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889, 177 pp.

<sup>53</sup> Dorado Montero, P., *El positivismo en la ciencia jurídica y social italiana*. 2ª Parte, Economía política, filosofía del derecho, derecho civil, derecho político, derecho romano, otras ramas jurídicas, Madrid, Revista de Legislación, 1891, 343 pp.

<sup>54</sup> Shortly after he published his *Problemas jurídicos contemporáneos*, Madrid: La España Moderna, [1893?], 162 pp. ([https://sirio.ua.es/libros/BDerecho/problemas\\_juridicos/index.htm](https://sirio.ua.es/libros/BDerecho/problemas_juridicos/index.htm)), although he barely dealt with Criminal Anthropology in that work.

<sup>55</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 89.

predisposition or propensity is admitted by everyone, even the most determined spiritualists”. This is demonstrated by a “particular letter that reaches my hands today,” from Dorado Montero to Bernaldo de Quirós, in which he admits such a predisposition or propensity<sup>56</sup>.

In addition to these two works, Dorado Montero’s contribution also included his translation of many works by foreign authors (Garofalo, Sighele, Carnevale, Tarde, Francotte, Proal, Ferri, and so on)<sup>57</sup>.

### 2.2.2. Rafael Salillas

Rafael Salillas (1854-1923) is probably the most outstanding exponent of Criminal Anthropology in the Spain of his time<sup>58</sup>. His status as a doctor and criminologist –but not as a jurist– is evident throughout his work. Hence, most have studied his contribution to criminology from a medical point of view rather than a legal one<sup>59</sup>. A tireless worker<sup>60</sup> and a good connoisseur of the penitentiary establishments<sup>61</sup>, his activity in promoting the new school was remarkable, trying to demonstrate to what extent genetic and environmental causes contribute to the emergence of criminality.

Among his several works<sup>62</sup>, the most relevant was undoubtedly *La vida penal en España* (1888)<sup>63</sup>. After reading it, Lombroso stated that “Spain has also its Marro”,

<sup>56</sup> Letter collected by Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 90.

<sup>57</sup> In this regard, see the article by José Franco-Chasán in the current issue: Franco-Chasán, J., “Pedro Dorado Montero: A Transitioning Figure”, *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 366, 375, 383, 385, 387.

<sup>58</sup> Serrano Maíllo, *Introducción a la Criminología*, p. 103, for whom Salillas was “one of the main Spanish representatives of positivism”, together with Bernaldo de Quirós and Dorado Montero.

<sup>59</sup> In this regard, see the works of Galera Gómez, A., *Introducción de la Antropología criminal en España. La Antropología criminal en la obra de Rafael Salillas*, Ciencias Biológicas, Universidad Complutense, 1984; by the same author, “Rafael Salillas: medio siglo de antropología criminal española”, *Llul* 9 (1986), pp. 8-104; see also Sánchez de Juan, M.C., *Medicina y reformismo penal: la obra de Rafael Salillas*, Doctoral Thesis, Cátedra de Historia de la Medicina, Universidad de Salamanca, 1986; from the legal perspective, see the study by Dorado Montero, P., “Sobre el libro Hampa del Dr. Salillas”, *Derecho protector de los criminales*, Madrid: Lib. de Victoriano Suárez, Madrid, 1915; Jiménez de Asúa, L., “Rafael Salillas. Sus precursores y discípulos”, *El Criminalista* (Buenos Aires) 3 (1949), pp. 36 ff.; Antón Oneca, J., “Don Rafael Salillas”, *Anuario de Derecho Penal y Ciencias Penales* (Madrid: Instituto de Estudios Jurídicos), 1974; Fernández Rodríguez, M.D., *El pensamiento penitenciario y criminalista de Rafael Salillas*, La Coruña: Universidad de Santiago de Compostela, 1976; Burillo, F., “Rafael Salillas. En los orígenes de la Criminología”, *Rolde* 90 (October-December 1999), pp. 45-50.

<sup>60</sup> Ruiza, M., Fernández, T., Tamaro, E., “Biografía de Rafael Salillas”, *Biografías y Vidas. La enciclopedia biográfica en línea*, Barcelona, 2004 (available at <https://www.biografiasyvidas.com/biografia/s/salillas.htm>).

<sup>61</sup> It is well known that “nunca cultivó una ciencia positiva cuantitativa al estilo de Lombroso”, but “sí tuvo un profundo conocimiento de la realidad criminal debido a su contacto con los establecimientos penitenciarios” (Serrano Maíllo, *Introducción a la Criminología*, p. 103).

<sup>62</sup> *La antropología en Derecho penal* (1889), *Doña Concepción Arenal en la ciencia penitenciaria* (1894), *Psicología picaresca* (1895), *Los ñáñigos en Cuba* (1895), *El delincuente español. El lenguaje* (1896), *La teoría básica* (1901), *La reforma penitenciaria* (1904), *El doctor J. Huarte y su ‘examen de ingenios’* (1905) and *La evolución penitenciaria* (1919), *Las Cortes de Cádiz* (1910), *Morral el anarquista* (1914).

<sup>63</sup> Salillas, R., *La vida penal en España*, Madrid: Imprenta de la Revista de la Legislación, 1888.

because, in his opinion, that work “is a second work of Marro, with the typical characters of Spain”<sup>64</sup>.

In his ‘Introduction’, the same author acknowledges that he never intended to write this book, which is nothing more than a collection of articles that he started to publish from 7 February 1886 in the newspaper *El Liberal*, and from September of the same year, in the journal *Revista General de Legislación y Jurisprudencia* (ix). His goal was to “contribute with selfless collaboration to establish on a positivist basis the criminal procedure and discipline in our country”<sup>65</sup>. The book, which contains the author’s comments from the *Directorate-General of Penal Establishments*, reflects that Salillas was perhaps a doctor rather than a criminologist, and certainly not a jurist. However, many of his statements have a purely legal content, since they deal, for example, with “legal progress”, the “distinguishing characteristic between ancient and modern criminal law”<sup>66</sup>, or penal sanction and its supposedly restorative purpose<sup>67</sup>.

For Salillas, “the crime is a stain on the conscience and the law. The prison adds the contact of the criminal, the filth of the environment, the impurity of the atmosphere, the laziness of the customs, and the habit of corruption. The imprisonment exaggerates and extends the stains of the prison. Finally, even the official language requires police. We use the expression *finished off*, that can be understood as incapable of cleaning, and *forced*, to live in the pigsty”<sup>68</sup>.

The base was the nourishment, which was, in his opinion, the foundational element of zoology and sociology, and consequently, the fact that the psychic responded to the organic. “Any alteration of the food base has an impact on the psyche, and how its history is the history of the evolution and the background of human ideas”<sup>69</sup>. For Salillas, three terms have already merged: “Mendicity and vagrancy, prostitution and criminality; each of these terms has in its own way these three fundamental characteristics: falsification, suggestion, and coercion,” giving rise to *the ones who forge, suggest and robber*<sup>70</sup>.

The anthropological thought of Salillas is also included in *El delincuente español. El Lenguaje* (1896)<sup>71</sup>. As the title says, it is a more philological, psychological, and sociological than strictly legal work. However, it is remarkable how it highlighted the contribution of classical authors (16<sup>th</sup> and 17<sup>th</sup> centuries) to Anthropology and Criminology: Cervantes, Hurtado de Mendoza, Mateo Alemán, Quevedo, and so forth.

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<sup>64</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 90-94, in which he discusses Salillas’ contribution to the development of Criminal Anthropology; the aforementioned statement – between quotation marks– is included in p. 90.

<sup>65</sup> Salillas, *La vida penal en España*, Introducción, x.

<sup>66</sup> Salillas is particularly eloquent in *La vida penal en España*, chapter XII (‘Balance penal’), pp. 77-86.

<sup>67</sup> Salillas, *La vida penal en España*, pp. 79-80.

<sup>68</sup> Salillas, *La vida penal en España*, p. 39.

<sup>69</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 92-93.

<sup>70</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 93.

<sup>71</sup> Salillas, R., *El delincuente español. El lenguaje (estudio filológico, psicológico y sociológico) con dos vocabularios jergales*, Madrid, Librería de Victoriano Suárez, 1896 (available at <http://www.cervantesvirtual.com/obra/el-delincuente-espanol-el-lenguaje-estudio-filologico-psicologico-y-sociologico-con-dos-vocabularios-jergales--0/>).

In this work, Salillas argues –in Bernaldo de Quirós’s opinion– that “individuals are as they are because of their relations with the environment”<sup>72</sup>.

### 2.2.3. Constancio Bernaldo de Quirós

Constancio Bernaldo de Quirós Pérez (1873-1959) had a “long and exemplary life”<sup>73</sup>, as well as fruitful in the field of criminal science, criminology, and criminal sociology, as demonstrated by his scientific production<sup>74</sup>. His biographies highlight the early age at which his interest in criminology arose, just after obtaining his degree in Law –at the age of 19–<sup>75</sup>, and his capacity for work reflected in the preparation of the study –more complete until the end of the 19<sup>th</sup> century– on *Las nuevas teorías de la criminalidad*<sup>76</sup>, at the early age of 25, four years after the beginning of his doctorate, in which he studied Philosophy of Law, taught by Francisco Giner de los Ríos, his teacher, together with Dorado Montero and Salillas. These three figures (Dorado Montero, Salillas, and Bernaldo de Quirós) were –under the guidance, impulse, and inspiration of Giner de los Ríos– the most outstanding representatives of Criminal Anthropology or criminal sociology in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, Bernaldo de Quirós was the first not only to “disseminate in Spain the scientific work that had been carried out since the end of the 19<sup>th</sup> century by French and Italian positivist scientists within the criminal and criminological disciplines”<sup>77</sup>, but also to present, in a quite complete and rigorous way, the contributions of the Spanish ‘positivists’ up to the end of the same century.

In addition to his collaboration in several journals and publications<sup>78</sup>, he translated some Italian works into Spanish (Beccaria, Lombroso, and Nicéforo)<sup>79</sup>, and

<sup>72</sup> Text by Salillas collected by Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 92.

<sup>73</sup> Jiménez de Asúa, L., “La larga y ejemplar vida de Constancio Bernaldo de Quirós”, Preliminary Study to *El espartaquismo agrario andaluz*, Madrid, 1974.

<sup>74</sup> *Las nuevas teorías de la criminalidad*, Madrid: Reus, 1898; with J. M. Llanas Aguilaniedo, *La mala vida en Madrid*, Madrid: Cerra, 1901; *El alcoholismo*, Barcelona: Gili, 1903; *Alrededor del delito y de la pena*, Madrid: Viuda de Rodríguez Serra, 1904; *Criminología de los delitos de sangre en España*, Madrid: P. Apaletgui, 1906; *La Picota, crímenes y castigos en Castilla en los tiempos medios*, Madrid: Suárez, 1908; *Figuras delincuentes con ocho reproducciones de antiguos rollos jurisdiccionales*, Madrid, J. Góngora, ¿1908?; “Yebala y Garb,” *Boletín de la Real Sociedad española de Historia Natural* (Madrid), separata (July 1914); *Derecho Penal*, Madrid: Instituto Reus, 1931; *Cursillo de criminología y derecho penal*, Santo Domingo: Montalvo, 1940; *Lecciones de legislación penal comparada*, Santo Domingo: Montalvo, 1944; *Nuevas noticias de picotas americanas*, La Habana: Montero, 1952; *Lecciones de derecho penitenciario*, México: Universidad, 1953; *El bandolerismo en España y en México*, México: Jurídica Mexicana, 1959.

<sup>75</sup> See, for example, some of the works we have discussed about Bernaldo de Quirós: by Ribes Leyva, A.J. (<http://dbe.rah.es/biografias/13028/constancio-bernaldo-de-quirós>), by Herráiz García, C. (<http://www.mcnbiografias.com/app-bio/do/show?key=bernaldo-de-quiros-constancio>); see also the work collected in [https://www.ecured.cu/Bernaldo\\_de\\_Quir%C3%B3s](https://www.ecured.cu/Bernaldo_de_Quir%C3%B3s).

<sup>76</sup> Dorado Montero, Review of the book “*Las nuevas teorías de la criminalidad*”, already mentioned, pp. 377-378; see footnote no. 25.

<sup>77</sup> Herráiz García, “Bernaldo de Quirós” (available at <http://www.mcnbiografias.com/app-bio/do/show?key=bernaldo-de-quiros-constancio>).

<sup>78</sup> See his biography at [https://www.ecured.cu/Bernaldo\\_de\\_Quir%C3%B3s](https://www.ecured.cu/Bernaldo_de_Quir%C3%B3s).

<sup>79</sup> See, for example, regarding the work of Alfredo Nicéforo, an author certainly less known than Beccaria and Lombroso, the following translations: *La transformación del delito en la sociedad moderna: estudio inédito*. Translated by C. Bernaldo de Quirós; prologue by Rafael Salillas, Madrid: Librería General de Victoriano Suárez., 1902, 154 pp.; *Guía para el estudio y la enseñanza de la criminología*. Translated and extended by C. Bernaldo de Quirós, Madrid: Casa Editorial Viuda de Rodríguez Serra, 1903, 112 pp.

he wrote several prologues to various works by Italian authors (Lombroso, Ferri, and Niceforo). Besides, in 1899, Bernaldo de Quirós joined the recently created *Laboratory of Criminology* –belonging to the Chair of Giner de los Ríos and under the direction of Salillas–, from where many studies on criminology, anthropology, sociology, and psychology were carried out over a decade, among which those by Salillas and Bernaldo de Quirós, among others, play a unique role<sup>80</sup>. In 1902, perhaps due to the close relationship between the two of them, Salillas entrusted Bernaldo de Quirós with the drafting of the Montilla Criminal Code, but the text itself was not successful.<sup>81</sup> A year later, he began to work on the recently created *Institute of Social Reforms*, presided over by Gumersindo de Azcárate.

Taking into account that many historiographers have studied with intensity the figure of Bernaldo de Quirós<sup>82</sup>, and considering the limited chronological scope of our investigation, it is sufficient to analyse his first book, which includes his doctoral thesis directed by Giner de los Ríos, published in 1998 under the title *Las nuevas teorías de la criminalidad*, and translated into English<sup>83</sup> and other languages<sup>84</sup> a decade later. The numerous references in these pages to work mentioned above by Bernaldo de Quirós show its value.

However, it is now appropriate to synthesise his thought regarding our object of study. The final pages of his work, and in particular those relating to ‘La solución del porvenir,’ can be used for this purpose<sup>85</sup>. Bernaldo de Quirós, after rigorously and extensively presenting “authors and science” and regretting that, “in practice, so little has been done that it can be said that everything is still to be done”<sup>86</sup>, affirms that it is

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<sup>80</sup> This is the case of J. M. Llanas Aguilaniedo, with whom Bernaldo de Quirós published *La mala vida en Madrid*, Madrid: Cerra, 1901; on this subject, see Broto Salanova, J., *Un olvidado: José María Llanas Aguilaniedo*, Huesca: IEA, 1992; see also [https://www.ecured.cu/Bernaldo\\_de\\_Quir%C3%B3s](https://www.ecured.cu/Bernaldo_de_Quir%C3%B3s).

<sup>81</sup> Vara Ocón, *Criminalidad y orden penal*, p. 117, footnotes nos. 90-91; where the study by Jorge Barreiro, A. is collected, *Las medidas de seguridad en el derecho español: un estudio de la ley de peligrosidad y rehabilitación social de 1970 y de la doctrina de la Sala de Apelación de Peligrosidad*, Madrid: Civitas, 1976, p. 48, and this in turn includes the *Proyecto de Reforma del Código Penal*, by Montilla (1902), “preparado por Constancio Bernaldo de Quirós” and which “acepta las tendencias antropológicas y sociales de la época”, quoting the study by Alfonso Rodríguez Dranguet, *Defensa Social, Tratamiento de los Peligrosos, Legislación de Vagos e Maleantes, Ley y Reglamento*, First edition. Ediciones Góngora, Madrid, 1935, pp. 183-184; Jorge Barreiro also mentions, as the second antecedent of the Vagrancy Act, the *Proyecto Piniés de Profilaxis Social* (1922) (p. 48).

<sup>82</sup> In addition to the work of Jiménez de Asúa, already mentioned in footnote no. 73, see the works of Alonso Burgos, J., *Marginalidad y delincuencia en la España de la Restauración (1875-1923). Una introducción a la obra de Constancio Bernaldo de Quirós; estudio preliminar a Figuras delincuentes y Figuras delincuentes en el Quijote*, Jaén, 2008; García Herreros, E., “Semblanza de Bernaldo de Quirós”, *Revista Jurídica* 64 (21 May 1904); VV.AA., *Estudios a la memoria de Don Constancio Bernaldo de Quirós* (México, 1960); Cassá Bernaldo de Quirós, C., *Vida y antepasados de Constancio Bernaldo de Quirós*, Santo Domingo, Instituto Dominicano de Genealogía, 1998; Nebreda Torres, J., “Debate sobre la normalidad del delito en los comienzos de la sociología española: Constancio Bernaldo de Quirós”, *Revista Española de Investigaciones Sociológicas*, 101 (2003).

<sup>83</sup> Under the title *Modern Theories of Criminality (Modern Criminal Science Series)*, Boston, Massachusetts: Little, Brown and Company, 1911, which was the subject of a review in English, published the same year, in *The Yale Law Journal* Vol. 20, No. 6 (Apr., 1911), pp. 519-521.

<sup>84</sup> Also *La mala vida en Madrid. Estudio psico-sociológico con dibujos y fotografías del natural* (see references in footnote no. 80), was translated into several languages.

<sup>85</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 339-348 (conclusions); pp. 344-348 (“La solución del porvenir”).

<sup>86</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 337.

possible to resolve “the complex problem of responsibility that torments authors.” For this expert in criminal law and criminology, “if the real essence of this problem is to distinguish between the *imputable* and *non-imputable* to *punish* the former and *absolve* the latter, the day when punishment is exhausted, could it not be well said that NONE is responsible or that ALL are responsible?”<sup>87</sup>.

In short, what Bernaldo de Quirós suggested was to link “solutions that were contrary in words”. A “notion of responsibility that extinguishes itself” with the sanctioning of the responsible, later “reborn and enlarged by picking up the old irresponsible” (or ‘non-liable’ or ‘dangerous’ –referring to “the crazy and invalid of the soul, the minor and imprudent, the impulsive defenders of their person”)–, as well as the return to society of those who have served the punishment– was, in Bernaldo de Quirós’ opinion, “the greatest immorality of the systems.” Where did the problem lie? In the concept of *responsibility*, which should be replaced by the *need for public guardianship*. In this way, “the disputes of *free will defenders* and *determinists* also cease” because, regardless of where the crime came from –“either from the most unbridled freedom of indifference or the fatal imposition of invincible agents”–, the *need for public guardianship* would not “disappear or be altered.” Moreover, moving from *misdeemeanour* to penal guardianship would also resolve the contradictions and limitations of the correctionalist school with the *incorrigible*, just as the medical sciences treat “their *incurable*, or in their language, their *perpetual pupils*”<sup>88</sup>.

