CATÓLICA LAW REVIEW

The Offense Definition as a Screenplay of Evil: The Rise and Fall of Visual Criminal Law*

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1. "Law in literature" and "law as literature"

For decades, a mainstream approach in *Law and Literature* studies has focused on researching and documenting the ways in which the legal phenomenon appears in literature. A twofold question is often asked: How are legal issues described and elaborated in literary creations, and, more generally, in art? Can we better understand the law through its representation in novels, figurative arts, theatre or cinema?

This research perspective concentrates, as we just said, on law "*in* literature". It is an extremely interesting stream of works and has generated countless scientific initiatives[1]. The "law *in* literature" approach is still very alive, especially in some countries. It is also promising, for its potential application to all forms of art and to the polymorphic world of media.

This paper will follow a different path. We will not look for law *in* literature. Rather, we will speak about law, and notably criminal law, *"as"* literature[2]. More in particular, we will consider criminal statutes, with their offense definitions, "as" literature[3]. "Law *as* literature" studies usually deal with the narrative and the style of judicial decisions or with lawyer's advocacy[4]. Considering this prevalent approach, our perspective, focused on the *text* of criminal statutes, seems to be quite new[5].

In the first part of this article, we will explore how the "offense definition"[6], i.e., the legal description of the elements of each crime (murder, rape, bribery, theft

1 The "law *in* literature" relation has been explored at least since the mid 19th century. *See*: JCS (1865), pp. 194ff.; Stephen (1857), pp. 124ff. For an analysis of this early stage of the studies, Frank (2010). Bibliography is so large than even attempting a short list is over-ambitious. Milestone works are those of Cardozo (1925); Posner (2009); Weisberg (1976); Weisberg (1984); White (1985); White (1989); White (1982); Wigmore (1907-1908); Wigmore (1922-1923). For an overview, *see*: Sage Heinzelman (2006). Research on law *in* literature is, for example, the prevalent approach adopted in Italy. I'm thinking, among others, of the scientific activities carried out at the Catholic University of Milan and at the University of Florence. *See*: Forti *et al.* (2012), Forti *et al.* (2014), Forti *et al.* (2016); as well as: Roselli (2018), Roselli (2020). It is active an *Italian Society for Law and Literature*: *https://www.lawandliterature.org/index.php?channel=HOME-PAGE*.

2 The study of law *as* literature has been the other mainstream approach. *See*, among the many, Brooks & Gewirtz (1996), Guyora & Weisberg (2000); Hanne & Weisberg (2018).

3 Besides statutes, we will also refer to "common law crimes", focusing on definitions which are elaborated by courts and institutional authors. While common law crimes are the product of a peculiar lawmaking process, notoriously different from that of statutes and quite problematic in terms of legality, to our "law *as* literature" ends all offense definitions can be assimilated.

4 The focus on the literary nature and of the judicial decision is present since the pioneering work of Cardoso (1925), pp. 699ff.

5 This approach is almost unknow in respect to criminal legislation. It is marginal also in other areas of the law, *see*: Schenck (2013), pp. 9ff.

6 "Offense definition" is probably the most effective way of naming what, in continental criminal law doctrine, is called "*Tatbestand*", "*tipo penal*" or "*fattispecie incriminatrice*": these terms make reference to

and so on), is inherently a narrative text[7]. The "offense definition" is contained in a text produced by the parliament, or, when permitted by the constitutional framework, by the common law. The function of such definition is to convey *a paradigm of wrongdoing* in order to communicate *a schema of a wrong conduct*. Furthermore, wrongdoing often generates an unjust outcome, a result that can be included in the definition too (as "death" in the crime of murder). In continental criminal law, the definition of the offense is called, depending on language and scientific tradition, "*tipo penal*", "*fattispecie criminosa*", "*Tatbestand*".

This article will argue that the offense definition, with its narrative text, is a sort of "screenplay of evil". A screenplay that functions as a very effective tool to describe what each prohibition is about. This tool is able to communicate normative messages to a dual audience: ordinary people and adjudicators. Indeed, the narrative of the offense definition generates, on the one hand, rules of conduct for citizens; on the other hand, rules of adjudication for judges and juries[8].

