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Why the Punishment's Retributive Component is Absurd: Jurists Facing Neuroscience

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Abstract:
The present paper argues that the Ego and the Unconscious are metaphors engaged in a continuous interaction: the Ego is not stable but constantly reshaped by unconscious contents emerging into consciousness, while the Unconscious absorbs what falls out of consciousness. *Personal* identity is therefore a dynamic and illusory construction. The author criticises the juristic concept of the person developed between the 17th and 18th centuries by thinkers such as Descartes and Locke, claiming it rests on naïf psychology. The apparent continuity of the Ego derives from autobiographical memory, which is fragmentary and artificially reconstructed. The Ego is thus likened to a thread linking isolated pearls of memory. This perspective has major implications for law. Legal systems assume a stable, responsible subject endowed with consciousness and free will, yet neuroscience suggests that decisions arise unconsciously before they are experienced as voluntary. *Conscious will* is therefore an illusion created through backdating, while the Unconscious determines action. As a result, key juridical notions such as criminal responsibility, capacity to understand and to will, and personal accountability appear scientifically weak. Even judicial decision-making is not truly free but shaped by unconscious processes. In conclusion, the retributive aspect of punishment lacks rational foundation: it is illogical to punish the Ego if actions originate in the Unconscious. According to this paradigm, law focuses on prevention and education only, and jurists should be trained with knowledge of neuroscience in order to bridge the gap between legal practice and scientific understanding.

A CONTINUOUS OSMOSIS, A CONTINUOUS MUTATION

The Ego *(noun)* and the Unconscious *(noun)* are metaphors acting in an analogous space and are in a continuous osmotic transfer: the Ego constantly reforms itself thanks to unconscious *(adj.)* contents that rise above the threshold of consciousness [Jung, 2015], and the Unconscious *(noun)* feeds on the contents contemplated by the Ego that fall below the threshold of consciousness or have never reached it. The Unconscious [Tallis, 2019] has been demonstrated as existing [Casiglia et al., 2016], the Ego not yet and perhaps never will.

To the jurist – who generally doesn't know this, also because probably no one has ever told him – it must be explained that this process of continuous osmosis Ego↔Unconscious never ends and that for this reason *the Ego is never the same as it was a moment before*, let alone a month or a year or ten years before.

The Unconscious manifests itself – as psychoanalysts, who are not scientists, maintain – 1) in the psychopathology of everyday life, 2) in dreams, 3) in free associations, 4) in neuroses, 5) in

psychoses, and (as scientists say) 6) in scientific experiments [Casiglia et al, 2016], but it also manifests itself always, 8) at every moment [Casiglia, 2020; Jung, 2015], in giving life to the complex called ego↔consciousness or the Ego. It can be said that the Unconscious is and always has been the owner of the Ego, since everything that is in the Ego from time to time was or was born in the Unconscious (which is self-generating) and can always return to it.

Although it has no purpose or morality, the Unconscious can be directed, let's say polarized, in some contexts [Casiglia, 2025; Martin & Levey, 1988].

AUTOBIOGRAPHICAL MEMORY, THE EGO, AND THE FALLACIOUS CONCEPT OF *PERSON*

It cannot be emphasized enough that the concept of *person* in the modern sense of the term, taken for granted as if it had always existed, was born recently, no earlier than the 17th century. René Descartes (d. 1650), who lived in a world of monarchies, mistakenly considered the ego to be a stable, centralizing monarch, Ptolemaic in nature. It was the philosopher John Locke (d. 1704) who saw an apparent continuity in discontinuities and defined person in the legal sense as *"the perception of what passes in the mind and is preserved in the difference of its states*". For those times it was a step forward, but today we know that it was still a naïf psychology, because what is maintained in the difference of its states is a pure illusory invention of our mind, an invention that we call Ego and that holds together completely distinct and separate spots[1]. This naïf and sweet mystification that, for evolutionary reasons, we are not easily able to recognize as such [Casiglia, 2020, 2022] is based on the acceptance of autobiographical memory, a characteristic typical of *Homo sapiens* only, a memory which, as we know today, requires the intervention of the prefrontal cortex and hippocampus, as well as basal ganglia and amygdala.

Autobiographical memory simply *cannot* be continuous: we only remember the (few) significant events of our life, and autobiographical memory is held together by an artificial function called Ego[1] which is designed to fill the gaps, that are more numerous than the full ones. These gaps give rise to *evolutionarily useful non-existent something*, that is, a metaphor totally constructed *a posteriori* [Boncinelli & Di Francesco, 2010; Casiglia, 2020, 2022;]. David Hume (d. 1776) had already intuited this, for whom this fictitious identity could not be considered a monarchy but at most a *federal republic* whose parts change incessantly together with its constitution.

In short, we can consider autobiographical memory as a necklace of pearls joined by a thread, pearls that are all different from each other – each with its own characteristics – and placed at different distances from each other; the pearls are the spots of memories and the thread that unites these pearls is the metaphor or meta-metaphor Ego, a naïve function[1]. Some South American populations actually use a mnemonic writing system consisting of knots placed at different distances on strings: from these knots, connected by the string, they can reconstruct the history of their personal life, that of their family, and even of their entire population, the knots being the memory spots and the string the naive function called "I" (Ego) or "we." From a journalistic perspective, the spots of biographical memory could be news items, events worthy of being remembered, strung together in the necklace or string of reality because they are specific. For the journalist, at a certain point, only the archived news items will exist, but they will see them

[1] just as in the USA Interstate 1 seems to hold together the islands that are part of the Keys in Florida: if you drive along Interstate 1, you do not consider the discontinuities, even if in reality you are simply joining together islands that are very detached from each other from Key Largo to Key West.

united in a seemingly continuous function that they will call *news*. But news items do not exist; archives contain only isolated news items.