His long life and his remarkable scientific production make Bernaldo de Quirós a kind of bridge that connects the teaching of Francisco Giner de los Ríos, of whom he was one of his most appreciated disciples –together with Dorado Montero and Salillas– and the later authors who would take up, in their own way, the torch of positivist doctrines. It is the case of Luis Jiménez de Asúa<sup>89</sup>, who, to elaborate his doctoral thesis under the direction of Quintiliano Saldaña, in which he tackled a classic topic of the criminological positivist of the time (under the title “El sistema de penas determinadas a posteriori en la ciencia y en la vida”)<sup>90</sup>, was inspired “by the work of Pedro Dorado Montero and Constancio Bernaldo de Quirós, authors of an enthusiastic preface to the publication”<sup>91</sup>.

#### 2.2.4. Ángel María Álvarez Taladrid

In addition to his political activity, Ángel María Álvarez Taladrid (1850-1919) stood out as a jurist, renowned criminal lawyer, and university professor, “for

<sup>87</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 345-346.

<sup>88</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 346.

<sup>89</sup> In this regard, see the study by Roldán Cañizares, E., *Luis Jiménez de Asúa: Derecho penal, República, Exilio*, Madrid: Dykinson, 2019.

<sup>90</sup> Unpublished doctoral thesis, Universidad de Madrid, Facultad de Derecho, defended in 1913 (available at <https://eprints.ucm.es/54097/1/5324098075.pdf>).

<sup>91</sup> Arroyo Zapatero, L., “Luis Jiménez de Asúa”, *Diccionario Biográfico de la Real Academia de la Historia*, Madrid 2011, vol. XXVII, 22nd open edition 2018 (available at [http://blog.uclm.es/luisarroyozapatero/files/2018/04/JIM%20C3%89NEZ-DE-AS%20C3%9AA-LAZ\\_RAE\\_Definitivo2018-1.pdf](http://blog.uclm.es/luisarroyozapatero/files/2018/04/JIM%20C3%89NEZ-DE-AS%20C3%9AA-LAZ_RAE_Definitivo2018-1.pdf)).

introducing the theories that were most in vogue at the time, such as the application of anthropology to the study of criminality”<sup>92</sup>.

There is little relevant information about this figure concerning our object of study. We have already seen that he founded, in 1888, in Valladolid, the *Revista de Antropología criminal y Ciencias Médico Legales* journal, directed by himself<sup>93</sup>. It is well known his relationship with Salillas –with whom he directed the journal mentioned above for a year–<sup>94</sup>, with Giner de los Ríos –because of his relationship with the *Free Institution of Education*–<sup>95</sup>, with Dorado Montero –with whom he corresponded–<sup>96</sup>, and with César Silió Cortés, whose work entitled *La crisis del derecho penal* he prefaced in 1891<sup>97</sup>.

In this prologue, the only written text of the Valladolid jurist that we have been able to find and consult, Álvarez Taladrid states that Silió knew how to portray the new criminal science, by surrounding the ‘young pupil’ “with the essential elegance and finery to present it to the Spanish society, so that the latter would not run into the antiquated theories of *classicism* nor fall into the nonsense of the most exaggerated systems. These causes force the author not to be a true *orthodox* of the positivist school...;”<sup>98</sup> this seems to imply that he did consider himself as such, even though he praised Silió’s “reasoning and harmonic *eclecticism*”<sup>99</sup>. It also responds to the criticism from “such illustrious writers as Carrara, Luchini, Brusa, Aramburu” against Criminal Anthropology for denying free will, “noting that neither denial is new and absolute, nor are there any grounds for such violent attacks, nor is the opposition to Criminal Anthropology justified, based on this single point of view”<sup>100</sup>. However, what Álvarez Taladrid admires most about the author of the work he prefaces is not the defence of the “doctrines of free will, trying with a titanic effort to unite them skilfully and artfully with the unbearable consequences of its entire criminal system,” but “something greater” done by Silió, that is, “to embroider the rough silhouettes of matter with the reflections of a light (...), the spirit...”<sup>101</sup>. In short, Álvarez Taladrid, on the one hand, is amazed at Silió’s “titanic effort” to “unite,” with his “reasoning and harmonious *eclecticism*,” two antagonistic ways of understanding criminal law and criminality, one from the metaphysics –or “metaphysical digressions”–, and the other one from matter and “anthropological and social factors”. On the other hand, he doubts that this well-intentioned and praiseworthy effort made by Silió served to make “the so-

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<sup>92</sup> Cano García, J.A., “Ángel María Álvarez Taladrid”, *Diccionario Biográfico de la Real Academia de la Historia*, Madrid 2011 (available at <http://dbe.rah.es/biografias/63569/angel-maria-alvarez-taladrid-cabeza-de-vaca>).

<sup>93</sup> In this regard, see footnote no. 31, and its corresponding main text.

<sup>94</sup> *Ibidem*.

<sup>95</sup> Checa Godoy, A., *Historia de la prensa pedagógica en España*, Sevilla: Universidad de Sevilla, 2002, p. 211.

<sup>96</sup> See, for example, the attentive Letter of Ángel María Álvarez Taladrid, a Valladolid lawyer and friend, to Pedro Dorado Montero, asking him for a copy of the ‘Pastoral’ of father Cámara and sending him a newspaper clipping, in 1897 (available at <https://gredos.usal.es/handle/10366/100246>).

<sup>97</sup> César Silió Cortés, *La crisis del derecho penal* (prologue by Ángel M<sup>a</sup> Álvarez Taladrid), Madrid: Fuentes y Capdeville, 1891.

<sup>98</sup> Álvarez Taladrid, A.M., ‘Prologo’ to *La crisis del derecho penal*, by César Silió y Cortés, vii.

<sup>99</sup> Álvarez Taladrid, ‘Prologo’ a *La crisis del derecho penal*, ix.

<sup>100</sup> Álvarez Taladrid, ‘Prologo’ a *La crisis del derecho penal*, xiii-xiv.

<sup>101</sup> Álvarez Taladrid, ‘Prologo’ a *La crisis del derecho penal*, xxiii.

called classical penologists” properly value “the study of the criminal and the atmosphere surrounding him”<sup>102</sup>.

### 2.2.5. César Silió Cortés

We had already introduced this author when we spoke about Álvarez Taladrí. César Silió Cortés (1865-1944) was “a prestigious lawyer, expert in criminology and with great influence in the Valladolid Bar Association”<sup>103</sup> and mainly devoted to politics. He began his internship with Álvarez Taladrí, who managed to transmit his interest in criminological matters. Perhaps this is why he decided to write his study entitled *La crisis del derecho penal*, and why Álvarez Taladrí wrote the ‘Prologue’<sup>104</sup>.

As we have seen, Silió tried to combine the classical doctrine with the new positivist theories. Álvarez Taladrí praised his fatuous attempt, whereas, for Bernaldo de Quirós, Silió is “one of those who try to harmonise free will with positivism.”<sup>105</sup> This statement is somewhat surprising because, in reality, there were not so many authors who made such an attempt of harmonisation, and especially considering the numerous chapters and pages that Silió dedicated to the most positivist part of the work<sup>106</sup>.

Although Silió did not write any other monograph on Criminal Anthropology – he did it on other issues, some related to his interest in education, history, and politics<sup>107</sup>, it is remarkable that his biographers have so overlooked this work<sup>108</sup>. This might be because those who have studied Silió Cortés have done it from a political perspective, and not from a more juridical perspective, and even less from a juridical-criminal or criminological one<sup>109</sup>.

<sup>102</sup> Álvarez Taladrí, ‘Prologo’ a *La crisis del derecho penal*, xxvii.

<sup>103</sup> Gil Pecharromán, J., “César Silió Cortés”, *Diccionario Biográfico de la Real Academia de la Historia*, Madrid 2011 (available at <http://dbe.rah.es/biografias/8238/cesar-silio-cortes>).

<sup>104</sup> In this regard, see footnote no.97, as well as its corresponding main text.

<sup>105</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 94.

<sup>106</sup> Silió Cortés, *La crisis del derecho penal*, see all chapters, except Chapter I, as can be seen when handling the work; Chapter II, El Delito (pp. 67-98); Capítulo III: El Delincuente (pp. 99-151); Chapter IV: Clasificación de Delinquentes (pp. 152-183); Chapter V: Temperatura y Delictuosidad (pp. 184-210); Chapter VI: Los factores sociales del delito (pp. 211-240); Chapter VII: Estadística Criminal (pp. 241-268); Chapter VIII: Homicidio-Suicidio (pp. 269-301); Chapter IX: La pena de muerte (pp. 302-316).

<sup>107</sup> *Problemas del día*, Madrid: Lib. Victoriano Suárez, 1900; *La educación nacional*, Madrid: Printed by Rev. de Archivos, 1914; *En torno a una revolución. Caída de la Monarquía*, Madrid: Espasa Calpe, 1933; *Vida y empresas de un gran español: Maura*, Madrid, 1934; *Don Álvaro de Luna y su tiempo*, Madrid: Espasa Calpe, 1935; *Isabel la Católica, fundadora de España*, Valladolid: Santarén, 1938; *Trayectoria y significación de España. Del tiempo viejo al tiempo nuevo*, Madrid: Espasa Calpe, 1939; *Maquiavelo y su tiempo*, Madrid: Espasa Calpe, 1946; collected in Gil Pecharromán, “César Silió Cortés”, biography already mentioned in footnote no. 103.

<sup>108</sup> Up to the point of not even mentioning it in the text of his biography nor gathering it among his works: this is the case of Gil Pecharromán, “César Silió Cortés”, already mentioned; García Cano, J.A., “El conservadurismo vallisoletano en la segunda Restauración”, *Investigaciones históricas. Época moderna y contemporánea* 15 (1995) pp. 97-106; see also in Wikipedia ([https://es.wikipedia.org/wiki/C%C3%A9sar\\_Sili%C3%B3](https://es.wikipedia.org/wiki/C%C3%A9sar_Sili%C3%B3)).

<sup>109</sup> In fact, we do not know of the existence of any studies on Silió from a legal perspective, while there are studies with a more political content: García Canales, M., *El problema constitucional en la dictadura de Primo de Rivera*, Madrid: Centro de Estudios Constitucionales, 1980; Tusell, J. and Avilés, J., *La derecha española contemporánea. Sus orígenes: el maurismo*, Madrid: Espasa- Calpe, 1986; González, E., *Sociedad y educación en la España de Alfonso XIII*, Madrid: Fundación Universitaria

One of his biographies points out that “Silió defined himself as a ‘critical positivist,’ whose objective was to harmonise the materialistic and deterministic perspective of the positivist school with the dogmas of traditional Catholicism”<sup>110</sup>. Is this statement true? To what extent can Silió Cortés be considered a “critical positivist”? What was his criticism? Is this statement correct? The fact that he adopted a good part of the postulates of the Italian positivist school, perhaps influenced by his time as an intern in the office of Álvarez Taladrid, seems to be beyond doubt<sup>111</sup>. We can find the sense or meaning of his ‘critical’ vision of positivism in the first two chapters of *La crisis del Derecho penal*. At the beginning of the preliminary chapter, referring to ‘The new Doctrines’<sup>112</sup>, he admits the Darwinist theses, making them compatible with the “law (...) written by God in the great Code of nature”<sup>113</sup>. According to Silió, the “biological law that presides over the evolution of all organisms” also affects the history of peoples and civilisations, which would explain, for example, why “pagan idols were present in ancient Rome, before the sublime moral of the Gospel, sanctified by Christ at Calvary”<sup>114</sup>.

Silió argued that this same law applies to the history of criminal science. Acknowledging that Beccaria’s initiative “responded perfectly to the needs of his time and succeeded in the fight against the systems of the Middle Ages, just as retaliation had triumphed before over the system of revenge,” it was the right moment to turn to other “doctrines, vivified with the vitality of observation and statistics, which today appear in the world of science vigorously and with extraordinary strength.” He quoted the three great defenders of the new doctrines: Lombroso, Ferri, and Garofalo<sup>115</sup>.

Silió describes the great schools, the classical, the positivist, and the correctionalist, between the two main ones. He criticises the classical school for several reasons: “it studies crime as an abstraction, and abstractions are lifeless beings without consistency,” “it completely forgets the offender without caring about anything else than the crime committed,” “its purpose is the absolute mathematical equality between penal sanction and crime, which is impossible.” Furthermore, it has the “the illusory pretension of adjusting the penal sanction in each case, for the moral freedom of the individual to whom it is applied, as if this faculty –so much discussed and above all so inestimable– could be measured as the steam pressure in the boilers or the air temperature can be measured”<sup>116</sup>.

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Española, 1988; González Hernández, M. J., *Ciudadanía y acción. El conservadurismo maurista, 1907-1923*, Madrid: Siglo XXI, 1990; Gil Pecharromán, J., *Conservadores subversivos. La derecha autoritaria alfonsina, 1913-1936*, Madrid: Eudema, 1994; Cano García, J. A., *El poder político en Valladolid durante la Restauración. La figura de César Silió*, Valladolid: Universidad de Valladolid, 1996; González Cuevas, P.C., “El pensamiento político de Silió”, *Razón Española* 99 (September-October 1999); collected in Gil Pecharromán, “César Silió Cortés”, biography already mentioned in footnote no. 103.

<sup>110</sup> Affirmation found in <https://www.valladolidweb.es/valladolid/vallisolet/biograf/silio.htm>, date of consultation: 5.3.2020.

<sup>111</sup> See, in this respect, the contents of most of the chapters of his work, the titles of which are included in footnote n. 106.

<sup>112</sup> Silió Cortés, *La crisis del derecho penal*, pp. 1-18.

<sup>113</sup> Silió Cortés, *La crisis del derecho penal*, pp. 1-2.

<sup>114</sup> Silió Cortés, *La crisis del derecho penal*, p. 3.

<sup>115</sup> Silió Cortés, *La crisis del derecho penal*, pp. 8-9.

<sup>116</sup> Silió Cortés, *La crisis del derecho penal*, pp. 9-10.

Silió is less critical of the “modern” positivist school, which “rejects the *a priori* foundations of the classic and applies to criminal science a new method, whose beautiful and brilliant results (...) guarantee the success that certainly awaits it in the legal and social fields”. Silió is captivated by the natural, physiological and anthropological sciences when they study the “incorrigible criminal figure”. It is his conviction that with them, it is possible to “solve with success the complicated issues of madness and crime”. He is so motivated by the convenience of replacing the “metaphysical and narrow criterion of the responsibility that diminishes or grows with the free will of the individual, with the positivist and broad criterion of social defence”, that he concludes by asking “in a humble way to take into account its works, without expecting them to be considered as the exclusive way of resolving criminal problems”<sup>117</sup>.

Between the two mentioned schools, he places correctionalism, which he treats with a particular disdain, even though “it produced and still produces great goods insofar as it promotes and extends the very urgent penitentiary reform...” He criticises its “sentimental aspect” because it gives “new wings to crime, with the suppression of life sentences”, it confuses “in a pitiful way a dubious effect of the penal sanction, with its end and its fundamental reason”, and it “bumps into the growing and frightening patterns of recidivism”<sup>118</sup>.

After exposing the existing schools at the end of the 19<sup>th</sup> century, Silió confesses his position in favour of the *Nuova Scuola*, but “without this meaning absolute conformity, nor unconditional assent to what they proclaim...” In short, Silió only accepts, “in a simple way”, the “method of study (...) and of the truths confirmed by the attentive and careful observation of the facts”, “certainly putting aside the sentimental utopia of Röder and his supporters.” He also affirms “with a frankness that today the classical doctrine is increasingly unstable, and its mission is fulfilled, as evidenced by the sterility of its supporters, which certainly contrasts with the second and extraordinary work of the apostles of positivism”<sup>119</sup>. Silió criticised how the “supporters of the classical school”, unlike the “apostles of positivism,” dedicated themselves to “copying their scarce productions, in the old metaphysical moulds, without even granting their adversaries the very high honour of fighting them, I do not know whether with disdain or ignorance. Frequently using mockery and sarcasm, and also falsehoods, without realising that they are forbidden weapons”. Moreover, he only excludes from this criticism Félix Aramburu y Zuloaga, who, in his work *La nueva ciencia penal*, had shown his remarkable knowledge of the new positivist theory, and criticised him scientifically, in fairness, and unlike the others, “who censor the new school, without knowing the principles it supports”<sup>120</sup>.

Silió criticised the “supporters of the classical school” for their reductionist vision of criminal law, for limiting themselves to affirming –and “repeating a thousand times”– “free will”, as if this was enough to explain and justify an amendment to the totality of the proposals of the new school, with the laws falling into notorious

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<sup>117</sup> Silió Cortés, *La crisis del derecho penal*, pp. 10-11.

<sup>118</sup> Silió Cortés, *La crisis del derecho penal*, pp. 11-12.

<sup>119</sup> Silió Cortés, *La crisis del derecho penal*, pp. 13-14.

<sup>120</sup> Silió Cortés, *La crisis del derecho penal*, p. 14; in pp. 14-15, footnote no. 1, points out that Aramburu’s scientific criticism was responded by Enrique Ferri, in the ‘Prologue’ to the Spanish edition of his work *Los Nuevos horizontes del Derecho y del Procedimiento Criminal* (1887).

inconsistencies and “betrayals”<sup>121</sup>. Moreover, –Silió continued to point out–, the extraordinary increase in crime in Europe throughout the 19th century “shows that new means of defence are needed to break the rising tide of crime”<sup>122</sup>.

In ‘Chapter One’<sup>123</sup>, however, Silió surprisingly takes a turn in his speech. In fact, after his sharp criticism of the “supporters of the classical school”, and having “placed himself fully and loyally in the second field of the supporters of new science”<sup>124</sup>, he devoted the whole chapter to making amends to the positivist school for starting “by categorically denying free will (...), the necessary consequence of materialism, which reduces us to the category of simple machines, governed and driven by forces inherent in themselves”, to the point of “converting thought, the purest and greatest, the noblest and highest thing of our being, into a secretion of brain substance”<sup>125</sup>.