In the second part of our work, we will focus on the semiotics of the "offense definition", analysing the crisis of its traditional way of dramatizing and communicating evil. Conceiving and writing the "*tipo penal*", the "*fattispecie criminosa*", the "*Tatbestand"* has become extremely difficult for contemporary lawmakers. We will try to explain the origins of this crisis and discuss future directions of the "literary art" of defining crimes: what kind of *dramatization of evil* will characterize the future of Criminal law?

2. The offense definition as a literary text

Definitions of offenses consist in descriptions of the elements which characterize each crime. Such definitions are the backbone of the so-called *Special part* of the criminal law. The objective of defining offenses is to describe analytically forbidden conduct: murder, rape, bribery, theft and so on. This task is

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the *type of fact* described by the legal provision of a specific crime. Terminological options different from "offense definition" have been considered before making our choice in this paper. "Paradigm of the offense" or "Type of fact" get probably closer to *Tatbestand* and to the other expressions. However, since they are not commonly used in English legal literature, they would probably result obscure and not immediately understandable.

An "offense definition" usually includes "conduct", "result", other modalities of the prohibited transaction, and sometimes *mens rea* elements. I'm aware that "offense definition" does not completely express the significance of the mentioned terms, a significance which is indeed extremely rich. *See*: Gargani (1997), pp. 11ff.; Hassemer (1968); Jiménez de Asúa (1965), pp. 746ff.; Muñoz Conde & García Arán (2010), pp. 251ff.; Palazzo (1979), pp. 342ff.; Quintero Olivares (2010), pp. 308ff.; Vassalli (1992), pp. 535ff.

7 *See also*, for further references, Papa (2019), pp. 22ff.

8 For this distinction, *see*: Robinson (1990), pp. 729ff.; Robinson (1994), pp. 857ff.; Robinson *et al.* (1996), pp. 304ff. *See also*: Dan-Cohen (1984), pp. 625ff.

usually in the hands of the legislator and, as we mentioned, it is carried out for (at least) two purposes: a) to communicate rules of conduct to ordinary people; b) to restrict discretion of adjudicators, i.e., judges and juries, telling them what the different crimes entail and hence when they are allowed to convict and impose punishment[9].

Strangely enough, the offense definition is not usually vehiculated by direct imperatives. Criminal law establishes fundamental rules of conduct for all members of the society and yet, surprisingly, does not recur to direct imperatives[10]. Rules of conduct are not formulated as instructions. They look very different from orders shouted by a ship commander to its crew during a storm. Or from the Ten Commandments ("*Thou shall not kill*"; "*Thou shall not commit adultery*"; "*Thou shall not steal*", etc.)[11].

Criminal law does not speak, does not "say" what to do and what not to do; it rather… "tells". It orders by *telling*, or, as we will argue, *storytelling*. It imposes rules of conduct through the depiction, the illustration of what is wrong. Prohibitions and commands are expressed by a narrative, which consists of micro-stories, kind of "*bonsai* tales" which render a vision, an iconographic description of wrongdoing. This is true both at common law and according to statutory law.

Let's consider "burglary": its narrative, according to the common law definition, tells the story of "*someone who's breaking and entering the house of another in the nighttime, with intent to commit a felony therein….*"[12]. The tale of larceny tells us of "*someone who's taking and carrying away the property belonging to another…*"[13].

Statutory storytelling is not different: robbery statutes narrate of "*the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear*"[14]. Arson is the story of "*who sets fire to or burns or causes to be burned… any structure, forest land, or property*"[15].

It is very important to keep in mind that the "short story" told by the offense definition makes sense if it is read as a whole – if it is considered as one

9 Offense definitions work as decision rules also in respect to discretion of prosecutors, police officers and other law enforcement agencies.

10 Papa (2019), pp. 23ff.

11 We have mentioned the "Ten Commandments" following the widespread vulgate according to which they would constitute paradigmatic examples of direct and peremptory orders. This is not the theological meaning of the Decalogue: indeed, the so called "Commandments" are "ten words" intended to talk to each human being and not to direct him/her like a puppet.

12 *Cf.* Perkins & Boyce (1982), p. 246.