Just as tribal memory does not exist (only isolated knots on the string exist), just as news items do not exist (only news items exist), so too the Ego does not exist: only isolated memory spots exist. The Ego forms and crumbles according to what I remember, what I forget, what rises from the Unconscious or falls into it. The Ego is a pure fiction.

It is extremely difficult to make scientists who are not in the field understand this, let alone jurists, who – given the way university studies are structured – come from a completely different background. This has disastrous consequences. For the jurist, the advertisements are the laws and the rulings that create jurisprudence; and there is nothing between one advertisement and the next because *quod non est in actis non est in mundo* (what is not in the records does not exist); however, he, not being prepared on the subject, will accept in perfect good faith (as almost everyone does) the existence of an apparently continuous function called *Law* or *individual responsibility*, the equivalent, in his world, of the Ego function.

In other words, memories, news, acts, etc., all particular and different from one another, are synchronic events not diachronic [Jaynes, 2014; Jung, 1983; Von Franz, 1969].

THE PERSON IN A LEGAL SENSE

With Locke and Hume, with autobiographical memory, the foundation of modern criminology *(the person)* was laid, a foundation that, however, was founded and still is founded on the clouds of a similar sky. Today, thanks to scientific studies on the subject, such crudeness would no longer be plausible. If we add the poor aptitude in neo-Latin countries to discriminate between *consciousness* and *conscience*, the confusion is now at its height because the codes (drafted by ancient political decision-makers unaware of the aforementioned difference) now hopefully refer to egoic consciousness, while jurists (who through no fault of their own remain largely unaware) often refer to moral conscience and discuss the retributive aspects of punishment. Such aspects, as outlined further on and elsewhere [Casiglia, 2022], have no scientific reason to exist and lead to considerations such as the brutality of the crime, particular cruelty, etc., which *concern conscience, not consciousness*. Judges often speak of a lack of repentance, but these concepts pertain to conscience, not consciousness—unless we want a judicial system that operates according to the principles of moral policing, which are difficult to justify in modern, advanced regimes. But everything (even egoic consciousness, even moral conscience) arises from the Unconscious, which is not cruel because it is amoral.

Autobiographical memory, developed in *Homo sapiens* only, has a single role: to contribute to the birth and maintenance of the Ego. It serves no other purpose: it certainly doesn't help us be better, nor to qualify as upright citizens, nor to adhere more closely to laws and social rules, nor even to be punished with justice. Arthur Schopenhauer (a determinist d. 1860, shortly after the birth of modernity), Hippolyte Taine (a naturalist d. 1893), and Rudolph Wirchow (a physiologist d. 1902) would more or less say that *within me there is a bottomless void from which comes a voice that has no origin in the Ego* (the Unconscious, we would say today), that *the Ego is a mere archipelago of islands of consciousness or a coalition consciousness whose existence rests on a system of alliances and balances purposely but not voluntarily constructed*, that *Homo sapiens is an animal that produces philosophies and poems like silkworms make cocoons and bees make hives*, and that *I am not the owner of my existence*. Would that jurists today would apply these notions! It must also be

reiterated, as mentioned above, that the term *person* (from the Latin *persona,æ* = mask) indicating precisely the mask worn by actors in ancient times, is inadequate for a justice system that claims to aim to reveal the truth, not the disguise or face distortion.

A CLARIFICATION AND A SUMMARY BEFORE CONTINUING

Anthropologists have clarified that until approximately 60,000 BC, sapiens acted purely by instinct like animals [Casiglia, 2020]. From 60,000 BC onward, sapiens gradually began to develop an Unconscious, of which he was obviously unaware, as he did not yet possess a consciousness, an Ego: he was guided in this phase by hallucinatory voices originating symbolically from the right hemisphere and perceived unconsciously by the left hemisphere [Casiglia, 2020; Jaynes, 1976]. From 1400-1300 BC These voices are silent and coalesce in the Ego function, remaining only in the inner speech that characterizes the basic functioning of the central nervous system. To acquire this linguistic Ego that feeds on semantic metaphors, sapiens renounces (obviously without knowing it given the lack of subjective consciousness) the symbolic part of the mind, a part that in modern times remains only at a deep and subliminal level.

These datings, however approximate, are possible partly on the basis of physical anthropology (a new brain center, corresponding to a new function, must be irrigated, which leaves new grooves – negative blood vessels – on the surface of the skull, which is then found as a fossil) and partly on cultural anthropology (analysis of burials, pictograms, cave paintings, writing, documents, poems, etc.) [Bruner, 2018; Canci & Minozzi, 2013; Casiglia, 2010; Casiglia, 2025a].