Silió defends the existence of an “entirely free faculty, which ultimately takes the decisions”, “an immaterial and indefinable substance, which animates and gives warmth to matter, a mysterious and impalpable substance, different from the white and grey substances that make up the brain”, as well as a “spirit” that keeps “in the archives of mind the memories of the past, and in the consciousness, the absolute conviction of its indestructible unity”<sup>126</sup>. As a consequence, our jurist and politician from Valladolid understands that “the materialistic and determinist tendencies of the modern school”, “to formulate the conclusions that constitute its scientific creed,” are “unnecessary,” “perfectly gratuitous”, contrary “to the observations and experimental studies of the physiologists”, and counterproductive. From there, “undoubtedly arise most of the misgivings aroused by the studies of Criminal Anthropology –barely understood by its adversaries– and the repulsive horror with which we look at the new science...”<sup>127</sup>

For Silió, the connections of the soul with the brain are not enough to deny the existence of an “immaterial soul,” and it would be meaningless to consider “vice and virtue” as “mere products like vitriol or sugar”. Such conclusions could only be reached by “a fanatical spirit, since in science, too, there are fanaticisms”. Silió is therefore placed halfway between the two extremes, that of “intransigent spiritualism, which divides man into two parts in no way independent of one another,” and that “of the doctrine which claims to explain all the phenomena of life, with the mere existence of matter”<sup>128</sup>. In this sense, Silió affirms that molecular renovation, for example, cannot fully explain memory, especially when the latter, already in old age, remembers with greater ease “the events of childhood, and those other very recent ones, whose *purely material* impression should exist in all their purity”<sup>129</sup>. For Silió, one cannot deny that there is a “reciprocal influence of spirit on the matter and matter on the spirit”<sup>130</sup>.

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<sup>121</sup> Silió Cortés, *La crisis del derecho penal*, pp. 15-16.

<sup>122</sup> Silió Cortés, *La crisis del derecho penal*, pp. 16-17.

<sup>123</sup> Silió Cortés, *La crisis del derecho penal*, Chapter One, pp. 19-66.

<sup>124</sup> See footnote no. 119, as well as its corresponding main text.

<sup>125</sup> Silió Cortés, *La crisis del derecho penal*, pp. 19-20.

<sup>126</sup> Silió Cortés, *La crisis del derecho penal*, pp. 20-21.

<sup>127</sup> Silió Cortés, *La crisis del derecho penal*, p. 21.

<sup>128</sup> Silió Cortés, *La crisis del derecho penal*, pp. 25-27.

<sup>129</sup> Silió Cortés, *La crisis del derecho penal*, pp. 29-30.

<sup>130</sup> Silió Cortés, *La crisis del derecho penal*, p. 31.

Silió reasserts his affinity with the postulates of the new school. However, he rejected its materialistic premises. He was aware of the convenience, in all scientific research, of “perfectly fixing with clarity and accuracy the point of departure, so that while avoiding misinterpretations or malicious understanding, one can firmly place the first stone of the building on a terrain chosen with an honest and deep conviction”. Although it would have been “more comfortable and easier not to deal with such burning and transcendental issues as that of materialism”, Silió preferred “to begin with the concrete and clear exposition” of his opinion, and then tried to reach his primary objective: “to harmonise my spiritualist convictions with the doctrines of the Italian positivist school”<sup>131</sup>. He wanted to end this part of the first chapter by gathering the “conclusions that resume and synthesise” his ideas on the subject<sup>132</sup>. In short, Silió’s conclusions on the doctrine of matter were “equidistant (...) from the spiritualist and materialistic exaggerations”<sup>133</sup>.

Silió also criticised the determinist doctrine. Furthermore, he did so by affirming the existence of an internal faculty, which, noticed and known “through internal observation as an evident fact,” and “effectively aided by the intelligence”, decides the course of one’s actions<sup>134</sup>. For the Valladolid jurist, “free will is first and foremost a fact of conscience and purely internal observation”, whose demonstration could be compared to that of someone who can demonstrate movement through the simple act of walking<sup>135</sup>. However, taking the existence of free will for granted, Silió asks himself whether “man is responsible for his actions because he is free and only insofar as he is free or there is something, different from that, freedom, that justifies the imposition of a punishment”. Besides, he adds: “Here is a different and by no means independent issue from the one we have just discussed”, which he intends to answer from his position or “neutral ground”, supposedly far from “the stormy waves of exaggeration and passion” and from the “violent hurricane of exclusivism and intransigence”<sup>136</sup>.

When he deals with the ‘Fundamentals of criminal responsibility,’<sup>137</sup> Silió argues that this cannot be free will only, thus rejecting the classical school’s postulates. The author states that free will cannot be the foundation of responsibility, in particular when such “harmful, destructive, even monstrous acts are executed by someone who lacks that faculty”, in which case “society must sit back, commiserate the aggressor... And turn the other cheek”<sup>138</sup>.

From here on, Silió speaks once more against the “supporters of the classical school”. He does not share the opinion that “only under that freedom (...) can we be held responsible for our actions”, and that if a “force greater than our free will” is given, in that case, “neither do we deserve the prize given to the virtuous, nor are we worthy of the punishment imposed on the wicked”. Otherwise, “as it would be senseless to punish the stone for hurting an old man”, so it would be “to ask the man to account for actions

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<sup>131</sup> Silió Cortés, *La crisis del derecho penal*, p. 32.

<sup>132</sup> Silió Cortés, *La crisis del derecho penal*, pp. 32-33.

<sup>133</sup> Silió Cortés, *La crisis del derecho penal*, p. 33.

<sup>134</sup> Silió Cortés, *La crisis del derecho penal*, pp. 40-41.

<sup>135</sup> Silió Cortés, *La crisis del derecho penal*, p. 46.

<sup>136</sup> Silió Cortés, *La crisis del derecho penal*, p. 49.

<sup>137</sup> Silió Cortés, *La crisis del derecho penal*, pp. 49-66.

<sup>138</sup> Silió Cortés, *La crisis del derecho penal*, p. 50.

that do not belong to him, since he executes them and carries them out, drawn by invincible forces, which he is not able to master”<sup>139</sup>. This way of reasoning of the “supporters of the classical school” is due to “prejudices, inherited from our parents (...),” and therefore “deeply rooted in the conscience, and only after enormous struggles and violent shocks, they can be completely abandoned, and replaced by new ideas”. Additionally, these prejudices are rooted in “tradition, which is the fetter of progress, and *that* is the only cause of its strength”<sup>140</sup>.

The overcoming of such prejudices derived, according to Silió, from an entirely verifiable fact: “man is before all and primarily the social being *par excellence*, and society is as necessary for him as air for lungs”, and “Law needs society to exist, to such extent that these two terms, *Law* and *society*, cannot be conceived separately. *Law* needs a being able to demand it, and another one to carry it out; it necessarily is the indication of an existing relationship; one cannot conceive *Law* without duty”<sup>141</sup>. According to Silió, after Rousseau's social contract, it makes no sense to base the criminal responsibility exclusively and fundamentally on free will. Moreover, by quoting Ferri, Silió states that “criminal sanction should not take into account the moral guilt”<sup>142</sup>. If the individual and the family have the right to protect their lives, “why should one deny such right to that superior body in which all men are united?”<sup>143</sup>.

If the penal sanction is imposed because society exists, and the former is “the manifestation of the social function, legitimised by the need of that function,” the latter must fulfil its function and respond to the behaviours of individuals that do not “adapt completely to its peculiar form of being”, regardless of whether they act “freely or fatally, since this has little importance for our object.” Ultimately, if an individual “shows, through his acts, incompatibility with the body he belongs to, he becomes worthy, because of them, of a punishment that we will not call penal sanction, but that, through this or another name, will still be a punishment, after all”<sup>144</sup>.

Silió's approach infringed on two fundamental principles of the classical doctrine of liberal criminal law: the principle of culpability as the basis of penal sanctions and the prohibition of being punished without having been condemned for the commission of a crime, not as a preventive measure or because of the possibility to commit it. There should be no crime without guilt, and it is not appropriate to punish without verifying that one has committed a crime. However, the Rousseauian's view of society as a living body led Silió to state that “there is a perfect and absolute equality between the right of the society and the right of the individual to defend himself”. Also, as pointed out by the author, any aggression against an individual of the society had a double phase: the one “that only affects the individual while it lasts, because once it is over, the danger ends, but that keeps affecting the society, whose tranquillity becomes incompatible with the criminal's freedom”. Therefore, “once the attack ends, the right of the individual ends; but society is in danger if it does not impose the sanction, even if the aggression or the material violation of the law is over, and since the danger exists

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<sup>139</sup> Silió Cortés, *La crisis del derecho penal*, pp. 50-51.

<sup>140</sup> Silió Cortés, *La crisis del derecho penal*, pp. 51-52.

<sup>141</sup> Silió Cortés, *La crisis del derecho penal*, pp. 52-53.

<sup>142</sup> Silió Cortés, *La crisis del derecho penal*, p. 55.

<sup>143</sup> Silió Cortés, *La crisis del derecho penal*, p. 57.

<sup>144</sup> Silió Cortés, *La crisis del derecho penal*, pp. 58-59.

for the society, the right to defence, which for the individual ends with the aggression, in society does not disappear except by imposing a penal sanction, whose seriousness increases or decreases, with the danger of the criminal”<sup>145</sup>.

It is understandable that, in this light, free will was scarcely or not at all useful, regardless of its multiple “limitations, that in some cases reduce it, and they frequently even annul it”<sup>146</sup>. Furthermore, “the fact of stating that if they are executed without freedom, all the acts lose their value, and they do not deserve neither praise nor censorship, neither reward nor punishment is constantly refuted by practice.” Otherwise, it would make no sense to praise the “perhaps indifferent and lazy painter, who was able to take from the sun its light,” or the “perhaps scarcely deep, but still brilliant, fluent and clever orator”, and “a hundred painters and orators, who do not have enough aptitudes to reproduce beauty in their paintings, nor in their speeches” would not be doomed to oblivion –or even censored–<sup>147</sup>. According to Silió, what was relevant was –quoting Fouillée– “knowing if the determinism of acts suppresses the right to defence”<sup>148</sup>.

Silió was more worried about the increase in delinquency in Europe at the end of the 19th century than about the possibility of punishing some individuals because of the potential danger of their freedom in society<sup>149</sup>. He considered “the concern and fear that certain persons feel or pretend to feel facing the continuous development and the astonishing diffusion of the new school's doctrines are completely unmotivated”. Silió said he believed in freedom, but –for various reasons– he chose to relegate it to the private field of the conscience of each individual, without giving it any importance in the social, legal and criminal field. He did it because, according to him, the important thing was the social defence (*Salus populi suprema lex*), the protection of the collective, at the expenses –if necessary– of the dignity and freedom of each individual<sup>150</sup>. Silió believed that he stood in a “neutral ground,” but he was inclined –it is not easy to know whether he did it consciously or unconsciously– to consider the protection of the community at the expense of the individual, so common among the “supporters” of the positivist school.

The other chapters of *La crisis del derecho penal* [*The crisis of criminal law*] keep confirming the apparent approach of Silió<sup>151</sup>, despite disagreeing with the materialist view of the new school and believing in an assumed free will, lacking relevance in the legal-criminal field. In chapter II, on ‘*El Delito*’<sup>152</sup> [*The crime*], for example, Silió found support –primarily– in the doctrines of Lombroso, Büchner, Marro, Garofalo, and Ferri. By literally transcribing Ferri's work<sup>153</sup>, Silió understood that it was

<sup>145</sup> Silió Cortés, *La crisis del derecho penal*, p. 59.

<sup>146</sup> Silió Cortés, *La crisis del derecho penal*, pp. 59-60.

<sup>147</sup> Silió Cortés, *La crisis del derecho penal*, pp. 63-64.

<sup>148</sup> Silió Cortés, *La crisis del derecho penal*, p. 65.

<sup>149</sup> Regarding the danger, see the study by Martín Martín, S., “Criminalidad política y peligrosidad social en la España contemporánea (1870-1970)”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 38.1 (2009), pp. 861-951, in particular, pp. 922-935, although the author focuses more on the first half of the 20<sup>th</sup> century than on the last decades of the 19<sup>th</sup> century.

<sup>150</sup> Silió Cortés, *La crisis del derecho penal*, p. 66.

<sup>151</sup> See footnote no. 106, as well as its corresponding main text.

<sup>152</sup> Silió Cortés, *La crisis del derecho penal*, pp. 67-98.

<sup>153</sup> Ferri, E., *Los nuevos horizontes del derecho y del procedimiento penal*, Madrid: Establecimiento tipográfico de José Góngora, 1887 (available online:

convenient to differentiate three categories of the crime: the anthropological or individual factors<sup>154</sup>, the physical factors<sup>155</sup> and the social factors<sup>156</sup>. Besides, after literally transcribing Ferri's thought, Silió praised his "brilliant synthesis, that frames the complex set of the multiple causes that produce the crime". It justified –according to him– "the high importance of the critical mission of the anthropological school", primarily if, "by studying the offender man under his double physical and moral aspect, the social conditions in which his activity is developed and the physical environment in which he lives, it analyses each of the multiple causes of the crime"<sup>157</sup>.

Silió's positivism can be described as "critical positivism" if, by it, we mean his refusal of the new school's materialist foundation and the recognition of free will, something unthinkable among the Italian positivists of the end of the 19<sup>th</sup> century. However, the inconsistencies of Silió's positivist thought are, somehow, as notable or even more notable than those of the Italian authors themselves. It was almost useless for Silió to recognise the spirit and conscience of all human beings and free will if these realities did not permeate his legal-criminal or criminological thought. He even denied and contradicted them. As already indicated, it is not easy to know whether he did it consciously or unconsciously, and even less secure it is to tell whether he noticed some of his inconsistencies. Maybe he was influenced by the willingness –or the non-confessed interest– to ingratiate himself to Álvarez Taladrí, as a way to show his gratitude for enjoying an internship in his prestigious office. In any case, it would be correct to say that, in this work, Silió's thought was, of course, more "positivist" than "critical".

However, it does not seem that Silió maintained this thesis for long, not only because he abandoned gradually such issues, but also for his political activity and doctrine: especially in some of his last works, he does not seem to support many of the theses defended in his first period.<sup>158</sup> Furthermore, it does not seem either that, in his following texts, he brought up the issue of *La crisis del derecho penal*, a work that he wrote when he was a young lawyer willing to create for himself a future as an intern in the office of a prestigious criminal law expert captivated by the Italian positivist school.

### 2.2.6. Félix de Aramburu y Zuloaga

Félix de Aramburu y Zuloaga (1848-1913) was a Professor of Criminal Law at the University of Oviedo, son of one Professor of the same University, Juan Domingo

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<https://helvia.uco.es/xmlui/handle/10396/3473>), pp. 217-218; collected by Silió Cortés, *La crisis del derecho penal*, pp. 94-96.

<sup>154</sup> Ferri, *Los nuevos horizontes del derecho y del procedimiento penal*, pp. 217-218, paragraphs of these pages transcribed by Silió Cortés, *La crisis del derecho penal*, pp. 94-95.

<sup>155</sup> Ferri, *Los nuevos horizontes del derecho y del procedimiento penal*, p. 218; paragraph of these pages transcribed by Silió Cortés, *La crisis del derecho penal*, p. 95.

<sup>156</sup> Ferri, *Los nuevos horizontes del derecho y del procedimiento penal*, p. 218; paragraph of this page transcribed by Silió Cortés, *La crisis del derecho penal*, pp. 95-96.

<sup>157</sup> Silió Cortés, *La crisis del derecho penal*, p. 96.

<sup>158</sup> See, with regard to this –as an example–, some references not very favourable to positivism that Silió collected in another of his following works, much more known than the one analysed here: *La educación nacional*, Madrid: Librería Española y Extranjera de Francisco Beltrán, 1914 (available online: <http://bibliotecadigital.jcyl.es/es/consulta/registro.cmd?id=2103>), pp. 42, 47, 69, 105, 143, 145, 150 ("...positivismo hoy en ruinas"), 154, 156.

de Aramburu y Arregui<sup>159</sup>. Aramburu was a criminal law expert, known and respected even by those who did not share his views. Despite the fact that he made the most forceful and thorough critique against the new school –not the first one–<sup>160</sup>, Aramburu was respected and well regarded even by those who did not share his views, and deserved the appraisal and recognition of various positivists. As some stated, unlike those who criticised what they did not know, the criminal law expert from Oviedo studied the postulates of such doctrine profoundly, and criticism was acceptable only under the *auctoritas* of that study and knowledge –not of prejudice, indolence, and ignorance–<sup>161</sup>.

Although Aramburu’s work was not very extensive<sup>162</sup>, this criminal law expert is well known as a supporter of the genuine Spanish trend of correctionalism<sup>163</sup>, somewhat distant from the postulates of its founder Karl D.A. Röder, as well as the great representative and –in turn– the critic of the positivist school in Spain at the end of the 19th century<sup>164</sup>. One work was sufficient for Aramburu to earn respect and recognition as a criminal law expert (*La nueva ciencia penal. Exposición y crítica*, 1887)<sup>165</sup>, to such

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<sup>159</sup> Regarding his life, see Giuliani, A., “Juan Domingo de Aramburu y Arregui”, *Derecho ex cathedra. 1847-1936. Diccionario de catedráticos españoles* (C. Petit, ed.), Madrid: Dykinson, 2019, p. 43 (available online: [http://portal.uc3m.es/portal/page/portal/instituto\\_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/jdaramburu\\_a](http://portal.uc3m.es/portal/page/portal/instituto_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/jdaramburu_a);

[http://rabida.uhu.es/dspace/bitstream/handle/10272/17020/derecho\\_excathedra.pdf?sequence=2](http://rabida.uhu.es/dspace/bitstream/handle/10272/17020/derecho_excathedra.pdf?sequence=2); his most known work is De Aramburu y Arregui, J.D., *Instituciones de Derecho penal español, arregladas al Código reformado en 30 de junio de 1850*, Oviedo: Imp. y Lit. de Benito González, 1860; other works of his were: *Discurso inaugural que, en la solemne apertura de estudios de esta Universidad Literaria de Oviedo, pronunció el 1º de octubre de 1846...*, Imp. of F. Pedregal, Oviedo, 1846; *Manual Histórico del Derecho español*, Imp. of Benito González, Oviedo, 1860.

<sup>160</sup> The first study that presented the theories of the Italian positivist school was the one of Isidro Pérez Oliva, entitled “Escuela positivista del Derecho penal en Italia”, published in *Revista de los Tribunales*, of December 1885; two years later, the same author published the Spanish version of the work of Enrico Ferri, *Los nuevos horizontes del Derecho y del procedimiento penal* (Madrid, 1887); regarding this, see Ramos Vázquez, I., *La reforma penitenciaria en la historia contemporánea española*, Madrid: Dykinson, 2013, p. 300, footnote no. 218.

<sup>161</sup> Therefore, for example, while Álvarez Taladrid mentions Aramburu, together with Carrara, Luchini and Brusa–, among the “escritores tan ilustres” (see footnote no. 100; and its corresponding main text), Silió only excluded Aramburu from his criticism addressed to those who “censuran á la nueva escuela, sin conocer los principios que sostiene” see footnote no. 120; and its corresponding main text).

<sup>162</sup> Regarding this, it is worth to consider that he held several positions, among which the one of Chancellor of the University of Oviedo from 1888 to 1906; on his life and work, see Petit, C., “Félix Pío de Aramburu y Zuloaga”, *Derecho ex cathedra. 1847-1936. Diccionario de catedráticos españoles* (C. Petit, ed.), Madrid: Dykinson, 2019, pp. 43-44 (available online: [http://portal.uc3m.es/portal/page/portal/instituto\\_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/azuluoaga](http://portal.uc3m.es/portal/page/portal/instituto_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/azuluoaga);

[http://rabida.uhu.es/dspace/bitstream/handle/10272/17020/derecho\\_excathedra.pdf?sequence=2](http://rabida.uhu.es/dspace/bitstream/handle/10272/17020/derecho_excathedra.pdf?sequence=2).