13 *Cf.* Perkins & Boyce (1982), p. 292.

14 *Cf.* California Penal Code, Title 8, Ch. 4, sect. 211.

15 *Cf.* California Penal Code, Title 13, Ch. 1, sect. 452.

articulated and comprehensive tale. Considered as fragments (i.e., as single, isolated, words: "whoever" + "breaks" + "enters" + "the house" + "of another", etc.) the elements of the offense definition do not convey much information. In other words: the communicative effect stems from the narrative, from the story taken as a whole. It is the entire plot of the story that portrays the relevant image of wrongdoing. It is the story globally told – with its plot, its continuous, analogy--based and completed figurative features – that expresses the meaning of what the lawmaker wants to prohibit[16].

Like in a novel, in a fairy tale or in a movie, the overall meaning can only be understood by reading the whole story. The reader must take a holistic approach. No accurate message can be received by considering single lines, isolated pages or random photograms.

3. A prophetic narrative

We have already said that the "offense definition" tells a short story, a kind of "*bonsai* tale". This story has the capacity of conveying normative messages. They are directed both towards citizens, who receive information about the prescribed rules of conduct, and to judges and juries, who are driven to convict and punish only under certain conditions.

Although obvious, it is important to point out that the story contained in the "offense definition" does not talk about the past or the present and does not perform entertainment purposes. Offense definitions have a prescriptive function, which is naturally directed towards the future. Hence, the stories they tell, rather than a fable with moralising purposes (like those written by Aesop or Phaedrus) have something *prophetic*. They have the nature of an *apocalypse*, intended in its original etymology, which refers to the unveiling of knowledge, including the revelation of future events[17]. Indeed, the "offense definition" announces to citizens and adjudicators that, in the future, something is very likely to happen. According to the prophecy, a certain development of human actions will take place: someone will steal, taking and carrying away the property belonging to another with the intent to deprive him/her permanently of the chattel; someone else will kill, intentionally causing the death of a human being, and so on.

The mentioned *apocalypse*, the announcement of future events of the mentioned kind, works as a warning. "*Qua nescitis hora, estote parati*": even if you

16 Papa (2019), pp. 26ff.

17 In ancient Greek: ἀποκάλυψις *(apokálupsis)*. The word is composed by the prefix ἀπό (*apó*) and the verb καλύπτω (*kálupto*: to hide, to cover). Apocalypse literally means "an uncovering" (of knowledge), a revelation.

don't know when, be ready![18] When the day comes, when the forecast development of human actions takes place, it will be necessary to draw due consequences. It will be necessary to do what needs to be done, i.e., to bring criminal charges and, if conviction follows, to punish the perpetrator of the crime by imposing on him/her the penalty set out by the law.

4. Imaginal apocalypses

We said that the offense definition is a sort of apocalypse – a revelation about the future. The revelation is also associated with prescriptions concerning what should be done when the prophecy will come true: when the day comes, it will be appropriate to convict and punish. But what is exactly the nature of this apocalypse? To answer this question, we need a closer analysis of the particular narrative contained in the offense definition.

The narrative of the "offense definitions" is indeed a very special one. Its main characteristic is that it is capable to produce imaginative thinking. The "*bonsai* tale" narrated by the words of the lawmaker is able to create the mental image of a fact[19].

Offense definitions offer very good examples of the rhetorical figure known as "*hypotyposis*"[20]. *Hypotyposis* is a communication technique that *uses narrative to portrait visual experience*, putting the reader in the condition "to see through the words". In the case of the definitions of criminal law, the generated image is dynamic. Thanks to the words of the statute, we see a kinetic representation of events. The narrative of "offense definitions" succeeds in evoking a "dramatic action", an authentic "cinematographic view" of wrongdoing, a short video of evildoing. Here is, for example, a first short film: "*Purse snatching*". The vision of this variant of theft is projected in our mind by the words, for example, of art. 624.2 bis of the Italian Criminal Code, which reads as follows: " […] *who gets the possession of another's chattel, […] taking it from the person that holds*

18 This is obviously a reference to the Gospel of Matthew 24.44: "*So you also must be ready. The Son of Man will come at a time when you don't expect him*". ERV translation.