In 600 BC Around 1600-1900 AD, philosophy was born in the barely conscious era, but sapiens still did not question their own ego until the 17th century AD. From approximately 1600 to 1900 AD, psychiatry began to treat annoying patients and nothing else. Between 1800 and 1900, the Unconscious was discovered and hypnotism was used, but it was soon overshadowed and sidelined by the nascent psychoanalysis (a narrative, non-scientific discipline), which employed an enormous expenditure of time and resources to treat something as limited as neuroses, which were mostly nothing more than conditioning. Psychiatry subsequently began to treat the healthy, and subsequently, psychology was born in the humanities. Brief psychotherapies were then devised for those who could not afford psychoanalysis. Finally, psychotherapy becomes very short thanks also to the rediscovery of modern hypnotism and its definitive passage (also thanks to the work of our Padua research group) into the realm of science [Casiglia et al., 2012].

So, first the Unconscious and the Ego do not exist, then the Unconscious is born (60,000 BC), then the Ego is born (13th century BC), then sapiens begins to question the Ego (17th-18th century AD), then to question the Unconscious (19^{th}-20^{th} century AD), and finally the nature of consciousness (20th-21st century AD): a curious reverse process. And we have arrived here today [Casiglia & Gadotti, 2026, 2026a], with on one side jurists, strong in their ancient beliefs crystallized in archaic codes based on reward/punishment, and on the other scientists, strong in their experimental evidence that those dated beliefs cannot undermine because the two groups do not speak the same language.

There are interpretative issues that confront scientists and jurists. It's obvious that scientists' opinions should prevail, since jurists live and work in a world that isn't the real one, but a particular narrative called law, whose rules are arbitrary and difficult to change. Scientists, on the other hand, observe the facts and are quick to change their rules and theories if they prove to be incorrect. How can we avoid problems between jurists and scientists? There is only one way

forward: to create a class of jurists (prosecutors, prosecuting counsels, judges, defence counsels and experts [Torre, 2008]) who know the law and reason like jurists, but who also know neuroscience, the philosophy of egoic consciousness and hypnosis and know how to reason and behave like scientists, perhaps even being both things[2]. In many countries elements of science such as those described in the present treatise should enter the academies of law and be taught to future jurists. After all, doctors are taught considerable elements of law [Casiglia, 2022]: the effort should be bilateral. Furthermore, expert opinions on hypnotism should not be entrusted simply to forensic doctors, who as a rule and with minimal exceptions know very little about the subjects inherent in hypnosis and the mind. Furthermore, those who judge on consciousness and will and on the capacity to understand and want should not be (only) psychiatrists, who deal with the sick, but also anthropologists, which study human phenomena as a whole, even in so-called healthy individuals. To achieve this goal, assuming we want to do so, will require many generations of willing workers[1] [Rivello, 2022]. Perhaps we're starting here?

ABILITY TO UNDERSTAND AND WILL

Hypnosis and fMRI have taught us neuroscientists many interesting things that have important implications for the philosophy of law and criminology, and have paved the way for a better understanding of mental phenomena. If the hundred years between 1850 and 1950 were the century of psychoanalysis, if the second half of the twentieth century was the age of the brain, now we are in the age of the mind (which will perhaps, but not necessarily, end with the age of artificial consciousness).

Let's talk, for example, about the so-called ability to understand and will, a concept to which jurists are very attached even though its scientific basis is tenuous. Imputability is connected to the ability to understand and will, and therefore the fate of an unfortunate individual is decided upon it.

The ability to understand, this unknown, is the ability to understand the meaning of one's actions in the context in which one acts, realizing the social value of the act one performs; In this sense, for anthropologist and neuroscientist, the ability to understand coincides with narratization9,18, a function that 1) depends on the anterior cingulate, the ventromedial prefrontal cortex (vmPFC), and the limbic structures responsible for emotions, 2) is unique to Homo sapiens, and 3) consists in using the ego as a probe to be sent into the future18 to predict (see above) the effects of an action. Narratization is connected to egoic consciousness and – like it – originates in the Unconscious [Casiglia, 2020].

The ability to will, on the other hand, according to jurists, would be the power to control one's own stimuli to act.

Everyone agrees on the difficulty of demonstrating capacity to will, but no one asks why it is so difficult (the answer is that the capacity to will is not conscious). Typically, the issue of capacity to will is delegated to an expert who, believing himself to be free and unconditioned [Torre, 2028] must express an opinion on an undefined mental state, as if the mind were a state and not a contingent and changeable combination, as if there were a clear boundary between health and

[2] Ciuffa R. Ipnosi. aspetti giuridici. https://www.rominaciuffa.com/ipnosi-soggetti-abilitati/?Print=pdf; and https://www.rominaciuffa. com/ipnosi-soggetti-abilitati/?print=pdf. (Romina Ciuffa is laywier, psychologist and hypnotist).

illness, and as if the one who should decide this boundary should be someone whose profession is to deal only with the sick who have already crossed that boundary, if it exists. I think everyone agrees that, in reality, at least according to the experts' conclusions, criminal acts attributable to mental illness are extremely rare; so why call in a psychiatrist to express an opinion? Psychiatrists, not even forensic psychiatrists, should be the ones competent to comment on mental capacity, a nosographic entity that exists only in jurisprudence, not in science or real life. Rather, they should be anthropologists and neuroscientists. And even they will encounter difficulties because 1) the science of consciousness is young and not taught in the core curriculum of universities, 2) its history is brief and controversial, 3) experts are few, 4) its path is constantly evolving, and 6) the process, greatly aided by what emerges from experiments, always holds new surprises.