<sup>163</sup> Together with Silvela, Millet, Auriolles, Carril, Santamaría de Paredes, Crespo, Rueda, Valdés, Llopis, and so on.; regarding this, see the references collected in footnotes nos. 6 ff., as well as their corresponding main texts; the figure of Félix de Aramburu, as criminal law expert representing the correctionalist school –with his work *La Nueva Ciencia Penal* (exposition and critique), Madrid, 1887–, was recognised by Ferri (in the Prologue to the Spanish version of his work *Los nuevos horizontes*) and Garofalo (in various passages of the last editions of *Criminología*).

<sup>164</sup> According to Bernaldo de Quirós, the critical part of the Criminal Anthropology has three great authors: Aramburu, Concepción Arenal and Silvela (Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 95-100).

<sup>165</sup> De Aramburu y Zuloaga, F., *La nueva ciencia penal. Exposición y crítica*, Madrid [and so on.], Madrid: Librería de Fernando Fé [and so on.], 1887 [Monografía de Asturias, Oviedo: A. Brid, 1899, VI] (available online:

an extent that he obtained an answer from Ferri himself -without asking for it, of course- to his critique against the positivist school<sup>166</sup>.

*La nueva ciencia penal* [*The new criminal science*] includes the conferences that the author gave in the Circle of Oviedo, as pointed out by Aramburu in his 'Prologue', and that he would have never dared to publish if he had not received the invitation to give such speeches, as well as the repeated suggestions of colleagues and friends to publish them in a book. Its structure follows the order of the five conferences that he gave. A careful reading of their content, relatively dense and extended, is sufficient to verify that Aramburu studied the new school's doctrine profoundly, from its origins until that moment.

In the 'First conference', Aramburu dealt with the '*Génesis de la Nueva Escuela*' [*Genesis of the new school*]<sup>167</sup>. He describes the evolution of the thought, from the classics until the arrival of the positivist trend, by mentioning various authors, although it only collects the works of some of them<sup>168</sup>. From the second half of the 19th century, through the influence of this materialist trend, "the terms of knowledge are subverted, and they put the man in the place of God, nature in the place of the moral world, the phenomena in the place of the principles, the infinite and the absolute move to the side before the acts,<sup>169</sup> thus emerging anthropology and sociology. Aramburu points out that, for the positivists of Law, "their main operative field is Criminal Law"<sup>170</sup>.

Aramburu analysed with remarkable attention the issue of the positivist method.<sup>171</sup> In his opinion, "the characteristic that separates the positivist method from the metaphysical one resides in the subordination of the *ideality* to *observation*, to the *fact*, since one cannot admit principles of reason or ideas preceding the organic experience. The typical processes of such a method lay on this basis: *observation*, *experiment*, *comparison*, *induction*, and *deduction*"<sup>172</sup>. Regarding this, Aramburu criticises "the whole doctrine, for ignoring the meaning of the principles of reason in themselves", and for not noticing that "the use that we make of the faculties to form knowledge through the most general organic experience possible implies a metaphysical problem *per se*" which should not be avoided, as the positivists do, by

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[http://fama2.us.es/fde/ocr/2009/la\\_Nueva\\_Ciencia\\_Penal\\_Aramburu\\_Y\\_Zuloaga.pdf](http://fama2.us.es/fde/ocr/2009/la_Nueva_Ciencia_Penal_Aramburu_Y_Zuloaga.pdf)); the relevant work that has a criminal content -although it was published in his last years-, is entitled *La actual orientación del Derecho penal y de la lucha contra el delito* (Speech read on the event of his reception by His Excellency Félix de Aramburu y Zuloaga and reply of His Excellency Eduardo Sanz y Escartin on 5 July 1910), Madrid, Fortanet, 1910; the other two works, collected by Carlos Petit in his already mentioned entry "Félix Pío de Aramburu y Zuloaga", are his *Discurso inaugural leído ante el claustro de la Universidad de Oviedo en la apertura del curso académico de 1871 a 1872*, Oviedo: Brid y Regadera, 1871; *Historias de pájaros (que parecen de hombres)*. Poesías, Barcelona: 'La Académica' de Serra hermanos y Russell, 1903.

<sup>166</sup> Ferri, E., 'Prólogo' to the Spanish edition of his work *Los Nuevos horizontes del Derecho y del Procedimiento Criminal*, Madrid, 1887 (collected in footnote no. 120); however, we have the 2nd edition, the Spanish version of Isidro Pérez Oliva, with a graphic chart of criminality in Italy and a prologue of the author expressly written for the Spanish edition, Madrid: Centro Editorial de Góngora, 1887 (available online: <https://helvia.uco.es/xmlui/handle/10396/3473>).

<sup>167</sup> De Aramburu, *La nueva ciencia penal*, pp. 3-51.

<sup>168</sup> As it is the case in some of Darwin's works: *Origen de las especies* (1859), *La descendencia del hombre* (1871).

<sup>169</sup> De Aramburu, *La nueva ciencia penal*, p. 30.

<sup>170</sup> De Aramburu, *La nueva ciencia penal*, p. 35.

<sup>171</sup> De Aramburu, *La nueva ciencia penal*, pp. 36 ff.

<sup>172</sup> De Aramburu, *La nueva ciencia penal*, p. 36; italics are used in the text by the author.

using “a cliché that says nothing: The unknowable”. He criticizes Auguste Comte, “father of the system,” for ignoring “what the Aristotelian philosophy established regarding that main issue”<sup>173</sup>.

Aramburu criticises the incoherence of those who present themselves as “the enemies of the *apriorism*” and then “assume gratuitous hypotheses dictated by a partial element of reality”. He also condemns those who “without dealing with the inconsistency of the foundation, expect to build on it an impregnable fortress.”<sup>174</sup> The criminal law expert from Oviedo considers the “supremacy” given “to the phenomenal”, whose exaggeration ends up leading “to a nihilism more complete than the one attributed to the metaphysical phantoms”<sup>175</sup>.

According to Aramburu, “the defect (...) is not on the surface, it is more profound” because it should not be used “the same measure with man and the ignorant, with the ignorant and the plant, with the plant and the stone”. Also, it is incoherent to blame some “for neglecting the criminal” and then showing a “boundless effort to defend the common security, without contemplations nor impediments of any kind”<sup>176</sup>. Aramburu blames the new school for the substitution of the “scale” for a “weighing machine”, which is a reflection of the substitution of the responsibility for “the weight of the species...and fatality”<sup>177</sup>.

At the end of his first conference, Aramburu synthesised the doctrine of the new positivist school, by referring to four points –that he analysed in the four following conferences–: the crime (which “does not have any ethical value; it is a natural phenomenon, a necessary result of the physiological laws”), the offender (“an anomalous being, someone who was left behind in the evolutionary course”), the penal sanction (“something absurd, and its efficiency for the repression of the crime is a lie”) and the judgement (“it is a danger for society, it is the triumph of ignorance and a sham of justice”)<sup>178</sup>.

In the ‘Second conference,’ on ‘*El Delito*’<sup>179</sup> [*The crime*], Aramburu focused on differentiating the human species from that of the animal to refute the natural notion of crime defended by Lombroso and the followers of the positivist school. Let us see some of his more eloquent arguments and statements.

According to Aramburu, the difference between the human being and the non-rational animal is so evident that there cannot “be immorality where there are fatal laws.” He considered the identification between man and animal “so absurd (...) that I would not have insisted on it” if it had not been “included in a book of positivist science”<sup>180</sup>. According to the professor of the University of Oviedo, “man is an animal, but he is something more than that; from animality to rationality, there is an enormous distance”. Facing the classic statement that “the Animal (...) has instinct, man has intelligence”, when he saw how some stated that also “animals are intelligent,”

<sup>173</sup> De Aramburu, *La nueva ciencia penal*, p. 45.

<sup>174</sup> De Aramburu, *La nueva ciencia penal*, p. 45.

<sup>175</sup> De Aramburu, *La nueva ciencia penal*, pp. 45-46.

<sup>176</sup> De Aramburu, *La nueva ciencia penal*, pp. 49-50.

<sup>177</sup> De Aramburu, *La nueva ciencia penal*, p. 50.

<sup>178</sup> De Aramburu, *La nueva ciencia penal*, pp. 50-51.

<sup>179</sup> De Aramburu, *La nueva ciencia penal*, pp. 55-106.

<sup>180</sup> De Aramburu, *La nueva ciencia penal*, pp. 65.

Aramburu repeated that such statement does not “express anything concrete, because (...) in a certain sense, a mechanism can also be qualified as intelligent”<sup>181</sup>. Aramburu does not deny that the animal can carry out “acts similar to the ones carried out by man,” but he adds that the “light” that guides the animal, “the intelligence (if we want to call it by this name) that it reveals, is very distant from human intelligence”<sup>182</sup>.

In human life, “necessity has a great role, and the organisation and the medium have a strong effect on the agent; however, all these concessions are not enough to deny and destroy human freedom”<sup>183</sup>. By quoting Kant, Aramburu explains that “freedom is the typical form of causality (...) and the offender causes the crime by letting himself be defeated by the appetite that enslaves will itself”. He also quotes St. Thomas Aquinas: if freedom is “*electio mediorum servato ordine finis* (...)”, our criminal law expert understands that “the criminal does not choose according to the order of the medium that he uses when he determines himself”. In this context, Aramburu shows his correctionalist thought. Precisely because “the honour of being free (...) resides in bending before the law and the authority that dictates it, and the Criminal rebels against the authority and the law”, the author states that “the penal sanction must be tutelary and educative to strengthen that energy that gives up so easily before passion; to regenerate that spirit that renounced to its best weapons and dithers and falls in the battle that evil presents to it”<sup>184</sup>.

Ultimately, Aramburu decided to demonstrate that it is not correct to equate “man and the animals with regard to crime”, that the crime “cannot occur except when the privative elements of intelligence and freedom of our species occur”, and that such elements constitute “the ethical foundation of the criminal disturbance”. He admits that man has aspects in common with the inert beings (“The man falls like a stone when he loses his balance”), with plant life (“he physically grows like the plant, as time passes”), and with animal life (“he feeds himself, reproduces himself, moves, has senses and instincts like the animal”). Nevertheless, every man is something more than that, thus differentiating himself “mainly from everything else in his *rationality*, which allows him to act for his own good and provides him with a law by giving him (...) the absolute good, detached from all egoism, and the possibility to comply with it meritoriously through *freedom*”<sup>185</sup>.

According to Aramburu, if freedom is the *conditio sine qua non* for the existence of Crime and Law –the latter understood as “norm of free conduct”–, the animals, since they lack freedom, cannot have a Law and they are only “producers of damages, not subjects of crimes”<sup>186</sup>. Because every crime “entails a conscious abandonment of norms of conduct connected to the universal order, dictated for being able to understand them and to deny them, since he is intelligent and free.” Besides, this is the “substantial” element of the crime beyond the “purely external or apparent” element or the so-called “embryology of crime”. Hence the mistake of those who, since they see “in crime a fatal and necessary phenomenon, expect to let their ideas fall on disgrace and not on wickedness”. A clear proof of this mistake is the attitude of positivists themselves. In

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<sup>181</sup> De Aramburu, *La nueva ciencia penal*, pp. 77-78.

<sup>182</sup> De Aramburu, *La nueva ciencia penal*, p. 79.

<sup>183</sup> De Aramburu, *La nueva ciencia penal*, pp. 87-88.

<sup>184</sup> De Aramburu, *La nueva ciencia penal*, p. 91.

<sup>185</sup> De Aramburu, *La nueva ciencia penal*, pp. 91-92.

<sup>186</sup> De Aramburu, *La nueva ciencia penal*, pp. 92-93.

fact, “when the fatalists protest against punishments in the name of justice, they demonstrate (...) how deeply inscribed they are in the heart of man, together with the idea of just, merit and demerit, which imply, in turn, the idea of freedom”<sup>187</sup>.

In the ‘Third Conference’ on ‘El Delincuente’ [*The offender*]<sup>188</sup>, Aramburu admits that that topic “is the one that the new criminal school studies the most”<sup>189</sup>. “According to the criminal schools preceding the naturalist or positivist one,” the offender is “a man that is essentially equal to the rest of men and who, despite knowing the law and being able to comply with it, consciously denies it, by obeying to clumsy and immoral appetites,” “a degraded and perverted individual, who can and should experience amendment and regeneration through penal sanction”<sup>190</sup>. For the new school, he is “an anthropological variety, a madman, a sick person...;” thus, it aims at overcoming the “theological and metaphysical prejudices” of the previous criminal science<sup>191</sup>.

After showing a remarkable knowledge of the new school's authors, and in particular, Lombroso (*El hombre Delincuente*), Aramburu criticises his notion of “offender.” He does it firstly from the perspective of common sense, by distinguishing between the offender and the madmen. Lastly, in section VII, he underscores the reflections, commentaries, and objections that the Italian criminal law expert's doctrine inspires him, with detailed criticisms and objections. In the final part, he states the incongruence implied by the fact that the woman, who has some of the physiological characteristics that are more typical of the offender –according to Lombroso's theory– is “four times less criminal than men”<sup>192</sup>.

In the ‘Fourth Conference,’ on the penal sanction (‘La Pena’)<sup>193</sup>, Aramburu reveals the complete breach entailed by the conception of penal sanction of the new school. The “capital principles (...) reining only on punishability” were two: 1) the *moral responsibility* (“there is no crime when the people are not morally responsible for their actions”) and 2) the *criminal proportion* (“the quantity of the penal sanction must be proportionate to the seriousness of the crime”). According to the positivist school, these two principles (*moral responsibility* and *criminal proportion*) are unacceptable because “they entail false assumptions and serious flaws”. It occurs because –in their opinion– “the responsibility lies on the existence of free will, a metaphysical theory generated by the ignorance of the vast majority of the motives that determine the will and of the true strength that is attributed to those who are known”<sup>194</sup>. Furthermore, Aramburu also complains about the fact that, concerning the penal sanction, the new school is only interested “in the fact that the means that it uses is not *desirable* for the offender and is *sufficient* for social defence,” thus suppressing “the merit and the demerit of actions” and “ignoring justice”<sup>195</sup>.

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<sup>187</sup> De Aramburu, *La nueva ciencia penal*, pp. 105-106.

<sup>188</sup> De Aramburu, *La nueva ciencia penal*, pp. 109-180.

<sup>189</sup> De Aramburu, *La nueva ciencia penal*, p. 109.

<sup>190</sup> De Aramburu, *La nueva ciencia penal*, p. 124.

<sup>191</sup> De Aramburu, *La nueva ciencia penal*, pp. 124-125.

<sup>192</sup> De Aramburu, *La nueva ciencia penal*, p. 180.

<sup>193</sup> De Aramburu, *La nueva ciencia penal*, pp. 183-263.

<sup>194</sup> De Aramburu, *La nueva ciencia penal*, pp. 202-203.

<sup>195</sup> De Aramburu, *La nueva ciencia penal*, p. 212.

According to Aramburu, “the most daring negation”, “the most arrogant pretension” and “the greatest absurdity” of the new school is the refusal of the moral responsibility of the offender, the fact of understanding responsibility as “a chimera of those who dream of free will,” while logic suggests precisely the opposite: “There is no responsibility?” Then there is no offender. Therefore there should be no penal sanction”. Moreover, if there were a responsibility, the logical approach would be the following: “...The one who did it, the one who caused damage, the one who committed a crime, and knew what he was doing, that was causing damage, that was committing a crime, and could avoid doing it, causing damage, committing a crime, is punished”. Besides, when he receives his punishment, one cannot forget what the offender is; he receives it for what he is and according to what he did, and with the pretension and the possibility that he may condemn what he has done and may not repeat the same abhorrent action in the future”<sup>196</sup>.

Since it denied the free will and, therefore, the offender's moral responsibility, the new school looked for the foundation of penal sanction in other bases such as the *social responsibility*, the *social defence*, and the *good of the species*. About the first one, Aramburu states that “if one denies the individual responsibility, either he does not know what the society is, or the social responsibility must be denied: one thing implies the other”. Regarding the *social defence*, he pointed out that, although it already seemed inappropriate when used “by schools that recognised responsibility”, “in the present case and with the positivist sense, the inappropriateness grows higher”. Finally, the *good or preservation of the species* was, according to the criminal law expert from Oviedo, “a euphemism, and it does not mean anything more than the caprice, the tyranny, the strength”<sup>197</sup>.

Aramburu even states that the new school is not scientifically acceptable under any point of view, that is, “neither for its heart nor its form; neither in its foundations nor in its applications,” it lacks “originality”, “logic”, and “rigour of its deductions”, and it is full of “skilful arrangements”, “contradictions” and “insuperable (...) difficulties”<sup>198</sup>. He does not share the view of those who wanted to banish the expressions “*law, punish, penal sanction*”, among others, and to replace them with the ones of “*legal laws, repressive function, repressive or eliminating means*, and so forth, as if with this change a great advance was made”<sup>199</sup>.

After a rigorous description and an accurate critique of the doctrine of the “Criminal substitutes” of Ferri<sup>200</sup>, he concludes by denouncing the pretension of the new school of setting itself up to a new educative religion of citizenry. Facing this, he points out that it would make no sense to transform “religion into a tool of petty interests, that aims at monopolising those who with their hate and resentments move away from the spirit of charity”, to settle for a religion “with vain formulas, with empty appearances” or with an “imitation of religion” that would cover up “a frightful emptiness and a repulsive infertility”. In other words, the new school's doctrine would be like a denatured religion devoid of content, and not one that “informs the conduct and is incarnated in life, that regenerates and enlivens, that illuminates and warms up, that

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<sup>196</sup> De Aramburu, *La nueva ciencia penal*, pp. 219-220.

<sup>197</sup> De Aramburu, *La nueva ciencia penal*, p. 230.

<sup>198</sup> De Aramburu, *La nueva ciencia penal*, p. 233.

<sup>199</sup> De Aramburu, *La nueva ciencia penal*, p. 233.

<sup>200</sup> De Aramburu, *La nueva ciencia penal*, pp. 250-263.

overcomes the passions and upraises the ideals”. According to Aramburu, this religion can be found only in “the august religion of Christ, well felt and practised for real, infused from childhood, cultivated during the adult life, honoured at home and outside, never indifferent for the State, it is the one that can have an unmeasurable effect on the dreadful problem of criminality”. If “the vast majority of offenders is composed of men who lack any religious education, who did not have this brake to repress their evil impulses,” Aramburu affirms that the best “criminal substitute” is to transmit a “healthy education to all the social classes”. Because if it is true that “to open a school is to close a jail,” it is also true that “to open to God the intelligence of the hearts is to tackle crime”<sup>201</sup>.