19 On how mental images can be produced by language, Arnheim (1969), pp. 226ff.; Mitchell (1994), pp. 111ff.; Wunenburger (1997), p. 53ff.; Thomas (2019).

20 The rhetorical figure called "*hypotyposis*" has been well known both among ancient rhetoricians (such as Cicero and Quintilian) and modern critics. For a definition and references, *see*: Prato (2017), pp. 267ff.; *see also*: Eco (2014), pp. 77-88.
Interesting examples of hypotyposis can be found in the early-20th century literary movement called "*Imagism*". Imagism favoured precision of imagery and clear, sharp language. The movement included, among others, E. Pound, F. S. Flint, T. S. Eliot. I discussed the possible relevance of *Imagism* for the criminal law in Papa (2019), p. 35 note 19.

it, by grabbing it out of another's hands or ripping it off the person, to obtain a profit for himself or others".

As already noted, it is a very effective narrative, apt to produce a vivid imagination of the fact, so vivid that readers may "see", in their minds, the animation of the prohibited conduct.

Fig. 1 – Purse snatching: a theft with violent apprehension of the chattel stolen
(https://www.canstockphoto.es/bandidomujer-de-negocios-calle-10591432.html)

Similarly, sect. 581 of the Italian penal code refers to the crime of battery, defining it as the act of someone "*who beats another person*". Here it is the immediate transposition of such narrative into an image:

Fig. 2 – Battery
(http://clipartportal.com/assault-and-batteryclipart/)

The images above demonstrate that it is quite easy to read the narrative of the definition and mentally see the corresponding images of wrongdoing. In other words, thanks to its particular way of telling, the "offense definition" can produce a mental vision of the wrongful conduct.

It is important to underline, once again, that the "offense definition" fulfils its goals thanks to a double characteristic. On the one hand, the narrative nature of the text; on the other hand, the particular style of such narrative, which uses the mentioned rhetoric of *hypotyposis*. It is a narrative that has the ability of creating, in the readers' mind, an imaginative thought.

As we have already said, the "offense definition" creates a kind of *Gestalt* knowledge, a holistic vision of the criminal wrongdoing[21]. It enables the reader to know a "whole", the prohibited wrongdoing, which is much more than a sum of parts. The image of evil that the reader is able to catch is not the addition of the several elements of the crime. If we concentrate on single fragments of the definition, the sense of the global vision may get lost, preventing us from seeing what wrongdoing is really about.

It is important to remember that the possibility of understanding the prohibited conduct as a whole, adopting a *Gestalt vision* of wrongdoing, does not depend only on narrativity, but also on *hypotyposis*: the capacity to produce visions, mental images of what is forbidden. The "*bonsai* tale" narrated by the offense definition evokes an iconic representation of wrongdoing. Such an amazing "iconography of evil" is possible if the representation of the prohibited fact describes a well-modelled shape of action. A shape whose traits are coherent, continuous, visible. Such paradigmatic shapes of wrongdoing trigger the reader's imagination and induce a holistic, *Gestalt* vision of the prohibition.

As illustrated extensively in a previous work, the capacity of "offense definitions" to generate an iconography of evil reveals the most authentic meaning of the word "*special*", the adjective that characterizes the "*Special part*" of criminal law[22]. Indeed, the word "special" comes etymologically from the Latin verb "*specio/spicio*", which means "to look at", "to see"[23]. Therefore, "special" alludes to the visual, imaginative and "spectacular" nature of the offense description. Thanks to this "specialty", thanks to the iconographic, cinematographic nature of the narrative, citizens and adjudicators can really understand what each crime definition refers to.

21 On the philosophy of *Gestalt*, *see*, for all: Katz (1948).

22 Papa (2019), pp. 14ff.

23 Papa (2019), p. 15.

5. Documentary narrative and fictional narrative

What exactly is depicted by the narrative of the offense definition? How does the narrative relate to wrongdoing? Which are the paths and the methods that legislators follow to conceive and describe the "dramatic action" represented in the *film noir* of Criminal law?

The topic – as it is understandable – is very complex. However, we can distinguish two approaches that are rather different and that, from the standpoint of semiotics and aesthetic choices, correspond to two different ways of narrating.