CONSCIOUSNESS, CONSCIENCE, AND WILL

Both in Civil Lay and in Common Law regimes, the Criminal Codes, which forms the basis of objective liability and defines intent and gross negligence, states that no one can be punished for an action or omission defined by law as a crime unless committed with awareness and will. It seems clear: we're talking about conscious will, a conscious impulse to act, voluntary actions performed deliberately by a conscious subject... what could be more obvious? Unfortunately, in light of modern scientific evidence and in the eyes of the anthropologist, nothing is clear in this statement, and the truth is highly counterintuitive. When someone is punished for an act he/she has committed, I would hope that his conscious part (consciousness) is punished, not the unconscious one (otherwise it would be legitimate to punish hallucinations or dreams as well: *I dreamed of committing a robbery, punish me!*) [Caillois, 1956]. I have already specified that consciousness is a mere metaphor [Casiglia, 2020, 2011, 2023; Jaynes, 1976]. I think it's clear to everyone that punishing a metaphor is bizarre, to say the least, especially if it's – as is the case with consciousness – a metaphor reconstructed *a posteriori* (see below) and continually changing over time due to the incessant influx of unconscious contents and the escape into the Unconscious of contents loosing *libido* [Jung, 2015]. As the neuroscientist well knows, this incessant Ego-Unconscious flow means that consciousness is never the same but changes from one moment to the next.

In recent years, this concept has become more precise, and today we know that the mutual passage between the Ego and the Unconscious, which the ancients had intuited, is very rapid and occurs continuously. Thus, when I commit an act foreseen (pre-seen, narratization) by the law as a crime, I commit it now with the consciousness of today, but I will be punished tomorrow, or more likely years from now, with the consciousness of then; a different Self will pay, not the one who committed the crime. It's difficult to accept, it's counterintuitive, but so it is: I commit a crime, but not I, but rather my own Ego, my son (my future Ego). This (the guilt of the father Ego falling on the son Ego) accords well with the origin of the norms, including criminal ones, that characterize jurisdiction, an origin that is compensatory with strong undertones of vengeance (not unlike blood feuds or Sharia law).

Let's move on to the will. In judicial systems, consciousness and will are linked by the Boolean operator and, not or. Both consciousness and will must be present at the time of the act for there to be objective responsibility. Where does the will come from? Where does the drive to act come from? Not from consciousness, certainly, not from the Ego. Even neglecting the question of

determinism[3] [24] which I will address later, it would be enough to reflect on the fact that when I perform an action I see it, I contemplate it, therefore it already exists. Science goes in the same direction, but much further. The very famous experiments of Libet et al. [305], known to everyone except apparently to jurists, have demonstrated with the EEG that if I decide in full consciousness and freedom to move a finger now, in reality this decision had been taken about half a second before in an unconscious way (Figure 35 on the left) in a brain area called the premotor cortex which is located anterior to the primary motor cortex; As is known today, I am not aware of this [884], indeed I am certain that I have decided to carry out the action now by virtue of a function called backdating which makes it appear to me as if my Ego had taken a decision now that had already been decided by my Unconscious 500 ms ago. Libet's studies were initially questioned by some [Brass et al., 2019; Nichelli & Grafman, 2024; Schlegel et al., 2015], but later, with fMRI, neuroimaging scientists of the Haynes School [Soon et al, 2008] demonstrated that they were able to establish not with seconds but even with minutes in advance whether I will move my right or left hand when now I do not even know. Backdating therefore exists and makes me so naive as to believe that I am free to carry out consciously and voluntarily an action that was instead taken much earlier by the Unconscious and without conscious will. One could object that here we are only talking about motor actions and decisions, but in reality for evolutionary reasons all decisions derive from motor/premotor areas [Libet et al., 1983: Soon et al., 2008]. All this seems strange, but the naturalistic universe is very good at misleading the mind of *Homo sapiens* and diverting it towards conclusions and opinions that seem obvious but are wrong; the truth is often if not always counterintuitive.

This has or should have important repercussions in criminology and law. Let us assume, for example, that the finger in the experiment by Libet et al. can act on the trigger of a loaded and cocked pistol placed in front of a human being. If I now decide to flex my finger, freeing the firing mechanism and causing the powder in the chamber to explode, a bullet will come out of the muzzle and hit the unfortunate person, killing him. The experiments cited say that my decision to move (contract) my finger, which I believe I have made now, was actually made unconsciously by the premotor cortex some time before, as demonstrated by the EEG and the fMRI. This is curious, because the witnesses, the judicial police, the district attorney, the judge and the jury will be convinced in good faith that I have now decided to shoot. But the scientifically proven truth is that the decision to flex my finger had already been made elsewhere—in the Unconscious—long before my Ego decided to do so (or even before I decided to do so); therefore, if anything, it is my Unconscious that must be judged, which, thank God, is not allowed. The funniest and most tragic thing is that, by virtue of the backdating mechanism, *even I myself, in good faith, would confess to having freely decided to shoot now, contradicting the EEG and fMRI results*.