In the ‘Fifth Conference’ on judgement (*‘El Juicio’*)<sup>202</sup>, Aramburu states that “the interests of justice are not incompatible with the interests of freedom. Rather, they are both harmonious and mutually affect and complete each other”, a harmony questioned or even denied by “the criminal law experts of positivism,” who seem to focus almost exclusively on the “intimidation effect”<sup>203</sup>.

According to Ferri and Garofalo, once one can prove the fact in the trial, “as Ferri writes, the magistrate determines the degree of *danger* of the offender, the social danger that is the result of *that* act carried out by *that* man in *those* circumstances, by using psychology, anthropology and criminal statistics to that end. Or, in other words, as Garofalo writes, the magistrate defines the guilty and orders the treatment that he deems more appropriate in compliance with the formulas and instructions of the code and the result of the direct exam of the pathological case. Thus, since such indications must necessarily be very general, they will only serve as a guide, and they will always entail a special investigation to specify the true nature and the exact definition of the case in question. Any clemency petition would be inappropriate. It is not about the individual anymore since his trial concluded after the resolution of factual issues. Rather, it is about the society that asks for protection, and the offended person who asks for compensation”<sup>204</sup>.

At the end of the last conference, Aramburu collected –in around ten pages– a summary or synthesis of his critique against the theses of the new criminal science<sup>205</sup>. Furthermore, the work collects, as a final ‘Appendix,’ a review of Luchini’s work on the new school, whose content –divided into ten chapters, the first one on the ‘social defence’– is described and reviewed, and whose critique, in various parts, is shared by the professor from Oviedo.

It is a bit of a paradox that the best presentation of the doctrine of the positivist school in Spain at the end of the 19<sup>th</sup> century should be borne by the one who developed, at the same time, its most rigorous, thorough and forceful critique. According to Maristany, Aramburu was the first great expositor of the theses of Lombroso<sup>206</sup>. According to Bernaldo de Quirós, he was the great critic<sup>207</sup>. The truth is

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<sup>201</sup> De Aramburu, *La nueva ciencia penal*, pp. 262-263.

<sup>202</sup> De Aramburu, *La nueva ciencia penal*, pp. 267-348.

<sup>203</sup> De Aramburu, *La nueva ciencia penal*, p. 282.

<sup>204</sup> De Aramburu, *La nueva ciencia penal*, p. 292.

<sup>205</sup> De Aramburu, *La nueva ciencia penal*, pp. 338-348.

<sup>206</sup> See footnote no. 28.

<sup>207</sup> See footnote no. 48.

that he was the two things at the same time, the great expositor and the great critic of the new school in the nineteenth-century Spain, thus honouring the title he chose for his work: *La nueva ciencia penal. Exposición y crítica*<sup>208</sup>.

### 2.2.7. Constante Amor y Naveiro

Constante Amor y Naveiro was the second great critic of the positivist school in Spain at the end of the 19th century<sup>209</sup>. I say ‘second’ because Aramburu, in my opinion, goes further in terms of extension, deepness, and rigour. On the one hand, Aramburu made a detailed presentation and criticised the positive school through the *auctoritas* of his in-depth knowledge. On the other hand, Amor y Naveiro’s presentation was less extended, and his forceful critique analysed the fundamental elements of the positivist school<sup>210</sup>.

His main work on criminal law is relatively known, maybe because it was awarded the second prize by the Royal Academy of Moral and Political Sciences in the regular competition of 1895, concerning the second topic (“*Examen crítico de las nuevas escuelas de derecho penal*”). Amor y Naveiro decided to present his work with that same title, which deserved –according to the tribunal, and not to Bernaldo de Quirós–<sup>211</sup> the award mentioned above and was published four years later<sup>212</sup>.

<sup>208</sup> See footnote no. 165.

<sup>209</sup> The information available on his life and work is reduced. He is known for his Academic record (available at <http://pares.mcu.es/ParesBusquedas20/catalogo/description/1483213>), and for being a student of the Faculty of Law of the Universidad Central. He was born in Ames (La Coruña). He had a Degree in Civil and Canon Law; he was Doctor in Civil and Canon Law. He defended his doctoral thesis in 1902, and its title was: “Naturaleza y origen histórico del derecho de castigar”.

<sup>210</sup> That is why it is hard to share the view of Ramos Vázquez, *La reforma penitenciaria en la historia contemporánea española*, p. 300, where, while comparing the critique to the new school of Aramburu with the one of Amor y Naveiro, he states that the one of the latter was “una crítica más completa a la cuestión”; maybe it is more complete as compared to the foundations of his critique, to which he dedicates the first pages, but not as a whole. The number of words and pages of both works reveal that the study of Aramburu (348 pages) was more extended than the one of Amor y Naveiro (286 pages), and that the knowledge that he had of the positivist school was more profound and detailed than the one of Amor y Naveiro. However, it must be taken into account that the object of Amor y Naveiro’s work is more extended than the one of Aramburu’s work, because he did not simply present and criticise the positivist school - First Part, pp. 31-286- but also the correctionalist one -Second Part, pp. 287-310- although very superficially and with gaps (for example he did not even mention Dorado Montero).

<sup>211</sup> Bernaldo de Quirós mentions this work in a footnote of his study, by stating -in the main text- that “[a]lguna otra obra crítica se ha publicado en España; pero de aquellas que por su escasa ciencia ó su conciencia no muy libre de prejuicios y odios misonéistas, interesa pasar por alto, pero nombrándolas”. And by quoting one of them and complaining “del triste estado de esta España que sigue produciendo inquisidores”, he points out that: “En 1895, la Academia de Ciencias Morales y Políticas puso como tema segundo de su concurso ordinario un *Examen crítico de las nuevas escuelas de derecho penal*. Examinadas tres memorias que tuvo por presentadas, declaró no haber lugar á premio, y sí á otros tantos *accessits*; dos de los cuales correspondieron á las que firmaban el Sr. Amor y los Sres. Arredondo y Bravo Goyena; y otro a la que, con escasas fuentes, el autor de este libro había redactado encontrándose en un lugar de la provincia de Ávila (Cebreros). Por mucho que le honrara esta recompensa, ha considerado oportuno renunciarla, al advertir que, contra naturaleza, se había permitido juzgar lo que aún no conocía como es debido conocer para formar un juicio” (Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 200, footnote no. 2).

<sup>212</sup> Amor y Naveiro, C., *Examen crítico de las nuevas escuelas de Derecho penal*. A report that received the second prize by the Royal Academy of Moral and Political Sciences in the regular competition of 1895 (second topic), Madrid, 1899 (available at [http://fama2.us.es/fde/ocr/2009/examen\\_Critico\\_De\\_Las\\_Nuevas\\_Escuelas\\_De\\_Derecho\\_Penal.pdf](http://fama2.us.es/fde/ocr/2009/examen_Critico_De_Las_Nuevas_Escuelas_De_Derecho_Penal.pdf)).

Amor y Naveiro wanted to clarify the fundamental premises of Law in general and of criminal law in particular, before starting his critical presentation of the positivist school. He did so in his ‘Introduction,’ where he dealt with the ‘moral order and the legal order’ (§ I) and with the ‘crime and its elements’ (§ II).

About the ‘moral order and the legal order’<sup>213</sup>, Amor y Naveiro starts from the jusnaturalist approach of Saint Thomas Aquinas, which describes the existence of an order in the creation that derives from God creator. Therefore, every existing thing expresses that order: “in the physical world, the Laws of Nature, and man, the Moral Law”. Whereas the order of nature is “contingent in its origin, and *relatively* necessary in its execution”, the moral order “is conditionally necessary in its origin and contingent in its fulfilment”. Despite the existence of ethical laws, “man is *de facto* free to oppose those laws and break the order that they represent”<sup>214</sup>.

If “the moral law regulates all the human acts”, and “man was born to live in society,” it is logical to think that a part of Moral “guides the social acts”, thus being, in turn, “expression of the social order”. Therefore –suggests Amor y Naveiro–, “this part of Moral referred to “the social acts” is Law, understanding this word in the objective sense, that is, as a law or norm of conduct”<sup>215</sup>. Seen in these terms, “Law does not identify completely with the Moral, but it cannot be separated from it either, because they have in common its material object, the human acts, and its formal object, which corresponds to guiding them towards good and order”. The separation of these two realities, that is, if the legal norms were not moral as well, they would not be “morally binding” and would lose their rationality to become a “mere determination of coercions without a norm [moral] to adhere to”, Therefore, “Law can only differentiate itself from Moral as a part of the whole”<sup>216</sup>.

Law and moral have convergent and divergent aspects. They are convergent because “God has written both realities. Their foundation is the essential order of things, and their subject is the rational and free man, whose *voluntary* acts regulate both”. However, they are different because moral “has as its material object all the human acts and its formal object is their honesty or overall goodness”, whereas Law “has as its material object only the acts that are somehow *social* and its formal object is the specific honesty of such acts, which is *justice*”<sup>217</sup>. From this derives the difference between crime and sin: “Every crime, therefore, is a sin, although not every sin is a crime”<sup>218</sup>.

Amor y Naveiro dealt with ‘Del delito y sus elementos’ [crime and its elements] (§ II)<sup>219</sup>, by starting from a particular definition of crime, “*any infraction of Law through voluntary and external acts,*” glossing each one of its elements: “*infraction of*

<sup>213</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, pp. 7-11.

<sup>214</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 7, nos. 1-2.

<sup>215</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 8, no. 3.

<sup>216</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 8, no. 4.

<sup>217</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, pp. 9-12, no. 5.

<sup>218</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 12, no. 6; regarding this, see Masferrer, A., “La distinción entre delito y pecado en la tradición penal bajomedieval y moderna. Una propuesta revisionista de la historiografía española, europea y anglosajona”, *Anuario de Historia del Derecho Español* 87 (2017), pp. 693-756.

<sup>219</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, pp. 12-29.

Law” (not “sins for being mere infractions of Moral,” *voluntary* acts (“if they were not voluntary, they could not be immoral, and even less unlawful or criminal”), *external* acts (otherwise, “they could not be criminal, although they were immoral; because the merely internal acts do not affect social order”)<sup>220</sup>.

According to Amor y Naveiro, “in Law, as in Moral, the acts carried out with knowledge and freedom are called *voluntary acts*”<sup>221</sup>. All crimes entail, according to this author, the convergence of two necessary elements, an internal one (the “effective intention of executing an act that infringes the law,” and an external one (“the external acts accessible to the senses, with which the internal element is carried out and shown”). This distinction is essential, because the external element is the “necessary complement and necessary condition for an act, that otherwise would be only immoral, to be strictly unlawful or *criminal*”. The external element, united with the internal act (or of will), does not only “acquire *as the case may be* a new nature, the nature of the crime”. Instead, “the same will is depraved more normally when it externalises its bad acts, than when it does not externalise them” thus provoking “a mysterious return of influence of the external good or bad acts on the will [as an internal element] that disposed of them”<sup>222</sup>.

Amor y Naveiro concludes this introductory section by stating that the penal sanction is the answer from the public power that has “the mission of protecting the fulfilment of the order of Law” and is also responsible for the restoration of this order when the crime has caused its disruption”<sup>223</sup>.

In the following sections, on ‘Penal sanction and its aims’ (§ III), he starts by defining the penal sanction as “the ailment that the public authority must impose on offenders, to reinstate the order disrupted by crime”<sup>224</sup>. He explains that to the triple disruption of crime –depending on whether it contradicts i) the proper legal order or the divine-natural law; ii) the intellectual and volitional order of the members; and iii) the fair order of the will of the offender–, the punishment must respond by restoring each of such disruptions –with i) the expiation; ii) the exemplariness, and iii) the correction–.<sup>225</sup>

He concludes his ‘Introduction’ on the principles that should be the foundation of Criminal law, and verifies that “there have been many schools and isolated authors of Criminal law who ignored or contested directly or indirectly the fundamental principles that I have established regarding the crime and the penal sanction.” He also states that his purpose is to “examine the new schools that squarely contradict such principles: the positivist school and the correctionalist one”. In this study, we will only analyse his

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<sup>220</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 12, no. 7.

<sup>221</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, pp. 12-13, no. 8.

<sup>222</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, pp. 13-14, nos. 9-11.

<sup>223</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 14, no. 12; on the predominant idea of crime as the transgressio of a natural order that must be re-established by the penal sanction, see the works of Martín Martín, S., “Penalística y penalistas españoles a la luz del principio de legalidad (1874-1944), *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 36 (2007), pp. 503-609; Ruíz Robledo, A., *El derecho fundamental a la legalidad*, Valencia: tirant lo Blanch, 2004.

<sup>224</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 14.

<sup>225</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, pp. 16-29.

critic against the first one, “the newest, the most invasive and dangerous of these schools”, in his opinion<sup>226</sup>.

In his critic of the positivist school<sup>227</sup>, he admitted having been explicitly inspired by the main work of Enrico Ferri, *Los nuevos horizontes del Derecho...*<sup>228</sup>. Nevertheless, the text shows that he knows and notably quotes the primary studies of Lombroso, Garofalo, and Tarde, among others. He uses or adheres to the critique of Aramburu against the new criminal positivist doctrines on various occasions<sup>229</sup>.

Despite considering himself as “a spiritualist, a scholastic and a humble disciple of the ethical-legal school of Suárez and Fr. Alfonso de Castro”, he states that he has “no doubt in adopting, by correcting them, some of the ideas that today are warmly protected by the followers of positivism (although they are much older than the latter)”<sup>230</sup>. In any case, his critique is harsh, and it is not easy to glimpse those parts of the positivist theses that the author says he is ready to accept.

He thinks that the historical reasons of the criminal positivism's emergence are, among others: “the spirit of independence, insubordination of the understandings and that of the hearts against the doctrine and the Law of Jesus Christ and the *magisterium* of the Church; the love for novelty; the vanity of differentiating oneself from the crowd –and constitute a school–; the desire to break those bonds against which the low passions of nature protest; that spirit of rebellion, overall...”<sup>231</sup>.

When he explains the emergence of positivism, he starts from Auguste Comte, and his disciple Littré, and from Strauss, who joined positivism from the Hegelian idealism, not empiricism<sup>232</sup>. In the criminal field, Amor y Naveiro points out that Lombroso was –with his *Antropología criminal*– the first one who studied it from his medical profession. Tarde progressed in his medical profession in France.

Chapter II analyses the ‘positivist method’<sup>233</sup> and focuses on art. 3 ‘El método en el Derecho penal’<sup>234</sup> [*The method in criminal law*], where he demonstrates the existence, in Criminal law, of “purely rational principles, which constitute the fundamental and absolute part of such law or, in other words, that the method of that law is the one of pure reason”<sup>235</sup>. Amor y Naveiro affirms, by quoting the criminal law

<sup>226</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 29.

<sup>227</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, Primera Parte, pp. 31-286.

<sup>228</sup> Ferri, E., *Los nuevos horizontes del Derecho y del procedimiento penal* (Spanish version of Isidro Pérez Oliva, Madrid, 1887) (Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 31, footnote no. 1).

<sup>229</sup> It is incorrect to state the same with regard to his critique to the correctionalist school, for which he used a lot less sources (Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, Segunda Parte, pp. 287-310). In this sense -as an example-, he points out that the main supporters of that school are professors Silvela (Madrid), Rueda (Santiago de Compostela) and Aramburu (Oviedo), but he does not mention any of their works.

<sup>230</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 38.

<sup>231</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 51.

<sup>232</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 56.

<sup>233</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, pp. 59 ff.

<sup>234</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, pp. 106 ff.

<sup>235</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 110.

expert José Tissot<sup>236</sup>, that if we see “Law as a set of precepts that determine duties,” such “precepts and duties, both in the criminal and other legal orders, can only be naturally recognised through reason”<sup>237</sup>.

Amor y Naveiro knew very well the new school when he wrote his *Examen crítico de las nuevas escuelas de Derecho penal*, in spite of his young age. In fact, three years later, he published his doctoral thesis on a topic related to this issue: “Naturaleza y origen histórico del derecho de castigar”<sup>238</sup>. Additionally, he kept studying Criminal law, as some of his publications show<sup>239</sup>. As the priest of a church in Santiago de Compostela, he kept studying these issues, and he has even done researches in Italy to study in-depth Criminal Law and criminal sociology. There, he attended a course taught by Enrico Ferri on ‘Derecho y Procedimiento penal’ [criminal law and procedure]<sup>240</sup>. He wanted to be appointed to a chair of Criminal law. He participated in (at least) two civil service examinations, but he was not appointed. Eventually, one of the designated was Luis Jiménez de Asúa<sup>241</sup>.

## 2.2.8. Máximo de Arredondo Fernández Sanjurjo and José Bravo Goyena

The third work, whose main aim is to make a critical analysis of the positivist school, was written by two authors, Máximo de Arredondo Fernández Sanjurjo (1866-1936) and José Bravo Goyena<sup>242</sup>.

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<sup>236</sup> Tissot, J., *Derecho penal estudiado en sus principios y en sus aplicaciones y legislaciones de los diversos pueblos del mundo*, Spanish version of the edition 1880 por J. Ortega García, extended with norms and some bibliographical indications of the author by A. García Moreno, Madrid, 1880) (available at [https://sirio.ua.es/libros/BDerecho/derecho\\_penal\\_01/index.htm](https://sirio.ua.es/libros/BDerecho/derecho_penal_01/index.htm)); quoted by Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 110.

<sup>237</sup> Amor y Naveiro, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 110.

<sup>238</sup> See footnote no. 209.

<sup>239</sup> On Criminal law, he also published the *Bibliografía de los estudios penales por orden alfabético de autores, seguida de varias clasificaciones que facilitan el uso de la misma*, Editorial: Hijos de Reus, 1909; *El problema de la pena de muerte y de sus sustitutos legales: sustitutivo para la represión del anarquismo* (with a prologue by Dr. D. P. Isaac Rovira), Madrid: Hijos de Reus, 1917; whose years of publication are excluded from the chronological contexts of our study.

<sup>240</sup> In fact, it is known that when he was a priest in Santiago de Galicia (Sovereign Ordinance of 15.12.1910), he made a six-month stay in Italy to study Criminal Law and Criminal Sociology from 4 February 1911. Specifically, “[p]ermaneció dos meses en Roma, asistiendo en la Universidad á la clase del profesor E. Ferri, sobre Derecho y Procedimiento penal, y á las de los profesores Sergi y Pigorini. En los comienzos de Abril vino á España para hacer unas oposiciones y regresó á Roma el 11 de Mayo, permaneciendo en Italia hasta fines de Julio. Durante este tiempo estuvo en Módena, Bolonia, Turín, Milán y Florencia para ponerse en relación con los profesores Alimena, Stoppato, P. Gemelli, Mayno y P. Bianchi. Ha presentado una Memoria sobre “Las causas psicológicas de los delitos” (‘Memoria correspondiente a los años 1910 y 1911’, *Junta de Ampliación de Estudios e Investigaciones Científicas*, p. 32; available online: <http://cedros.residencia.csic.es/imagenes/Portal/ArchivoJAE/memorias/003.pdf>).