On the one hand, there is what we may call a *documentary* and *portraiture* representation of the relevant action and of the significant outcome. When the "offense definition" is inspired by this narrative model, it is basically a mirror, a *mimesis* of recurring aggressive conducts.

On the other hand, there is a more creative way of narrating, a more fictional and artistic way of "*rendering*" evil. It is an attempt to make the invisible visible and to give shape to the kind of wrongfulness that the lawmaker wants to stigmatize and punish. We can call this approach "*artistic*" or "*fictional*" because the narration of the fact is the result of a creative effort and, in some way, it takes shape thanks to the lawmaker's creativity. This peculiar "*rendering*" effort requires a complex reflection about the ways of expressing, depicting, forming and dramatizing the "tragic action" – the action which forms the basis of each crime.

When the "offense definition" is inspired by this model, it is very much a script about wrongdoing, a screenplay of evil. Most "offense definitions" in contemporary criminal statutes are written by using this narrative technique.

5.1. Documentary narrative: The "offense definition" as a mimesis of frequent patterns of aggression

Simplifying a very complex topic, we can define the first manner of narrating described above – that is, the *documentary*, *portraiture* one – as basically a straight, mimetic, photographic, "literal" representation of the relevant fact. The relevant fact is, literally, the one represented in the image.

A good example of this form of narrative is offered by a classic photograph of the September 11 attacks at the Twin Towers, the World Trade Center in New York:

Fig. 3 – September 11, 2001: The attack on the Twin Towers
photo by Robert Clark – Institute
(https://time.com/3449480/911-the-photographs-that-moved-them-most/)

In criminal law, the said "documentary approach" is of course applied in a unique way. Offense definitions cannot picture a single fact, a specific historical transaction. It is always necessary, in framing the "relevant offense", to carry out a process of abstraction and typification. However, the lawmaking process can be labelled as documentary when the offense definition portraits "paradigmatic patterns of wrongdoing", "visual schemata of evil", "manifest shapes of aggressive conduct".

The "documentary" approach, with its literal vision of patterns of manifest wrongdoing, was very popular in the ancient criminal law. For instance, as we will see later on, the approach was adopted in describing "the mother of all property offenses", the crime of larceny. Extremely documentary is, within the law of larceny, the crime of manifest larceny (*furtum manifestum*) present in the Bible and in Roman law, more specifically in the XII Tables[24]. Even today, many offenses belonging to the most traditional core part of criminal law are inspired by this approach.

The documentary approach is characterized by a strong figurative formalism, by a vivid iconicity in the description[25]. In its celebrated works, George Fletcher says that this approach reveals one of the fundamental patterns of criminal liability: "the pattern of manifest criminality"[26]. The documentary approach focuses on very specific "modalities of action". Hence it can be also described as "ritualistic". This type of criminal law seems indeed very close to ancient culture, which

24 *See*: Fletcher (1976), pp. 469ff.; Fletcher (1978), pp. 115ff.

25 Papa (2019), pp. 59ff.

26 Fletcher (1976), pp. 469ff.; Fletcher (1978), pp. 115ff.

elaborated rules of purity, as well as ritual prescriptions concerning sex, hygiene and health.

As already mentioned, an example of documentary offense definition is represented by the figure of *furtum manifestum* provided by ancient Roman law. In the case of *furtum manifestum*, the narration of the prohibition, and of its consequences reflects, very iconically, a precise *trance de vie*. It is night-time: a thief enters another person's home. His hands are already on the goods to be stolen, but he is caught by the householder just in the act of stealing. Here is an extremely evident icon of wrongdoing, a clear pattern of manifest criminality. So clear that it allows the householder, the *dominus* (the owner of the home, of the *domus*) to kill the thief on the spot.

Still today, the crime of larceny is often described according to a similar narrative and follows a documentary drafting model. Still today, the representation of the criminal wrongdoing is highly mimetic, visual, and, in some way, "literal". It represents a perpetrator who enters into another person's area of spatial control, takes a chattel, and carries it away into an area of own control – and this is the "taking of possession". The paradigm of a thievery aggression has its own constant, recurring and manifestly wrongful form.