[3] As I have discussed at length elsewhere [Casiglia, 2022, 2025], it seems absurd free choices and decisions can be conceived in a deterministic universe in which the cause→chaos→effect principle has never been interrupted from the initial singularity to now (if there is an interruption, we are talking about a miracle, not an everyday decision). In the *naturalistic universe* it cannot be the Ego who decides an action, but rather all the events that in an uninterrupted chain have led to the action itself. In short, in our macroscopic Newtonian universe the cause→chaos→effect trajectories exist and are *necessary* (in both senses of this term, that is, they serve, and occur out of necessity). Boncinelli states: *«man has lived... for millennia as a victim of fear and superstition and even today he falls back into it as soon as he can... Despite all its conceptual difficulties, Newtonian mechanics... has worked well for every material operation... and even today if someone wants to send a satellite into orbit he must... rely on it. Not to mention those who build locomotives and airplanes»* [Boncinelli, 2014]. However, when it comes to volition, determinism seems no longer to be good. Volition must be free, the decision must not be determined, although free decision-making would be implausible due to philosophical determinism (i.e., the predetermination of the course of events) which is always operative in the naturalistic universe to which the *Homo sapiens* species belongs.

Why does this self-deception, this backdating, exist? Evidently for evolutionary reasons, since it is much more useful for sapiens to believe they are masters of their own actions, that they are the scriptwriter and director of their own life, when in fact they are an actor, or better yet, a deterministic puppet in the asocial and amoral hands of the Unconscious. In fact, those who believe in determinism (which is not a religion, of course, but experimental evidence [Tallis, 2002]) are in fact less good, less altruistic, less enterprising than those who believe in freedom [Vohs & Schooler, 2008]. The phenomenon of *finalization*, cited in this regard by the bio-geneticist Boncinelli and the philosopher Di Francesco [Boncinelli & Di Francesco, 2010], could be at play.

It goes without saying that those who shoot or commit any criminal act in the everyday world, outside of the experimental context, do not have on themselves the equipment and sensors capable of exonerating them by demonstrating backdating; But who knows, perhaps in some time, given the progress made in technology, it will be possible to have constantly active sensors implanted in order to confirm, even for the sceptics or the ignorant, the acquittal or, even better, the dismissal of a case due to a backdated decision.

THE RETRIBUTIVE ASPECT OF PUNISHMENT

Who/what makes decisions? 1) A superior. As I pointed out in a book of mine intended primarily for jurists and criminologists and entitled *Things Happen. Free Will, Consciousness, the Criminal's Ability to Understand and the Judge's Free Conviction in a Deterministic Perspective* [Casiglia, 2022], traces of this determination to act by entities that are not in the Ego remain in certain jargon practices in the legal, bureaucratic and military fields. For example, the colonel could say to the captain: *will you like to come to my office tomorrow at 10*. And the captain, tomorrow, a little before 10, will perhaps feel the impulse to voluntarily *(will you like to!)* go to his superior's office... let's say he won't have a choice; but it would have been inappropriate to say *will have to*; *will you like* sounds much freer. This is a fiction (called hierarchical communication) in which both participate. Even *now would you like to kindly withdraw* It's certainly much better than an abrupt *go away!* 2) A hypnotist. When *you will like* or something similar is said for example by a hypnotist [Casiglia, 2025], for instance *tomorrow you will like to come to my office at 10*, this *you will* acquires the character of a neurological command, so that receiving the command and acting become one and the same and tomorrow the subject will really want to come at 10 and will show up, being however certain this was his free and conscious choice, even if it was made by a hypnotist a long time before and he only accepted it: the decision was backdated, and naïve psychology [18] did the rest with the complicity of the interested party. 3) And in the other cases of everyday life? And when it's not a superior or a hypnotist who gives the order to perform an action, who does it? It's always someone/something outside the ego, that is, the Unconscious. The same is true for all our actions, which are backdated at least in seconds or minutes (as the Libet/Haynes experiments teach) [Libet et al., 1983; Schlege et al., 2015; Soon et al., 2008], but in reality also in years (as psychoanalysis and analytical psychology teach [Jung, 2015]) or even generations (as psycho-genealogy teaches, which has been scientifically proven to be true and reliable in both animals and humans [Dias & Ressler, 2014; Yehuda et al., 2016]).

These considerations lead to a disturbing conclusion. How can we reconcile the retributive aspect of punishment (which stems from the concept that punishment is deserved by the ego) with the scientific evidence that the action is predetermined? **And so?** According to philosophy and science, the retributive aspect of punishment has no reason to exist. Neuroscientists know that applying retributive aspects to punishment is absurd. In fact, 1) consciousness is a sporadic, inconstant metaphor originating from the Unconscious [Jaynes, 1986], 2) the will is

predetermined and unconscious [Jaynes, 1986; Jung, 2015; Casiglia, 2020], 3) the decision is not made by a conscious Ego but by the Unconscious [Libet et al., 1983; Soon et al., 2008], 4) even if the cited Libet/Soon experiments did not exist, this psychology would be naïve because it conflicts with our belonging to a deterministic universe. Besides, consciousness – which depends on autobiographical memory, and which had a beginning and a history [Jaynes, 1986; Kuijsten, 2006; Kuijsten, 2012] – is like the latter not continuous but incomplete, indeed it is constructed by evolution precisely to be affected by latencies. The Libet/Haynes experiments highlight some of these very short latencies. But there are much longer latencies, which we probably share with all mammals [888], latencies which mean that an action which now appears to me as voluntary was in reality decided or even begun much earlier (the week or the year before or in childhood or perhaps in uterine life): as De Caro reminds in the rich monograph *Are We Really Free?* [De Caro et al., 2010] this does not mean that *«thought cannot exist, that creation cannot exist, that dreaming cannot exist, that the conception of ideas cannot exist; but that all these are disguised, slowed down, frayed ways of action»*, it is as if an illusionist hidden behind the scenes of my Unconscious prepared the antecedents of the action and then, with a clever trick of sleight of hand, made the action appear to me as if it had been decided at that moment by my Ego [De Caro et al., 2010]. The term *illusionist* is very good because it is precisely an illusion that we are dealing with.