<sup>241</sup> On the first examination, the one of 1911, I do not have any other information than the reference collected in the previous footnote; regarding the second one, of 1918, there is more information: he participated to obtain a chair of Criminal Law in an examination convoked by virtue of a R.O. of 15 July 1915, published in the Gazette of 15 August; the examination took place between February and March of 1918, and Luis Jiménez de Asúa, Federico Castejón and Enrique de Benito de la Llave participated in it. Jiménez de Asúa obtained it and he did not move the second exercise; regarding this, see <https://www.boe.es/datos/pdfs/BOE//1915/299/A00193-00193.pdf>; Díaz Rico, J.C., (ed.), *Oposiciones a cátedras de derecho (1847-1943)*, Madrid: Dykinson, 2018, pp. 240-241.

<sup>242</sup> Arredondo y Fernández Sanjurjo M. de & Bravo Goyena, J., *Examen crítico de las nuevas escuelas de Derecho penal*. A report that received the second prize by the Royal Academy of Moral and

Máximo de Arredondo was a judge, and he is well known for the translation from German into Spanish of the work -already a classic- of Hans Gross, entitled *Handbuch für Untersuchungsrichter als System der Kriminalistik*<sup>243</sup>. José Bravo Goyena is less popular: he obtained a degree and a PhD in Law from the Universidad Central.<sup>244</sup> After a failed attempt to be appointed to the chair of Natural Law at the University of Valladolid<sup>245</sup>, he worked for a few years as a lawyer, and unexpectedly killed himself, leaving a wife and three children<sup>246</sup>.

After an ‘Introduction’<sup>247</sup>, with a short historical overview of the legal thought, the work analyses, in the first part, the ‘Generation and development of the positivist school,’<sup>248</sup> ‘The problem of moral freedom or free will,’ in which they criticised Ferri<sup>249</sup>, ‘the offender and his classes’<sup>250</sup>, and ‘The imputability and social responsibility.’<sup>251</sup> The second part deals with ‘The crime and its factors’<sup>252</sup>, ‘The *criminal substitutes* of Ferri and the rational system of penal sanction according to Garofalo’<sup>253</sup>, and ‘The judicial procedure according to positivists’<sup>254</sup>.

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Political Sciences in the regular competition of 1895 (second topic), Madrid, 1898 (available online: [https://sirio.ua.es/libros/BDerecho/examen\\_critico/index.htm](https://sirio.ua.es/libros/BDerecho/examen_critico/index.htm)).

<sup>243</sup> Gross, H., *Manual del Juez: para uso de los Jueces de instrucción y Municipales, Gobernadores de provincia Alcaldes, Escribanos, Oficiales y Subalternos de la Guardia Civil, Agentes de policía*, and so on., Translation and Prologue by Máximo de Arredondo, Madrid: La España Moderna, 1893; the work was reviewed by Félix de Aramburu, published in the *Revista de Derecho y Sociología. Una revista de vanguardia para el pensamiento jurídico hispano*, directed by Adolfo Posada, in its Year 1, Issue 1, 1895, p. 115.

<sup>244</sup> Academic record of José Bravo Goyena (1889-1897), student of the Faculty of Law of the Universidad Central. Born in Laredo (Cantabria). PhD in Law. Thesis: “Contratos por correo y por telégrafo” (<http://pares.mcu.es/ParesBusquedas20/catalogo/description/1485433?nm>).

<sup>245</sup> Diario Oficial de Avisos de Madrid, 25 February 1900, he appears in a list of person participating in a civil service examination for obtaining a vacant chair in Natural Law at the university of Valladolid (<file:///C:/Users/Direccion/Downloads/Diario%20oficial%20de%20avisos%20de%20Madrid.%2025-2-1900.pdf>).

<sup>246</sup> This is how it is collected and described in the *Heraldo de Madrid*, 31 July 1904, available at <file:///C:/Users/Direccion/Downloads/El%20Heraldo%20de%20Madrid.%2031-7-1904.pdf>: “El portero de la casa (...) dijo que el suicida era D. José Bravo Goyena, abogado de profesión y domiciliado en la calle del Almirante, núm. 2, piso segundo. Vivía con su esposa y tres hijos de corta edad. Parece que esta tarde salió la señora de D. José Bravo, llevando de paseo en su compañía á los tres niños, y quedando solo en la casa el abogado, que aprovechó la ocasión para consumir el desesperado pensamiento que deseaba poner en práctica. Nadie había advertido en el Sr. Bravo Goyena nada anormal, revelador de sus siniestros propósitos”.

<sup>247</sup> Arredondo & Bravo Goyena, *Examen crítico de las nuevas escuelas de Derecho penal*, pp. 11-61.

<sup>248</sup> Arredondo & Bravo Goyena, *Examen crítico de las nuevas escuelas de Derecho penal*, chapter I, pp. 63-84.

<sup>249</sup> Arredondo & Bravo Goyena, *Examen crítico de las nuevas escuelas de Derecho penal*, chapter II, pp. 85-125.

<sup>250</sup> Arredondo & Bravo Goyena, *Examen crítico de las nuevas escuelas de Derecho penal*, chapter III, pp. 127-168.

<sup>251</sup> Arredondo & Bravo Goyena, *Examen crítico de las nuevas escuelas de Derecho penal*, chapter IV, pp. 169-205.

<sup>252</sup> Arredondo & Bravo Goyena, *Examen crítico de las nuevas escuelas de Derecho penal*, chapter I, pp. 207-247.

<sup>253</sup> Arredondo & Bravo Goyena, *Examen crítico de las nuevas escuelas de Derecho penal*, chapter II, pp. 249-289.

<sup>254</sup> Arredondo & Bravo Goyena, *Examen crítico de las nuevas escuelas de Derecho penal*, chapter III, pp. 291-302.

In the ‘Conclusions’<sup>255</sup>, they show their discrepancy with the fundamental postulates of the positivist school. Nevertheless, they also point out some ‘coincidences’. The authors declare that “the positivist writers deserve well from the penal science, which needs to improve or progress, especially in the practical order that, at least in our Homeland, cannot be worse than it is”<sup>256</sup>. In particular –also considering the data that the *Dirección de Penales* published in 1888–, both authors affirm that the “modality to execute the penal sanction” should be reformed with the mutual effort of the “men of science” and the “men of the State”. Otherwise, “it is impossible to solve the problem of the crime”<sup>257</sup>.

### 2.2.9. Other criminal law experts

According to Bernaldo de Quirós, the critical part of the Criminal Anthropology had three great authors: Aramburu, Concepción Arenal, and Silvela<sup>258</sup>. Leaving aside the prejudices that this author could have against Amor y Naveiro, Arredondo, and Bravo Goyena –to whose works he only dedicated a not very complimentary footnote–<sup>259</sup>, it is comprehensible that he quoted Aramburu. It is less understandable that he cited Concepción Arenal and Silvela, two famous authors thanks to their contribution in the criminal field (Arenal)<sup>260</sup> and the correctionalist one (Silvela)<sup>261</sup>, but maybe less known for their critical contribution regarding the positivist school. According to Bernaldo de Quirós<sup>262</sup>, Concepción Arenal’s most relevant works on Criminal Anthropology are three: *Manual del Visitador del preso* (1862)<sup>263</sup>, *Cartas á los delincuentes* (1865)<sup>264</sup>, *Delito colectivo* (1896)<sup>265</sup>. Among them, maybe the last one, considering its publication

<sup>255</sup> Arredondo & Bravo Goyena, *Examen crítico de las nuevas escuelas de Derecho penal*, pp. 303-306.

<sup>256</sup> Arredondo & Bravo Goyena, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 305.

<sup>257</sup> Arredondo & Bravo Goyena, *Examen crítico de las nuevas escuelas de Derecho penal*, p. 306.

<sup>258</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 95-100.

<sup>259</sup> See the content of footnote no. 211.

<sup>260</sup> See, in particular, Arenal, C., *Estudios penitenciarios*, Madrid: Librería de Victoriano Suárez, 1895 (available online: <http://www.cervantesvirtual.com/obra/estudios-penitenciarios--0/>).

<sup>261</sup> Silvela, L., *El Derecho penal estudiado en sus principios y en la legislación vigente en España*, book I (Madrid, 1874) and book II (Madrid, 1879), as Bernaldo de Quirós himself admitted (with regard to this, see footnote no. 13, as well as its corresponding main text); see also his study –with a more informational tone– *El Código penal y el sentido común*, Madrid, 1886; regarding this, see the study of Antón Oneca, J., “La teoría de la pena en los correccionistas españoles”, *Obras*, Buenos Aires, 2000, t. I, pp. 160-162.

<sup>262</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 96-98.

<sup>263</sup> Work that was translated into various European languages (Ruiza, M., Fernández, T. & Tamaro, E., “Biografía de Concepción Arenal”, *Biografías y Vidas. La enciclopedia biográfica en línea*, Barcelona, (2004) (available at <https://www.biografiasyvidas.com/biografia/a/arenal.htm>; date consulted: 11.3.2020).

<sup>264</sup> Arenal, C., *Cartas á los delincuentes* (1865); I use the version edited by *Obras Completas de Concepción Arenal*, Madrid: Librería de Victoriano Suárez, 1894, book III (available at [https://sirio.ua.es/libros/BEducacion/obras\\_completas\\_de\\_concepcion\\_arenal\\_t\\_3/](https://sirio.ua.es/libros/BEducacion/obras_completas_de_concepcion_arenal_t_3/)).

<sup>265</sup> Arenal, C., *Delito colectivo* (1896); I use the edition of Madrid: Librería de Victoriano Suárez, 1896 (available at [http://www.cervantesvirtual.com/obra-visor/el-delito-colectivo--0/html/fefa0df2-82b1-11df-acc7-002185ce6064\\_3.html](http://www.cervantesvirtual.com/obra-visor/el-delito-colectivo--0/html/fefa0df2-82b1-11df-acc7-002185ce6064_3.html)).

year and its content, is more related to Criminal Anthropology, although it does not seem to share a big part of the postulates of Lombroso, Ferry, and Garofalo<sup>266</sup>.

Even Luis Silvela analysed the Criminal Anthropology<sup>267</sup>, in particular in his article “*El Derecho penal y los sistemas fatalistas y deterministas de la Antropología Criminal*” [‘*Criminal law and the fatalist and determinist systems of criminal anthropology*’] (1898)<sup>268</sup>. Bernaldo de Quirós criticised the small number of pages that Silvela dedicated to this issue: “Only thirty pages are enough, according to him, for this sentence of exile”<sup>269</sup>, Bernaldo de Quirós criticised the small number of pages that Silvela dedicated to this issue: “Only thirty pages are enough, for him, for this sentence of exile”. He reproached Silvela for “not knowing, of the new times, anything more than a vulgar and incomplete echo”, for “the lack of information and study of the issues that he defiles”, for using “comparisons of the worst taste”, and for other mistakes “that should not be attributed to a typographical error since all jurists know one must rectify the proofs with the *diligence of a good Father of the Family*”<sup>270</sup>. As can be seen, this short study of Silvela upsets Bernaldo de Quirós, who had no trouble in putting it down on paper and publishing it<sup>271</sup>.

It would be a mistake to think that those who adopted the authentic Spanish version of correctionalism or the new penitentiary trends, as Concepción Arenal, were supporters of the Italian positivist school. In general, they adopted a more open attitude towards the needs and new trends of the moment, but they never endorsed nor uncritically adhered to them. Therefore, for example, Romero Girón<sup>272</sup>, who played an essential role in the introduction of the Krause's correctionalist doctrine in Spain, confessed that he disagreed with “the Italian criminal law expert on his fundamental principles and his criminal theory [P.S. Mancini]”, despite being aware of the “high exigencies or imperious needs” that the criminal reform demanded<sup>273</sup>.

### 2.2.10. Contribution to medicine: the pathologising of crime

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<sup>266</sup> This work has its origin in the Congress of Criminal Anthropology of Brussels (1892), that Arenal wanted to attend and were I wanted to deliver a speech, but that was not possible, as she explains in the preliminary ‘Advertencia’ of the work. “Estas observaciones empezaron a escribirse para el Congreso de Antropología criminal de Bruselas, pero nos faltó salud, y expiró el plazo en que debían presentarse los trabajos mucho antes de haber terminado el nuestro” (Arenal, *Delito colectivo*, ‘Advertencia’).

<sup>267</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 98-100.

<sup>268</sup> Silvela, L., “El Derecho Penal y los sistemas fatalistas y deterministas de la Antropología Criminal”, *La España Moderna* 111 (1898), pp. 117-148.

<sup>269</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 99.

<sup>270</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 99.

<sup>271</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, p. 200, page whose footnote collected the arch critique already mentioned in footnote no. 211.

<sup>272</sup> Regarding this, see footnotes nos. 10-11, as well as their corresponding main texts.

<sup>273</sup> Romero y Girón, V., ‘Prologo’ to the *Proyecto de Código Penal Italiano*, by P. S. Mancini (translated by Vicente Romero y Girón), Madrid: Imprenta de la Revista de Legislación, 1879, viii ([https://books.google.es/books/about/Proyecto\\_de\\_c%C3%B3digo\\_penal\\_italiano.html?id=3ekzAQAAMAAJ&redir\\_esc=y](https://books.google.es/books/about/Proyecto_de_c%C3%B3digo_penal_italiano.html?id=3ekzAQAAMAAJ&redir_esc=y)); see, of the same author, his *Discurso leído por el Excmo. Sr. D. Vicente Romero Girón... en la sesión inaugural del curso de 1890 á 1891 celebrada en 14 de noviembre de 1890*, Madrid: Real Academia de Jurisprudencia y Legislación: Imprenta del Ministerio de Gracia y Justicia, 1890.

As observed, not so many jurists -criminal law experts or criminologists- published works of great importance that defended the thesis of the Italian positivist school. At the end of the 19th century, what was present in Spain was a large number of doctors, whose works -not always sufficiently rigorous and verified- contributed to the pathological study of crime or, if preferred, to the “pathologising of crime”<sup>274</sup>. Bernaldo de Quirós mentioned some of them, although most of the references are incomplete and, in some cases, with mistakes. An author, whose work he collected thoroughly and rigorously, was Ángel Pulido Fernández (1852-1932)<sup>275</sup>. In his work *Locos Delincuentes* (1883)<sup>276</sup>, he defended something right: the secret or non-public execution of the penal sanction is better, because the science showed, according to him, that the public execution did not only “not punish, but also infects and confuses the audience”<sup>277</sup>.

On the other hand, Pulido Fernández perfectly embodied the mentality of ‘scientism’ at the end of the 19th century. So, for example, he simplifies “the judgements of the human personality”, by comparing the “religious feeling” and the “scientific reason”. The first one adheres to the “*revealed truths*”, thus “resolving the problem, and it only takes care of not modifying that primitive judgement that he defends with energy against all the pretensions of science.” In contrast, the “scientific reason”, through the work –“that God imposed on man as if he wanted to distract his passage on this earth”– “modifies its concepts on its constitution, extends and offers new phases and perspectives as time and human spirit progress”<sup>278</sup>. According to Pulido, “the religion has satisfied its needs, and knows what is relevant for man”. Instead, science –“which started by being nothing, contrary to religion, which started by being everything”–, with its studies on “the mechanism, the modality of the constitution, the viable circumstances of the human body, as a consequence of its conquests”, was eventually able to modify “the judgement on man”<sup>279</sup>.

From the end of the sixties, and in particular during the last decades of the 19th century, the number of doctors worried by the various studies related to criminality increased, and it reflected in the development and publication of works, generally not very extended. It is the case of Fernando Calatraveño Valldares and Florencio Gaona Bocos, on “crime and madness”<sup>280</sup>; José de Letamendi, on “criminality before

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<sup>274</sup> Regarding this, see Campos Marín, R., “Crimen y locura. La patologización del crimen en la España de la Restauración”, *Norba. Revista de Historia* 20 (2007), pp. 85-105; more recently, Davies, R., “Crime and Reform in La España Moderna (1889-1914)”, *Bulletin of Spanish Studies* 95:4 (2018), pp. 243-272.

<sup>275</sup> See the Entry “Ángel Pulido Fernández”, Real Academia de la Historia (available online: <http://dbe.rah.es/biografias/24734/angel-pulido-fernandez>; access date: 10.3.2020).

<sup>276</sup> Pulido Fernández, A., *Locos Delincuentes*. Speeches delivered at the Sección de Ciencias Naturales del Ateneo científico y literario de Madrid on the topic ‘Estado actual de la ciencia frenopática y sus relaciones con el Derecho penal. Madrid: Imprenta de la Revista de Legislación, 1883.

<sup>277</sup> Bernaldo de Quirós, *Las nuevas teorías de la criminalidad*, pp. 94-95; see also Pulido Fernández, Á., *La pena capital en España*, Madrid, 1897.

<sup>278</sup> Pulido Fernández, *Locos Delincuentes*, p. 22.

<sup>279</sup> Pulido Fernández, *Locos Delincuentes*, pp. 22-23.

<sup>280</sup> Calatraveño y Valldares, Fernando & Gaona Bocos, Florencio, *Discursos sobre el crimen y la locura*. Ateneo Antropológico, Madrid, 1877 (available at <https://ebuah.uah.es/dspace/bitstream/handle/10017/5937/Bases%20Bibliogr%C3%A1ficas%20para%20una%20Historia%20de%20los%20Ateneos%20de%20Espa%C3%B1a%20y%20Am%C3%A9rica.%20Publicaciones%20Peri%C3%B3dicas%20y%20Obras.pdf?sequence=1&isAllowed=y>).

science”<sup>281</sup>; Eduardo Lozano Caparrós, on “madness facing the oral trial”<sup>282</sup>; Abdon Sánchez Herrero, on “hypnotism and suggestion”<sup>283</sup>; Antonio Velázquez de Castro, on “the responsibility of the hysterics”<sup>284</sup>; Vicente Ots y Esquerdo, on “the irresponsibility of the madmen”<sup>285</sup>; José María Escuder, on “madmen and anomalous men”<sup>286</sup>; Luis Dolsa i Ramón, on “degeneration and responsibility”<sup>287</sup>; Tomás Maestre Pérez, “on a mad homicidal”<sup>288</sup>, and so on.

These works emerged in a historical context of fascination for the use of the positivist method in science –in general– and the biological and medical sciences –in particular–. These researches would undoubtedly be very well known by a doctor as Rafael Salillas, but not so much by jurists such as Bernaldo de Quirós and Félix de Aramburu, and even less –or not at all– by the majority of the Spanish criminal law experts of the end of the 19th century, as we can deduce from the content of their studies. The programs and manuals of Criminal Law support this same interpretation: many of them describe the significant criminal trends or even the “fight of schools”, but they do not deal with the medical contribution concerning the pathologising of crime<sup>289</sup>.