Fig. 4 – The paradigm of larceny
[image drawn from Rodriguez (2010)]

Examples of documentary, manifest criminality can be found not only in other forms of larceny such as "*purse snatching*" and more in general larcenies committed with the use of some form of violence (see Fig. 1 above), but also in respect to crimes as battery (see Fig. 2 above), robbery, causing personal injuries, criminal damage, rape (according to the old legal schema based on sexual penetration by violence or threat), arson, burglary and other traditional crimes.

It is interesting to note how traditional paradigms of wrongdoing, characterized, as already said, by the evident criminality of the conduct, are born and take shape firstly in shared opinions of the community. In these cases, the legislator does not have to create any shape of the crime, since it is possible to receive such a shape from shared social opinions. The form of wrongdoing, its iconography, has already been created by the community. In conclusion, there is little plot to conceive and little script to write: like a National Geographic documentary, like a film crew on mission in the park of Serengeti, the legislator builds the narration by simply film shooting what is in plain view.

5.2. Fictional narrativity: the offense definition as a screenplay of evil

The time when the offense definition, the definition of criminal wrongdoing, was *mimesis*, i.e., a documentary representation of aggressive conducts and dangerous events, did not last long. After all, an effective criminal law system cannot be reduced to a simple translation of existing social conceptions of wrongdoing into law. No complex society can hope to find, already crafted in society, all relevant schemata of wrongdoing. Patterns of conduct capable of expressing a manifest, univocal, and conclusive meaning of criminality pattern are quite few and do not evolve as rapidly as the need of crime control.

Having said that, is not difficult to understand why it became necessary to move on to the second narrative technique, the fictional one.

In many contexts in which it is impossible to receive a paradigmatic, iconic figuration of wrongdoing directly from society, the legislator must conceive and define it by its own words. This is a complex work, which requires a creative reflection similar to the one of a novelist or a painter who, for example, wants to represent a holy subject; or a film director, who, together with his screenwriter, wants to give shape to a story. The writer wonders: how can I tell the story of a "marriage that cannot happen" ("*un matrimonio che non s'ha da fare*"), in Lombardy, in the 1600s[27]? The painter wonders: which figuration should be given to religious events such as "The Rising of Lazarus" or "The transportation of Mary's House from Nazareth to Loreto"[28]? The film director speculates: How can I tell

27 Reference is to the Italian historical novel "*I promessi sposi*" (The Betrothed) by Alessandro Manzoni, published in its final version between 1840 and 1842. Manzoni's *I promessi sposi* is the most famous and widely read novel in the Italian language. The story starts when a local baron of 17th-century Lombardy unjustly tries to stop the marriage between Renzo, a young silk-weaver of humble origins, and Lucia.

28 Reference is here to a celebrated religious theme, depicted, among others, by Caravaggio (*La Madonna dei Pellegrini*, 1604-1606) and by Annibale Carracci (*La Traslazione della Santa casa di Loreto*, 1605).

the story of a mediocre boxer, named Rocky, who starting from a squalid urban gym manages to become the world champion[29]?

Returning to criminal law: how should the legislator write the offense definition concerning misappropriation (embezzlement) or fraud? This is not an easy task. The documentary approach, adopted for *furtum manifestum* (where the legislator could receive the form of the relevant conduct directly from the community), cannot be applied. Indeed, the aggression to the protected legal interest is not embedded in a precise and visible form of conduct. Let's consider misappropriation/embezzlement: in these offenses, the wrongfulness derives from the conflict between who has a lawful possession of the chattel and the owner of such property. Since the former already has possession, the breach of the owner's rights does not require the taking of the property. The aggression starts when the holder performs acts implying the unlawful disposal of rights, i.e., acts not allowed by the title on which his/her possession is founded and that are incompatible with the rights of the owner. The criminality of these acts is usually invisible, since, from the point of view of an external observer, they look exactly as lawful acts.

If this is true, how should the new crime be drafted? How should wrongfulness be represented? When it is impossible to use paradigms that are imitative of recurring patterns of aggression, it is necessary to elaborate a creative and fictional figuration of evil/wrongdoing.