From an anthropological perspective, the experiments of Libet/Soon should be *"projected onto an archaic screen"* [Boncinelli & Di Francesco, 2010; Casiglia, 2020; De Caro et al., 2010;]. In short, they artificially reproduce a very ancient, very ancestral situation, a situation in which, I repeat, *"I am not yet there"* [De Caro et al., 2010]. In this archaic perspective, the idea that the drive to action and the decision lie in the Unconscious no longer appears absurd but the only possible one. We are always late in our decisions, and our conscious life is always *delayed*.

As a consequence, even if we were to ignore the role of determinism (for example because we adhere to a creed that questionably admits *compatibilism*), consolidated psychodynamic considerations and experimental evidence demonstrate that individual choices are not made at a conscious but rather at an unconscious level. Since criminal law regarding the punishment of offenders deals only with the conscious aspects of human actions, any retributive aspect in the imposition of punishment and any other afflictive measure appear illogical. I have had occasion to note that these considerations and conclusions, when presented at conferences and conventions, invariably raise doubts even among numerous scholars, and mostly indignant reactions among jurists who fear that such theses will end up undermining the normative framework on which the entire criminal law is based[4].

Given the body of incontrovertible evidence accumulated to date, attributing retributive value to punishment is clearly an expression of naïve psychology. However, even according to popular opinion, the advisability of retaining the punitive/deterrent aspect of punishment remains[5], but the decision in this regard has a purely political and symbolic value and does not depend on considerations of science or natural philosophy. The afflictive aspect of punishment, unchanged

[4] An enlightened jurist who edited the preface to one of my books [Casiglia, 2022], observed that by denying conscious reason *"we end up denying the main pillar on which the entire science of law is based, based on the principle of individual responsibility and closely related, moreover, to traditional ways of thinking"* [Rivello, 2022].

[5] provided that the *veto area* [Brass et al., 2019; Kuhn et al, 2009] with its presumed *free will to say no* is truly worth anything

since the Middle Ages, is popular with victims' relatives. In my opinion, based on scientific facts and their logical consequences, however, measures that act on egoic consciousness, such as punishing people, predicting new crimes, introducing possible intent, and harsher penalties, appear completely useless: these behaviourist measures are completely futile because they address the Ego, while actions are previously decided by the Unconscious and the consciousness simply acknowledges them after the fact. It follows that, to ensure good behaviour from citizens, we must act not on the Ego (when the decision has already been made) but on the Unconscious (so that it then makes good decisions). How? Through education, culture, example in the family, school, teachers, parents, cousins, uncles, the civil and religious community, and any other entity and institution that can provide positive conditioning. If well-conditioned, the Unconscious will produce an Ego that will behave well. The unconscious voices of *inner speech* [Casiglia & Gadotti, 2026] will offer, from time to time, in every circumstance of life, commendable suggestions that will be naïvely considered by the subject as freely made decisions. The judicial system may not even consider these words, but the neuroscientist cannot turn a blind eye to them. Doesn't the policymaker of the moment like this? Doesn't the judges like it? Doesn't the hangman populace like it? Doesn't the reader of this paper like it? I am sorry about this: once again, these people should change universe, because in this one – it has been proven – this is how things go[6].

AND THE JUDGE'S FREE CONVICTION?

I don't want to – and I don't feel comfortable doing so – but for the sake of truth I must also touch on this thorny issue that is seen as a pillar. I would prefer not to scratch this pillar here, but I cannot help but observe that, given what has been stated above, even the so-called free conviction of the judge and jury is not free. The judge, in fact, responds 1) to previous unconscious conditioning, even infantile or dreamlike, with their subliminal stimuli, 2) to the limitations of backdated free action underlined by the experimental evidence of Libet et al. [1983] and Soon et al. [2008], and if all this were not enough, 3) to Freud's psychic determinism [Musatti, 1899] and even more generally 4) to natural determinism with its principle of cause→chaos→effect [Casiglia, 2020; Casiglia, 2022] and taken in free consciousness, but are not.

In making their decision, the judge and jury believe they are acting with their heads, but in reality they are acting with their hearts, where the viscera, the entrails (the inner life, the interiority) are [Casiglia, 2025]. Far from being conscious, the activity that the judge and jury perform in the judgment chamber corresponds to the *ruminatio* of the monk in prayer, which is analogous to the re-digesting of material already present in the interiority. In reality, as I point out in *Things happen* [Casiglia, 2022], when he carries out his judging function, the judge - when sincere and honest, that is, I always imagine - is possessed by a *δαιμόν* (daimon), a good and wise spirit (a *genius*, as