### 3. To conclude

At the end of the 19th century, in 1897, Emilio Brusa, a known Italian criminal law expert, summarised the reaction to the Criminal Anthropology in Spain with the following words:

“Criminal Anthropology has been cultivated in Spain more than Sociology, but without the constitution of a compact and definite nucleus, until now. Álvarez Taladriz founded, in the

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<sup>281</sup> Letamendi Manjarrés, J. de, *La Criminalidad ante la ciencia*: speech-summary of the debate conducted by the Sección de Ciencias físicas del Ateneo de Madrid during the literary year from 1882 to 1883, Madrid: Estab. tip. de R. Cuesta, 1883.

<sup>282</sup> Lozano Caparrós, E., *La locura ante el juicio oral*, Madrid, 1884.

<sup>283</sup> Sánchez Herrero, A., *El hipnotismo y la sugestión. Estudios de fisio-psico y de psico-terapia seguidos de dos apéndices... segundo: la hipnoscopia judicial y la sugestión hipnótico-inquisitiva en el derecho penal y civil*, Valladolid: Estab. Tip. de Hijos de J. Pastor, 1889.

<sup>284</sup> Velázquez de Castro, A., *Responsabilidad de las histéricas*. Speech read at the inauguration of the Royal Academy of Medicine and Surgery of Granada, Granada, 1893 (available at [http://www.bibliotecavirtualdeandalucia.es/catalogo/es/catalogo\\_imagenes/grupo.cmd?path=156047](http://www.bibliotecavirtualdeandalucia.es/catalogo/es/catalogo_imagenes/grupo.cmd?path=156047)).

<sup>285</sup> Ots y Esquerdo, V., *La locura ante los tribunales o estudio médico-legal de la irresponsabilidad del loco*, Madrid, 1894.

<sup>286</sup> Escuder, J.M., *Locos y anómalos*, Madrid: Tip. Sucesores de Rivadeneyra, 1895.

<sup>287</sup> Dolsa i Ramón, L., *Concepto de degeneración y responsabilidad legal de sus productos mentales*. Inaugural speech of the academic year 1895-96 read in the Academy and Laboratory of Medical Sciences, Barcelona: Imprenta de Henrich & Cia., 1895.

<sup>288</sup> Maestre Pérez, T., *Un loco homicida*, Madrid: Impr. Rev. de Legislación, 1899.

<sup>289</sup> See, for example, the *Programa de la asignatura de Derecho Penal, ordenado por el Dr. D. Luis Gestoso y Acosta, profesor encargado de dicha asignatura*, Universidad de Salamanca, Curso 1889-1890, Valladolid: Imprenta de Hijos de J. Pastor, no date; in this programme, of the 16 lessons of the Programme, the first 18 –almost a third of the Course– dealt with the foundation of the right to punish and of penal sanction, by providing a historical overview of the theories that existed in contemporary Spain. In this way, for example, lessons 11 and 12 deal with the German schools, starting from Kant, from the theories of psychological coercion (Feuerbach), of the intimidation or exemplariness (Klein, Püttman), of the warning, of the special prevention (Grolman), of compensation (Welcker), and of the correctional (Röder). The presentation of this issue of the foundation of the right to punish ends in lesson 18 with the ‘Verdadero de éste’, with a comparative analysis of the different opinions and with a ‘Resumen y juicio crítico’ (p. 6).

first years of such an unusual movement, a Journal similar to the ones that Lombroso and Lacassagne run in Turin and Lyon (*Revista de Antropología criminal*); César Silió, secretary of the same publication, which has already disappeared, wrote on the *Crisis del Derecho penal* [the crisis of penal law]. After the translation of the school's fundamental texts (Pérez Oliva, the *Nuevos Horizontes del Derecho y el Procedimiento penal*, by Ferri; Dorado Montero, *La Criminología*, by Garofalo; Salillas prepares the translation of *Hombre delincuente*, by Lombroso) presentations, polemics, and propaganda commenced. The most notable presentation work belongs to Dorado, *La Antropología criminal en Italia*, and Salillas is the liveliest propagandist. The main journals (*De Legislación y Jurisprudencia*, *Boletín de la Institución libre de Enseñanza*, *La Nueva Ciencia Jurídica*), gave, of course, a special place to the new studies that in Spain, as in the rest of Europe, stand out for a greater liveliness and scientific production. For the critique, Aramburu's work, *La Nueva Ciencia penal*, is, without a doubt, the best one published in our homeland<sup>290</sup>.

At that time, this was not, of course, a bad summary. One year later, there was the publication of the work by the person who, according to us, was the criminal law expert more convinced of the bounties of the positivist school: Constancio Bernaldo de Quirós. Until that moment, the positivist school had not constituted “a compact and definite nucleus.” It never did. As we have seen, not many jurists carried out rigorous studies defending the Italian positivist school. Leaving aside Rafael Salillas –who was a doctor and a criminologist, not a jurist–, it is worth to mention the eclectic figure of Dorado Montero –more correctionalist and ‘social defender’ than representative of the positivist school–, the “critical positivism” of César Silió –who abandoned the topic after publishing *La crisis del derecho penal*–, and Bernaldo de Quirós –who is probably the criminal law expert most committed to Criminal Anthropology–. The other studied authors were somewhat critical of the *Nuova Scuola*: Aramburu, Silvela, Amor y Naveiro, Arredondo, and Bravo Goyena.

Among them, Aramburu's critic was the most rigorous one, respected and influential, probably because, leaving aside his prestige as a criminal law expert and Chancellor of his university, he was able to carry out –in his *Nueva ciencia penal*– a brilliant presentation and, at the same time, a consistent critique. In this sense, it should be true that “positivism had a strong impact in Spain towards the end of the 19th century and the beginning of the 20th, although with the predominance of the critical stances”<sup>291</sup>. That does not seem to have changed at the beginning of the 20<sup>th</sup> century. However, the confirmation of this hypothesis requires another study.

## Bibliographical references

Alonso Burgos, J., *Marginalidad y delincuencia en la España de la Restauración (1875-1923). Una introducción a la obra de Constancio Bernaldo de Quirós; estudio preliminar a Figuras delincuentes y Figuras delincuentes en el Quijote*, Jaén, 2008.

Amor y Naveiro, C.:

- “Las causas psicológicas de los delitos” (‘Memoria correspondiente a los años 1910 y 1911’, *Junta de Ampliación de Estudios e Investigaciones Científicas*, p. 32; available online: <http://cedros.residencia.csic.es/imagenes/Portal/ArchivoJAE/memorias/003.pdf>).
- *Bibliografía de los estudios penales por orden alfabético de autores, seguida de varias clasificaciones que facilitan el uso de la misma*, Editorial: Hijos de Reus, 1909; *El*

<sup>290</sup> Brusa, *Prolegómenos de Derecho penal...*, pp. 528-529.

<sup>291</sup> Serrano Mañillo, *Introducción a la Criminología*, p. 103.

*problema de la pena de muerte y de sus sustitutos legales: sustitutivo para la represión del anarquismo* (with a prologue by Dr. D. P. Isaac Rovira), Madrid: Hijos de Reus, 1917.

- *Examen crítico de las nuevas escuelas de Derecho penal*. A report that received the second prize by the Royal Academy of Moral and Political Sciences in the regular competition of 1895 (second topic), Madrid, 1899 (available at [http://fama2.us.es/fde/ocr/2009/examen\\_Critico\\_De\\_Las\\_Nuevas\\_Escuelas\\_De\\_Derecho\\_Penal.pdf](http://fama2.us.es/fde/ocr/2009/examen_Critico_De_Las_Nuevas_Escuelas_De_Derecho_Penal.pdf)).

Antón Oneca, J.:

- “Don Rafael Salillas”, *Anuario de Derecho Penal y Ciencias Penales* (Madrid: Instituto de Estudios Jurídicos), 1974.
- “La teoría de la pena en los correccionistas españoles”, *Obras*, Buenos Aires, 2000, t. I.
- *La utopía penal de Dorado Montero*, Salamanca: Universidad de Salamanca, 1951.

Arenal, C.:

- *Cartas á los delincuentes* (1865); I use the version edited by *Obras Completas de Concepción Arenal*, Madrid: Librería de Victoriano Suárez, 1894, book III (available at [https://sirio.ua.es/libros/BEducacion/obras\\_completas\\_de\\_concepcion\\_arenal\\_t\\_3/](https://sirio.ua.es/libros/BEducacion/obras_completas_de_concepcion_arenal_t_3/)).
- *Delito colectivo* (1896); I use the edition of Madrid: Librería de Victoriano Suárez, 1896 (available at [http://www.cervantesvirtual.com/obra-visor/el-delito-colectivo--0/html/fefa0df2-82b1-11df-acc7-002185ce6064\\_3.html](http://www.cervantesvirtual.com/obra-visor/el-delito-colectivo--0/html/fefa0df2-82b1-11df-acc7-002185ce6064_3.html)).
- *Estudios penitenciarios*, Madrid: Librería de Victoriano Suárez, 1895 (available online: <http://www.cervantesvirtual.com/obra/estudios-penitenciarios--0/>).

Arredondo y Fernández Sanjurjo M. de & Bravo Goyena, J., *Examen crítico de las nuevas escuelas de Derecho penal*. A report that received the second prize by the Royal Academy of Moral and Political Sciences in the regular competition of 1895 (second topic), Madrid, 1898 (available online: [https://sirio.ua.es/libros/BDerecho/examen\\_critico/index.htm](https://sirio.ua.es/libros/BDerecho/examen_critico/index.htm)).

Arroyo Zapatero, L., “Luis Jiménez de Asúa”, *Diccionario Biográfico de la Real Academia de la Historia*, Madrid 2011, vol. XXVII, 22nd open edition 2018 (available at [http://blog.uclm.es/luisarroyozapatero/files/2018/04/JIM%C3%89NEZ-DE-AS%C3%9AA-LAZ\\_RAE\\_Definitivo2018-1.pdf](http://blog.uclm.es/luisarroyozapatero/files/2018/04/JIM%C3%89NEZ-DE-AS%C3%9AA-LAZ_RAE_Definitivo2018-1.pdf)).

Bernaldo de Quirós, C.:

- *Las nuevas teorías de la criminalidad*, Madrid: Hijos de Reus, 1898; *Modern Theories of Criminality (Modern Criminal Science Series)*, Boston, Massachusetts: Little, Brown and Company, 1911 [review in English, published the same year, in *The Yale Law Journal* Vol. 20, No. 6 (Apr., 1911), pp. 519-521].
- *El alcoholismo*, Barcelona: Gili, 1903;
- *Alrededor del delito y de la pena*, Madrid: Viuda de Rodríguez Serra, 1904.
- *Criminología de los delitos de sangre en España*, Madrid: P. Apaletgui, 1906.
- *La Picota, crímenes y castigos en Castilla en los tiempos medios*, Madrid: Suárez, 1908.
- *Figuras delincuentes con ocho reproducciones de antiguos rollos jurisdiccionales*, Madrid, J. Góngora, ¿1908?.
- “Yebala y Garb,” *Boletín de la Real Sociedad española de Historia Natural* (Madrid), separata (July 1914).
- *Derecho Penal*, Madrid: Instituto Reus, 1931.
- *Cursillo de criminología y derecho penal*, Santo Domingo: Montalvo, 1940.
- *Lecciones de legislación penal comparada*, Santo Domingo: Montalvo, 1944.
- *Nuevas noticias de picotas americanas*, La Habana: Montero, 1952.
- *Lecciones de derecho penitenciario*, México: Universidad, 1953.
- *El bandolerismo en España y en México*, México: Jurídica Mexicana, 1959.

Bernaldo de Quirós, C. / Llanas Aguilaniedo, J.M., *La mala vida en Madrid*, Madrid: Cerra, 1901.

Broto Salanova, J., *Un olvidado: José María Llanas Aguilaniedo*, Huesca: IEA, 1992.

Brusa, E., *Prolegómenos de Derecho penal, con un apéndice sobre el Derecho penal español (historia y fuentes)* [Turin, 1888], Madrid: Hijos de Reus, editores, 1897.

Burillo, F., “Rafael Salillas. En los orígenes de la Criminología”, *Rolde* 90 (October-December 1999), pp. 45-50.

Calatraveño y Valldares, Fernando & Gaona Bocos, Florencio, *Discursos sobre el crimen y la locura*. Ateneo Antropológico, Madrid, 1877 (available at <https://ebuah.uah.es/dspace/bitstream/handle/10017/5937/Bases%20Bibliogr%C3%A1ficas%20para%20una%20Historia%20de%20los%20Ateneos%20de%20Espa%C3%BAa%20y%20Am%C3%A9rica.%20Publicaciones%20Peri%C3%B3dicas%20y%20Obras.pdf?sequence=1&isAllowed=y>).

Campos Marín, R., “Crimen y locura. La patologización del crimen en la España de la Restauración”, *Norba. Revista de Historia* 20 (2007), pp. 85-105.

Cano García, J.A.:

- “Ángel María Álvarez Taladriz”, *Diccionario Biográfico de la Real Academia de la Historia*, Madrid 2011 (available at <http://dbe.rah.es/biografias/63569/angel-maria-alvarez-taladriz-cabeza-de-vaca>).
- *El poder político en Valladolid durante la Restauración. La figura de César Silió*, Valladolid: Universidad de Valladolid, 1996.

Capellán de Miguel, G., *La España armónica. El proyecto del krausismo español para una sociedad en conflicto*, Madrid: Biblioteca Nueva, 2006.

Cassá Bernaldo de Quirós, C., *Vida y antepasados de Constancio Bernaldo de Quirós*, Santo Domingo, Instituto Dominicano de Genealogía, 1998.

Checa Godoy, A., *Historia de la prensa pedagógica en España*, Sevilla: Universidad de Sevilla, 2002.

Davies, R., “Crime and Reform in La España Moderna (1889-1914)”, *Bulletin of Spanish Studies* 95:4 (2018), pp. 243-272.

De Aramburu y Arregui, J.D.:

- *Instituciones de Derecho penal español, arregladas al Código reformado en 30 de junio de 1850*, Oviedo: Imp. y Lit. de Benito González, 1860.
- *Discurso inaugural que, en la solemne apertura de estudios de esta Universidad Literaria de Oviedo, pronunció el 1º de octubre de 1846...*, Imp. of F. Pedregal, Oviedo, 1846.
- *Manual Histórico del Derecho español*, Imp. of Benito González, Oviedo, 1860.

De Aramburu y Zuloaga, F.:

- *La nueva ciencia penal. Exposición y crítica*, Madrid [and so on.], Madrid: Librería de Fernando Fé [and so on.], 1887 [Monografía de Asturias, Oviedo: A. Brid, 1899, VI] (available online: [http://fama2.us.es/fde/ocr/2009/la\\_Nueva\\_Ciencia\\_Penal\\_Aramburu\\_Y\\_Zuloaga.pdf](http://fama2.us.es/fde/ocr/2009/la_Nueva_Ciencia_Penal_Aramburu_Y_Zuloaga.pdf)).
- *La actual orientación del Derecho penal y de la lucha contra el delito* (Speech read on the event of his reception by His Excellency Félix de Aramburu y Zuloaga and reply of His Excellency Eduardo Sanz y Escartin on 5 July 1910), Madrid, Fortanet, 1910.
- *Discurso inaugural leído ante el claustro de la Universidad de Oviedo en la apertura del curso académico de 1871 a 1872*, Oviedo: Brid y Regadera, 1871; *Historias de pájaros (que parecen de hombres). Poesías*, Barcelona: ‘La Académica’ de Serra hermanos y Russell, 1903.

Díaz Rico, J.C., (ed.), *Oposiciones a cátedras de derecho (1847-1943)*, Madrid: Dykinson, 2018.

Dolsa i Ramón, L., *Concepto de degeneración y responsabilidad legal de sus productos mentales*. Inaugural speech of the academic year 1895-96 read in the Academy and Laboratory of Medical Sciences, Barcelona: Imprenta de Henrich & Cia., 1895.

Dorado Montero, P.:

- “Los correccionistas españoles y la escuela positiva”, *La Scuola Positiva* (1894).
- “Del Derecho penal represivo al preventivo”, *Revista de Legislación y Jurisprudencia*, t. 90.
- “Sobre el libro Hampa del Dr. Salillas”, *Derecho protector de los criminales*, Madrid: Lib. de Victoriano Suárez, Madrid, 1915.

- *El positivismo en la ciencia jurídica y social italiana*. 2ª Parte, Economía política, filosofía del derecho, derecho civil, derecho político, derecho romano, otras ramas jurídicas, Madrid, Revista de Legislación, 1891.
- *La Antropología criminal en Italia*, Madrid: Imprenta de la Revista de Legislación, 1889.
- *Problemas jurídicos contemporáneos*, Madrid: La España Moderna, [1893?] ([https://sirio.ua.es/libros/BDerecho/problemas\\_juridicos/index.htm](https://sirio.ua.es/libros/BDerecho/problemas_juridicos/index.htm)).
- Review of “*Las nuevas teorías de la criminalidad* (Madrid: Hijos de Reus, 1898), by Constancio Bernaldo de Quirós”, *Revista general de legislación y jurisprudencia* 46 (93) (1898), pp. 377-378.

Durkheim, E., *Les regles de la méthode sociologique* (1895); it was not translated into Spanish (*Las reglas del método sociológico*) until 1984 (Madrid: ed. Morata) and two years later in Mexico (México: Fondo de Cultura Económica; available at [https://eva.fcs.edu.uy/pluginfile.php/45453/mod\\_resource/content/1/LAS\\_REGLAS\\_DEL\\_METODO\\_SOCIOLOGICO - EMILE DURKHEIN - PDF.pdf](https://eva.fcs.edu.uy/pluginfile.php/45453/mod_resource/content/1/LAS_REGLAS_DEL_METODO_SOCIOLOGICO_-_EMILE_DURKHEIN_-_PDF.pdf)).

Escuder, J.M., *Locos y anómalos*, Madrid: Tip. Sucesores de Rivadeneyra, 1895.

Fernández Rodríguez, M.D., *El pensamiento penitenciario y criminalista de Rafael Salillas*, La Coruña: Universidad de Santiago de Compostela, 1976.

Ferri, E., *Los nuevos horizontes del derecho y del procedimiento penal*, trans. by I. Pérez Oliva, Madrid: Establecimiento tipográfico de José Góngora, 1887 (available online: <https://helvia.uco.es/xmlui/handle/10396/3473>).

Galera Gómez, A.:

- “La antropología criminal en España: su proceso de asimilación y evolución”, *Asclepio. Revista de Historia de la Medicina y de la Ciencia* 39.1 (1988), pp. 273-289.
- *Ciencia y delincuencia*, Sevilla: CSIC, 1991.
- *Introducción de la Antropología criminal en España. La Antropología criminal en la obra de Rafael Salillas*, Ciencias Biológicas, Universidad Complutense, 1984.
- “Rafael Salillas: medio siglo de antropología criminal española”, *Llul* 9 (1986), pp. 8-104.