Called to conceive and define such figuration, the lawmaker has to forge the shape of the relevant conduct, elaborating, creatively and artistically, a "typified image" of its manifestation. Once the legislator enters the field of artistic creation, the aesthetic preferences and the stylistic vision adopted become more and more important. We can consider these preferences and vision as a "poetics", i.e., a theory of literary forms, a structured set of expressive intents.

6. Developing a "poetics": the need of an aesthetic theory to write offense definitions

Conceiving and then fictionally describing the "offense definition" are part of a writing process that, as often in aesthetics, depends, as we said, on a *poetics*. It depends on an *aesthetic theory of literary forms*, on a *structured set of expressive intents*, on a *body of stylistic options*. Exactly as in the work of an artist. The artist is, in our case, the lawmaker, the legislator.

29 Reference is to the movie "Rocky", the celebrated 1976 American sports drama film directed by John G. Avildsen, written by and starring Sylvester Stallone.

A poetics, as a theory of literary form, pertains to the field of aesthetics, but it obviously includes axiological connotations. For example, the poetics of "realism" or that of "symbolism" have their different moral or political implications.

To our purposes, it is relevant to note that after the demise of the "documentary" approach in lawmaking, good legal drafting requires, inevitably, a sophisticated and coherent poetics, a sound theory of literary forms.

7. The development of the narrative style: events, symbols and subjective insight

One of the key points in the process that leads from the "documentary offense definition" towards the "fictionalized" one is undoubtedly the enhancement, the valorisation of one or more "events", outcomes resulting from the wrongful conduct (such as "death" in murder). Events characterize the story narrated in the offense definition and give dynamism and salience to the tale.

Through the description of the relevant outcome, the "event", it is possible to develop the idea that crime consists not only in wrongful actions or omissions but also in a conduct that is *harmful. Harmful* because of its consequences[30]. Thus, something of great aesthetic value stems from the event: the outcome highlights the aggression to the protected interest, to the so-called "legal good". The event highlights "the gist of the story" told by the offense definition. The development of the idea of "legal good" (life, physical integrity, property, administration of justice, sexual autonomy) is a real turning point in the evolution of criminal law poetics. That of the legal good is a conceptual category apt to catch the essence of the offense. Regardless of the kind of action performed by the perpetrator, what counts is the outcome, i.e., the production of a harm to the protected legal good. Crime is no longer the violation of a rule of rituality. It consists in the harm of a legally protected interest.

This turning point allows the legislator to break free from the literalness of typical forms (those of *furtum manifestum* for example) and to move on towards a different "construction" of the wrongful act.

Another good example is offered by the offense definition of fraud. Fraud is often "invisible". Besides cases in which a false instrument is used to deceive, fraud can take a million different forms. Hence, the definition has to deal with a crime which can rarely be associated with a constant, recurrent, visible shape of wrongdoing.

30 *Harmful consequences* are the fundamental feature of a pattern of liability different from that of "manifest criminality" typical of larceny, Fletcher (1978), pp. 235ff.

In order to overcome these problems, in many criminal justice systems, legislators prefer to define by focusing on the fraudulent causation of a series of outcomes (deception of the victim, conveyance of property, damage, unjust profit). Fraud is defined as the breach of the victim's right to self-determination with economically relevant consequences.

While the construction of the offense definition goes beyond the pattern of manifest criminality, it inevitably ends up resorting to conceptual, technical and esoteric notions (like "conveyance", but also "damage", "profit" and "other person's ownership"), which, in their turn, refer to further technical notions that specify their content. The legal environment becomes more and more cryptical and a decryption key, usually in the hands of lawyers, becomes necessary. Like conceptual art, criminal law moves away from the sensitivity and from the cognitive capacity of ordinary people.

What we described until now mainly concerns the definition of wrongdoing, of the *actus reus*. If we turn to the *mens rea*, to the subjective aspect of the crime, we see an increasing interest of legislators for this side of the narrative.[31] Criminal law becomes a psychological novel. However, if the offense definition includes subjectively qualifying elements or if the agent's specific intent is even the very reason for criminalization, the task of the legislator becomes increasingly complicated, given the difficulty of describing the subjective features of the narrated fact in an iconographic way.