[6] Even if we were to ignore the problem of determinism, for example because we adhere to a creed that questionably admits *compatibilism* [Casiglia, 2022; Casiglia, 2020; Casiglia, 2025b, Cap. 11], consolidated psychodynamic considerations and experimental evidence demonstrate that individual choices are not made at a conscious level. Since criminal law regarding the punishment of offenders deals only with the conscious aspects of human actions, any retributive aspect in the imposition of punishment and any other afflictive measure appears illogical, with the sole punitive and deterrent effect of punishment remaining intact. Given the body of incontrovertible evidence accumulated to date, attributing retributive value to punishment is clearly an expression of naive psychology. However, even according to popular opinion, the advisability of retaining the punitive/deterrent aspect of punishment remains. The decision in this regard, however, has a purely political and symbolic value and does not depend on considerations of science or natural philosophy. I have had occasion to note that these considerations and conclusions, when presented at conferences and conventions, invariably raise doubts even among numerous scholars and mostly indignant reactions among almost all jurists, who fear that such theses will end up undermining the normative framework on which the entire criminal law is based.

they say in the East), a *spiritus* (spirit, impalpable breath) that should make his *ἄνεμος* (soul, spirit, impalpable breath) take the most correct decision, the same *δαιμόν* – in reality the fruit of the spontaneous amoral activity of the Unconscious – that gives inspiration to the scientist who wins the Nobel Prize or solves a theorem (of whom it is said that *he is a genius*, but it is unconsciously understood that *he has a genius*, a good *δαιμόν* separated from his Ego). In the solitude of the deliberation chamber, the judge's conviction is formed, generated, springs forth, germinates as a consequence of a process that is a kind of fermentation that has nothing to do with a pure examination of the facts: these matter, yes, but only as a basis for fermentation. Rather than isolate himself, it would be better for the judge to engage with others as much as possible. In this, a jury is superior to a monocratic judge.

If one wanted a judgment based solely on facts, it would be much better to use a computer, an algorithm, today an artificial intelligence. *Ruminatio* spontaneously leads to a holistic conclusion similar to that which leads monks to understand whether they have faith, whether they believe; for the monk as for the judge, a belief has little to do with the facts. Often judges (and even investigators), like mathematicians, talk about *a theorem to be proven*[7], but it is not a theorem but rather a belief, a conviction, a purely fideistic act in one's own opinions. For a judge, believing in the conscious freedom of the accused and in his innocence or guilt is like having any other faith (Christianity, Judaism, Islam, Buddhism or even atheism) [Casiglia, 2022].

CONCLUSIONS

In conclusion, even without bringing into play the determinism (which undermines any idea of free will and from which it is impossible to escape anyway), neuroscience has demonstrated that 1) decisions are always made by the unconscious, never by consciousness; 2) we, however, have the sensation that they are made *live* due to an evolutionarily favourable but deceptive mechanism called backdating; consequently, 3) no action, no crime, is committed voluntarily by the ego, but always unconsciously; therefore, 4) no retributive aspect of punishment can exist because it is equivalent to punishing the unconscious, which is amoral; 5) it would therefore be appropriate to limit ourselves to the afflictive and deterrent aspects of punishment, without deceiving ourselves by saying that punishment is deserved. This requires a new training for jurists, who must be educated in neuropsychology and neuroscience if they are to judge logically.

REFERENCES

Boncinelli, E. (2014). Alla ricerca delle leggi di Dio. Rizzoli, Milano. ISBN 9788817074810.

Boncinelli, E., & Di Francesco, M. (2010). Che fine ha fatto l'io? ESR, Milano. ISBN 9788896603024.

Brass, M,, & Furstenberg, A., Alfred, R. Mele, A.R. (2919). Why Neuroscience Does Not Disprove Free Will. *Neuroscience and Biobehavioral Reviews.* 102: 251-263. doi: 10.1016/j.neubiorev.2019.04.024.

Bruner, E. (2018). La Mente Oltre il Cranio. Prospettive di Archeologia Cognitiva. Carocci, Roma. ISBN 9788843093557.

Caillois, R. (1956). L'Incertitude Qui Vient dès Rêves, Gallimard, Paris. ISBN 9782070354887.

Canci, A., & Minozzi, S. (2013). Archeologia dei Resti Umani. Dallo Scavo al Laboratorio. Carocci, Roma. ISBN 9788843032006.

[7] My personal opinion is that this *theory of theorem* is not very tenable as it implies having a prejudicial opinion from the outset, which, at least in criminal law, seems to clash with the presumption of innocence. A scientist does not have preconceived ideas when beginning research; he does not start from theorems (a mathematician does, but he is not a scientist). I respect laws and rulings, even when I disagree with their spirit or consider them absurd, but I do not turn a blind eye to the truth: *magistra lex sed magis magistra veritas* (the law is master, but the truth is more so).

Casiglia E. (2022). Things Happen. Free Will, Conscience, the Criminal's Ability to Understand and the Judge's Free Conviction in a Deterministic Perspective. CLEUP, Padova. ISBN 978-8854955301.

Casiglia, E. (2020). The Ego and Its Voices. Anthropology and Archeo-Psychology of Egoic Consciousness. CLEUP, Padova. ISBN 9788854952973.

Casiglia, E. (2023). Ipnosi in Criminologia. In: Conte M. Manuale di Criminologia. Youcanprint, Lecce (pages 625-681). ISBN 9788831699433.

Casiglia, E. (2025). Where Is Your Ego? A Population Study Over Males and Females Aged 5 to 68 Years Based on Anthropological Considerations. *Psychology* 16: 1034-1050. doi: https://www.scirp.org/journal. psych.

Casiglia, E. (2025a). Really Modern Hypnosis. CLEUP, Padova. ISBN 9788854957992.