García Canales, M., *El problema constitucional en la dictadura de Primo de Rivera*, Madrid: Centro de Estudios Constitucionales, 1980.

García Cano, J.A., “El conservadurismo vallisoletano en la segunda Restauración”, *Investigaciones históricas. Época moderna y contemporánea* 15 (1995) pp. 97-106.

García Herreros, E., “Semblanza de Bernaldo de Quirós”, *Revista Jurídica* 64 (21 May 1904).

Gestoso y Acosta, L., *Programa de la asignatura de Derecho Penal, ordenado por el Dr. D. Luis Gestoso y Acosta, profesor encargado de dicha asignatura*, Universidad de Salamanca, Curso 1889-1890, Valladolid: Imprenta de Hijos de J. Pastor, no date.

Gil Pecharromán, J.:

- “César Silió Cortés”, *Diccionario Biográfico de la Real Academia de la Historia*, Madrid 2011 (available at <http://dbe.rah.es/biografias/8238/cesar-silio-cortes>).
- *Conservadores subversivos. La derecha autoritaria alfonsina, 1913-1936*, Madrid: Eudema, 1994.

Giner, V., “Carlos Röder”, *Revista de Legislación*, 1880.

Giuliani, A., “Juan Domingo de Aramburu y Arregui”, *Derecho ex cathedra. 1847-1936. Diccionario de catedráticos españoles* (C. Petit, ed.), Madrid: Dykinson, 2019 (available online: [http://portal.uc3m.es/portal/page/portal/instituto\\_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/jdaramburu\\_a](http://portal.uc3m.es/portal/page/portal/instituto_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/jdaramburu_a); [http://rabida.uhu.es/dspace/bitstream/handle/10272/17020/derecho\\_excathedra.pdf?sequence=2](http://rabida.uhu.es/dspace/bitstream/handle/10272/17020/derecho_excathedra.pdf?sequence=2))

González Cuevas, P.C., “El pensamiento político de Silió”, *Razón Española* 99 (September-October 1999).

González Hernández, M. J., *Ciudadanía y acción. El conservadurismo maurista, 1907-1923*, Madrid: Siglo XXI, 1990.

González, E., *Sociedad y educación en la España de Alfonso XIII*, Madrid: Fundación Universitaria Española, 1988.

Gross, H., *Manual del Juez: para uso de los Jueces de instrucción y Municipales, Gobernadores de provincia Alcaldes, Escribanos, Oficiales y Subalternos de la Guardia Civil, Agentes de policía*, and so on., Translation and Prologue by Máximo de Arredondo, Madrid: La España Moderna, 1893.

Iñesta-Pastor, E., “La interpretación del eclecticismo en la doctrina y en la legislación penal de la España del siglo XIX”, *Ius Fugit* 19 (2016), pp. 209-230.

Jiménez de Asúa, L.:

- “Rafael Salillas. Sus precursores y discípulos”, *El Criminalista* (Buenos Aires) 3 (1949), pp. 36 ff.
- *Tratado de Derecho penal*, Buenos Aires: ed. Losada, 1964.
- “La larga y ejemplar vida de Constancio Bernaldo de Quirós”, Preliminary Study to *El espartaquismo agrario andaluz*, Madrid, 1974.

Jorge Barreiro, A., *Las medidas de seguridad en el derecho español: un estudio de la ley de peligrosidad y rehabilitación social de 1970 y de la doctrina de la Sala de Apelación de Peligrosidad*, Madrid: Civitas, 1976.

Letamendi Manjarrés, J. de, *La Criminalidad ante la ciencia: speech-summary of the debate conducted by the Seccion de Ciencias físicas del Ateneo de Madrid during the literary year from 1882 to 1883*, Madrid: Estab. tip. de R. Cuesta, 1883.

Liszt, F. von, *La legislación penal comparada*, published by agreement of the International Union of Criminal Law, book I: El Derecho criminal de los Estados europeos (translation from the French version by Adolfo Posada, Madrid-Berlín, 1896).

Lithner, K., “Pioneers in Criminology: Karl Roeder—A Forgotten Prison Reformer”, 59 *J. Crim. L. Criminology & Police Sci.* 219 (1968) (available at <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=5517&context=jclc>).

Llanas Aguilaniedo, J.M. / Bernaldo de Quirós, C., *La mala vida en Madrid*, Madrid: Cerra, 1901.

Llopis Domínguez, J.M., *Apuntes de Derecho penal ó breve sumario de las explicaciones del profesor de esta asignatura (...) en el Curso de 1884 á 1885*, Valencia: Printed by Casa Beneficencia, 1885 (available at <https://bvpb.mcu.es/es/consulta/registro.do?control=RAJ2009000363>).

Lozano Caparrós, E., *La locura ante el juicio oral*, Madrid, 1884.

Maestre Pérez, T., *Un loco homicida*, Madrid: Impr. Rev. de Legislación, 1899.

Maristany, L., *El gabinete del doctor Lombroso. Delincuencia y fin de siglo en España*, Barcelona: ed. Anagrama, 1973.

Martín Martín, S.:

- “Criminalidad política y peligrosidad social en la España contemporánea (1870-1970)”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 38.1 (2009), pp. 861-951.
- “La utopía krausista: autonomía del sujeto (individual y colectivo) en la polémica jurídica española (1870-1900)”, *Quaderni fiorentini per la storia del pensiero giuridico moderno* 43.1 (2014) (Copy dedicated to ‘Autonomia. Unità e pluralità nel sapere giuridico fra Otto e Novecento’), pp. 481-539.
- “Penalística y penalistas españoles a la luz del principio de legalidad (1874-1944)”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 36 (2007), pp. 503-609.

Masferrer, A.:

- “La distinción entre delito y pecado en la tradición penal bajomedieval y moderna. Una propuesta revisionista de la historiografía española, europea y anglosajona”, *Anuario de Historia del Derecho Español* 87 (2017), pp. 693-756.
- “The Role of Nature in the Secularization of Criminal Law in Europe (17<sup>th</sup>–19<sup>th</sup> Centuries): The Criminal Law of the Enlightenment Revisited”, *Criminal Law and Morality in the Age of Consent: Interdisciplinary Perspectives* (Aniceto Masferrer, ed.),

Dordrecht-Heidelberg-London-New York, Springer (Collection 'Ius Gentium: Comparative Perspectives on Law and Justice'), 2020.

López-Morillas, J., *The Krausist Movement and Ideological Change in Spain, 1854-1874*, Cambridge University Press, 1981 (translation from the original version entitled *El Krausismo español*, México-Buenos Aires: Fondo de Cultura Española, 1956; 2nd ed., 1980).

Nebreda Torres, J., "Debate sobre la normalidad del delito en los comienzos de la sociología española: Constancio Bernaldo de Quirós", *Revista Española de Investigaciones Sociológicas*, 101 (2003).

Nicéforo, A.:

- *La transformación del delito en la sociedad moderna: estudio inédito*. Translated by C. Bernaldo de Quirós; prologue by Rafael Salillas, Madrid: Librería General de Victoriano Suárez., 1902.

- *Guía para el estudio y la enseñanza de la criminología*. Translated and extended by C. Bernaldo de Quirós, Madrid: Casa Editorial Viuda de Rodríguez Serra, 1903.

Ortolan, M., *Tratado de Derecho penal, según la ciencia racional, la legislación positiva y la jurisprudencia* (translated by Melquíades Pérez Rivas), Madrid: Librería de Leocadio López, 1878.

Ots y Esquerdo, V., *La locura ante los tribunales* o estudio médico-legal de la irresponsabilidad del loco, Madrid, 1894.

Pérez Oliva, I., "Escuela positivista del Derecho penan en Italia", *Revista de los Tribunales* (December 1885).

Petit, C.:

- "Félix Pío de Aramburu y Zuloaga", *Derecho ex cathedra. 1847-1936. Diccionario de catedráticos españoles* (C. Petit, ed.), Madrid: Dykinson, 2019, pp. 43-44 (available online:

[http://portal.uc3m.es/portal/page/portal/instituto\\_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/azuluoaga](http://portal.uc3m.es/portal/page/portal/instituto_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/azuluoaga);

[http://rabida.uhu.es/dspace/bitstream/handle/10272/17020/derecho\\_excathedra.pdf?sequence=2](http://rabida.uhu.es/dspace/bitstream/handle/10272/17020/derecho_excathedra.pdf?sequence=2)).

- "Pedro García Dorado y Montero", *Diccionario de Catedráticos Españoles de Derecho (1847-1943)*, Universidad Carlos III (available at [http://portal.uc3m.es/portal/page/portal/instituto\\_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/gdorado](http://portal.uc3m.es/portal/page/portal/instituto_figuerola/programas/phu/diccionariodecatedraticos/lcatedraticos/gdorado)).

Puig-Samper, M.A. & Galera Gómez, A., *La Antropología española del siglo XIX*, Madrid, 1983.

Pulido Fernández, A.:

- *Locos Delinquentes*. Speeches delivered at the Sección de Ciencias Naturales del Ateneo científico y literario de Madrid on the topic 'Estado actual de la ciencia frenopática y sus relaciones con el Derecho penal. Madrid: Imprenta de la Revista de Legislación, 1883.

- *La pena capital en España*, Madrid, 1897.

Quisbert, E., *Historia del Derecho penal a través de las escuelas penales y sus representantes*, La Paz (Bolivia): Centro de Estudios de Derecho, 2008, pp. 56-59 (available at [https://www.sijufor.org/uploads/1/2/0/5/120589378/historia\\_del\\_derecho\\_penal\\_a\\_traves\\_de\\_las\\_escuelas\\_penales\\_-\\_quisbert\\_ermo.pdf](https://www.sijufor.org/uploads/1/2/0/5/120589378/historia_del_derecho_penal_a_traves_de_las_escuelas_penales_-_quisbert_ermo.pdf)).

Ramos Vázquez, I., *La reforma penitenciaria en la historia contemporánea española*, Madrid: Dykinson, 2013.

Röder, C.D.A.:

- *Las doctrinas fundamentales reinantes sobre el delito y la pena. Ensayo crítico preparatorio para la renovación del Derecho penal*, translated by Francisco Giner, Madrid: Printed by Biblioteca de Instrucción y Recreo, 1871 [I also used other editions: *Las doctrinas fundamentales reinantes sobre el delito y la pena. Ensayo crítico preparatorio para la renovación del Derecho penal*, Madrid: Printed by Victoriano Suárez, 1876 (third edition, revised and corrected by the author and enlarged with a Report by the same author 'Sobre la necesaria reforma del sistema penal español

mediante el establecimiento del régimen cedular’, pp. 321-363) (available at <http://fama2.us.es/fde//ocr/2006/doctrinasFundamentales.pdf>); *Las doctrinas fundamentales reinantes sobre el delito y la pena en sus interiores contradicciones*, Madrid, 1877].

- *An poenam malum esse debet* or *Commentatio de quaestione an poena malum esse debeat* (1839).

Rodríguez Dranguet, A., *Defensa Social, Tratamiento de los Peligrosos, Legislación de Vagos e Maleantes, Ley y Reglamento*, Madrid: Ediciones Góngora, First edition, 1935.

Roldán Cañizares, E., *Luis Jiménez de Asúa: Derecho penal, República, Exilio*, Madrid: Dykinson, 2019.

Romero y Girón, V.:

- ‘Prologo’ to the *Proyecto de Código Penal Italiano*, by P. S. Mancini (translated by Vicente Romero y Girón), Madrid: Imprenta de la Revista de Legislación, 1879 ([https://books.google.es/books/about/Proyecto\\_de\\_c%C3%B3digo\\_penal\\_italiano.html?id=3ekzAQAAMAAJ&redir\\_esc=y](https://books.google.es/books/about/Proyecto_de_c%C3%B3digo_penal_italiano.html?id=3ekzAQAAMAAJ&redir_esc=y)).
- *Discurso leído por el Excmo. Sr. D. Vicente Romero Girón... en la sesión inaugural del curso de 1890 á 1891 celebrada en 14 de noviembre de 1890*, Madrid: Real Academia de Jurisprudencia y Legislación: Imprenta del Ministerio de Gracia y Justicia, 1890.

Rueda Neira, R.R.:

- *Elementos de Derecho penal, con arreglo al programa de esta asignatura en la Universidad de Santiago*, Santiago: Printed by José M. Paredes, 1886.
- *Parte artística del Código penal vigente. Estudio teórico y práctico de las reglas de aplicación de penas*, Santiago: Printed by José M. Paredes, 1890.

Ruíz Robledo, A., *El derecho fundamental a la legalidad*, Valencia: tirant lo Blanch, 2004.

Ruiza, M., Fernández, T. & Tamaro, E.:

- “Biografía de Concepción Arenal”, *Biografías y Vidas. La enciclopedia biográfica en línea*, Barcelona, (2004) (available at <https://www.biografiasyvidas.com/biografia/a/arenal.htm>).
- “Biografía de Rafael Salillas”, *Biografías y Vidas. La enciclopedia biográfica en línea*, Barcelona, 2004 (available at <https://www.biografiasyvidas.com/biografia/s/salillas.htm>).

Salillas, R.:

- *El delincuente español. El lenguaje (estudio filológico, psicológico y sociológico) con dos vocabularios jergales*, Madrid, Librería de Victoriano Suárez, 1896 (available at <http://www.cervantesvirtual.com/obra/el-delincuente-espanol-el-lenguaje-estudio-filologico-psicologico-y-sociologico-con-dos-vocabularios-jergales--0/>).
- *La antropología en Derecho penal* (1889).
- *La vida penal en España*, Madrid: Imprenta de la Revista de la Legislación, 1888.
- (Other Works): *Doña Concepción Arenal en la ciencia penitenciaria* (1894), *Psicología picaresca* (1895), *Los ñáñigos en Cuba* (1895), *El delincuente español. El lenguaje* (1896), *La teoría básica* (1901), *La reforma penitenciaria* (1904), *El doctor J. Huarte y su ‘examen de ingenios’* (1905) and *La evolución penitenciaria* (1919), *Las Cortes de Cádiz* (1910), *Morral el anarquista* (1914).

Sánchez de Juan, M.C., *Medicina y reformismo penal: la obra de Rafael Salillas*, Doctoral Thesis, Cátedra de Historia de la Medicina, Universidad de Salamanca, 1986.

Sánchez Herrero, A., *El hipnotismo y la sugestión. Estudios de fisio-psico y de psicoterapia seguidos de dos apéndices... segundo: la hipnoscopia judicial y la sugestión hipnótico-inquisitiva en el derecho penal y civil*, Valladolid: Estab. Tip. de Hijos de J. Pastor, 1889.

Sánchez-González, D. del M.:

- “Historiografía penal española (1808-1870): la Escuela Clásica española”, *Estudios de historia de las ciencias criminales en España* (J. Alvarado Planas, A. Serrano Maíllo, eds.), Madrid: Dykinson, 2007, pp. 69-130.
- “La influencia de los escritores italianos en el pensamiento jurídico-penal español del siglo XIX”, *“Italia-España-Europa”: Literaturas comparadas, tradiciones y traducciones: XI Congreso Internacional de la Sociedad Española de Italianistas* [held

from 11 to 13 May at La Cartuja de Sevilla] (M. Arriaga Flórez, J.M. Estévez-Saá, M.D. Ramírez Almazán, L. Trapassi, C. Vera Saura, coords.), 2005, vol. I, pp. 659-670.

Serrano Gómez, A. & Serrano Maíllo, A., “Centenario de la Escuela de Criminología”, *Revista de Derecho Penal y Criminología*, 2ª Época, 14 (2004), pp. 181-289.

Serrano Maíllo, A., *Introducción a la Criminología*, Madrid: Dykinson, 2003.

Silió Cortés, C.:

- *La crisis del derecho penal* (prologue by Ángel M<sup>a</sup> Álvarez Taladriz), Madrid: Fuentes y Capdeville, 1891.
- *La educación nacional*, Madrid: Librería Española y Extranjera de Francisco Beltrán, 1914 (available online: <http://bibliotecadigital.jcyl.es/es/consulta/registro.cmd?id=2103>).
- (Other Works): *Problemas del día*, Madrid: Lib. Victoriano Suárez, 1900; *La educación nacional*, Madrid: Printed by Rev. de Archivos, 1914; *En torno a una revolución. Caída de la Monarquía*, Madrid: Espasa Calpe, 1933; *Vida y empresas de un gran español: Maura*, Madrid, 1934; *Don Álvaro de Luna y su tiempo*, Madrid: Espasa Calpe, 1935; *Isabel la Católica, fundadora de España*, Valladolid: Santarén, 1938; *Trayectoria y significación de España*. Del tiempo viejo al tiempo nuevo, Madrid: Espasa Calpe, 1939; *Maquiavelo y su tiempo*, Madrid: Espasa Calpe, 1946.

Silvela, L.:

- “El Derecho Penal y los sistemas fatalistas y deterministas de la Antropología Criminal”, *La España Moderna* 111 (1898), pp. 117-148.
- *El Derecho penal estudiado en sus principios y en la legislación vigente en España*, book I (Madrid, 1874) and book II (Madrid, 1879).
- *El Código penal y el sentido común*, Madrid, 1886.

Tarde, G., *Estudios penales y sociales*, Madrid: La España Moderna. Revista Ibero Americana, Año V, Colección de Libros Escogidos [undated] (the translator is not indicated); *La criminalidad comparada*, Preface and notes by Adolfo Posada, with a letter from the author written for the Spanish edition, Madrid: La España Moderna. Revista Ibero Americana, Año V, Colección de Libros Escogidos [undated, 1893?].

Tissot, J., *Derecho penal estudiado en sus principios y en sus aplicaciones y legislaciones de los diversos pueblos del mundo*, Spanish version of the edition 1880 por J. Ortega García, extended with norms and some bibliographical indications of the author by A. García Moreno, Madrid, 1880 (available at [https://sirio.ua.es/libros/BDerecho/derecho\\_penal\\_01/index.htm](https://sirio.ua.es/libros/BDerecho/derecho_penal_01/index.htm)).

Tusell, J. and Avilés, J., *La derecha española contemporánea. Sus orígenes: el maurismo*, Madrid: Espasa- Calpe, 1986.

Vara Ocón, C., *Criminalidad y orden penal. Estudio de la delincuencia en la Granada de la Restauración (1875-1902)*, Doctoral Thesis, Universidad de Granada, 2001, pp. 212-213 (available at <https://digibug.ugr.es/handle/10481/1682>).

Velázquez de Castro, A., *Responsabilidad de las históricas*. Speech read at the inauguration of the Royal Academy of Medicine and Surgery of Granada, Granada, 1893 (available at [http://www.bibliotecavirtualdeandalucia.es/catalogo/es/catalogo\\_imagenes/grupo.cmd?path=156047](http://www.bibliotecavirtualdeandalucia.es/catalogo/es/catalogo_imagenes/grupo.cmd?path=156047)).

VV.AA., *Estudios a la memoria de Don Constancio Bernaldo de Quirós* (México, 1960).