Casiglia, E., & Gadotti, E. (2026). Freedom, Volition, Ego Development, Personal Responsibility, and Internal Chattering Within Us. *Advances in Social Sciences Research Journal* 13: 168-177. https://doi.org/10.14738/assrj.1304.20240.

Casiglia, E., & Gadotti, E. (2026a). The Nature of Consciousness Characterized by Means of Hypnosis. *Advances in Social Sciences Research Journal* 13: 188-207. https://doi.org/10.14738/assrj.1303.20165.

Casiglia, E., Tikhonoff, V., & Facco, E. (2016). The Unconscious Experimentally Demonstrated by Means of Hypnosis. *Psychology* 7: 469-479. doi: https://dx.doi.org/10.4236/psych.2026.74048.

Casiglia, E., Tikhonoff, V., Giordano, N., Regaldo, G., Tosello, M.T., Rossi, A.M., Bordin, D., Giacomello, M., & Facco, E. (2012). Measured Outcomes with Hypnosis as an Experimental Tool in a Cardiovascular Physiology Laboratory. *International Journal of Clinical and Experimental Hypnosis* 60: 241-261. doi: 10.1080/00207144.2012.648078.

De Caro, M., Lavazza, A., & Sartori, G. (2010). Siamo Davvero Liberi? Le Neuroscienze e il Mistero del Libero Arbitrio. Codice, Torino. ISBN 9788875781569.

Dias, B.G., & Ressler, K.J. (2014). Parental Olfactory Experience Influences Behavior and Neural Structure in Subsequent Generations. *Nature Neuroscience* 17: 89-96. doi: 10.1038/nn.3594.

Jaynes, J. (1976). The Origin of Consciousness in The Break Down of the Bicameral Mind. Houghhton Mifflin, Boston. ISBN 061805707a.

Jaynes, J. (2014). La Natura Diacronica della Coscienza. Adelphi, Milano, 2014. [in Italian only, no ISBN]

Jung, C.G. (1983). Synchronicity: An Acausal Connecting Principle. Routledge, New York. ISBN 978041513 6495.

Jung, C.G. (2023). Collected Works of C.G. Jung. The First Complete English Edition. Adler. G., Fordham, M., & Read, H., eds. Routledge, London. doi: https://doi.org/10.4324/9781032652047. ISBN 9781032652047.

Kühn, S., Haggard, P., & Brass, M. (2009). Intentional inhibition: how the «veto-area» exerts control. *Human Brain Mapping* 30: 2834-2843. doi: 10.1002/hbm.20711.

Kuijsten, M. Reflections on the Dawn of Consciousness. (2006). Julian Jaynes Society, Henderson. ISBN 9780979074417

Kuijsten, M. The Julian Jaynes Collection. (2012). Julian Jaynes Society, Henderson. ISBN 9780979074424.

Libet, B., Gleason, C.A., Wright, E.W., & Pearl, D.K. (1983). Time of Conscious Intention to Act in Relation to Onset of Cerebral Activity (Readiness-Potential). The Unconscious Initiation of a Freely Voluntary Act. *Brain* 106: 623-642. doi: 10.1093/brain/106.3.623.

Martin, I., & Levey, A,B. (1988). Classical Conditioning in a Cognitive Era. Biological Psychology. 27: 153-166. doi: 10.1016/0301-0511(88)90047-6.

Musatti, C. (1899,1966, 1967). Collana «Opere di Sigmund Freud». Boringhieri, Torino.

Nichelli, P.F., & Grafman, J. (2024). The place of free will: the freedom of the prisoner. *Neurological Sciences* 45: 861-871. doi: 10.1007/s10072-023-07138-4.

Rivello, P. (2022). Prefazione a: Casiglia E. Things Happen. Free Will, Consciousness, the Criminal's Ability to Understand. and the Judge's Free Conviction in a Deterministic Perspective. CLEUP, Padova (pp. 7-20). ISBN 978-8854955301.

Schlegel, A., Alexander, P., Sinnott-Armstrong, W., Roskies, A., Tse, P.U., & Wheatley, T. (2015). Hypnotizing Libet: Readiness Potentials with Non-Conscious Volition. *Consciousness and Cognition* 33: 196-203. doi: 10.1016/j.concog.2015.01.002.

Soon, C.S., Brass, M., Heinze, H.J., & Haynes, J.D. (2008). Unconscious Determinants of Free Decisions in the Human Brain. *Nature Neuroscience* 11: 543-545.

Tallis, F. (2002). Hidden Minds: a History of the Unconscious. Arcade Publ., New York.

Torre, E. (2008). I Sentimenti e le Conflittualità del Perito. Giuffrè, Milano. ISBN 8814139008.

Vohs, K.D., & Schooler, J.W. (2008). The Value of Believing in Free Will. encouraging a belief in determinism increases cheating. *Psychological Science* 2008; 19: 49-54. doi: 10.1111/j.1467-9280.2008.02045.x.

Von Franz, M.L. (1969). On Divination and Synchronicity: The Psychology of Meaningful Chance. Inner City Books, Toronto. ISBN 0919123023 & 9780919123021.

Yehuda, R., Daskalakis, N.P., Bierer, L.M., Bader, H.N., Klengel, T., Holsboer, F., Binder, E.B. (2016). Holocaust Exposure Induced Intergenerational Effects on FKBP5 Methylation. *Biological Psychiatry* 80: 372-380. doi: 10.1016/j.biopsych.2015.08.005.