8. Homelands without prophets: the crisis of the offense definition in contemporary criminal justice systems

In the last few decades, the complicated task of writing a "screenplay of the evil" has become an increasingly challenging one. Rendering evil has become incredibly difficult for the legislator. Challenges that are associated with the task of dramatizing wrongdoing have been greatly exacerbated in recent decades. Even the "scripted", fictionalized, approach – and not only the documentary one, the one based on the mimesis of the recurring event – is in deep crisis.

Lawmakers seem to have exhausted all prophetic capacity. They no longer are able to make an analytical forecast about the types of wrongdoing that will happen. They no longer have creative wisdom, visionary sensitivity, expressive resources. Legislators no longer have a "poetics", an aesthetic theory capable of elaborating the imaginary apocalypse of future scenarios. This is clear when we think of digital, immaterial new crimes that might emerge with the advance of technology.

31 Fletcher (1978), pp. 118ff.

There are many reasons for the crisis. In extreme synthesis, we can say that the ability to conceive and write offense definitions became problematic because the possibility of ordering the world according to the appearance of things became problematic too. It is more and more difficult, for the legislator, to describe (and, therefore, "prophesy") wrongdoing *by identifying the paradigmatic modalities of its realization*, modalities endowed with a constant form, with a clear icon of the typical fact.

The semiotic context in which the contemporary legislator operates is very different from the past. When it comes to conceiving and describing the typical conduct, when it comes to defining the typical criminally relevant fact, legislators are faced with a reality context whose forms are ambiguous, polysemic, elusive. Let us think of the definition of new crimes such as tax fraud, insider trading, self-money laundering, stalking; or of the many offenses provided for by the economic regulations. What is their visible face, what is the morphologically significant form of these crimes?

To the protean and polysemic mutation of the aspect of things we should add (and we see it daily) the process of progressive dematerialization and de-contextualization of the reality with which we interact. All this has an enormous impact on the social, economic and legal context in which we live. Planetary globalization, the development of information technology and virtual worlds, the, now permanent, migration of our minds to the web: everything goes in the direction of overcoming materiality. In the past, aggressions to property had to be necessarily carried out through intrusive conduct, i.e., conduct penetrating the sphere of the physical domain of others. By contrast, today, "just a click" is enough. One click on the keyboard of a computer or smartphone is all that it takes to illegally move millions of euros or dollars.

In addition to the difficulties of conceiving and describing visible, significant, shapes of conduct in an increasingly dematerialized world, there are also difficulties due to the multiplication of legal interests worthy of protection but in conflict with each other; interests that must therefore be balanced in concrete terms. The growing proliferation of deserving and conflicting interests makes it impossible to balance them "once and for all" and to write a well sculptured offense definition. With reference to the environment, for example, how can we balance "once and for all" the interests of businesses, the right of free enterprise, the right to employment, health protection, landscape protection, ecosystem protection, etc.? The balance has to be drawn in concrete terms, evaluating each specific setting.

Often, the only way to find an acceptable balance is to refer to a regulation, to the setting of a procedure to manage the issues, a procedure operated through administrative legislation, by-laws and case by case evaluation. It

is necessary to refer to a set of regulatory provisions capable of managing and balancing such interests: identifying, weighting, modulating, ordering them in a certain relationship. In other words, an otherwise unmanageable conflict can be handled by providing, outside of the criminal law, a regulation capable of balancing, in concrete terms, the various interests at stake – thus finding, precisely through a procedure, and often with the involvement of stakeholders, the difficult balance between the conflicting assets. Criminal law may re-enter the game by working as an instrument that sanctions the violations of the said administrative procedure.

9. End of visual criminal law?

Our reflection begs the question – is some form of iconographic and cinematographic figuration in the description of the criminal offense still possible? Is it still possible to "order reality according to its appearance"? Can the descriptive trait of legislative prose still, despite the demands of modernity, be continuous, pictorial, analogical?

Figurative art shows that the use of the forms of perceptible reality can be taken to its extreme limits. The art of the twentieth century has given full evidence of this, just think of Cubism. For example, we can refer to the use of the forms of nature made by Pablo Picasso in "Guernica":

Fig. 5 – Pablo Picasso: Guernica (1937)
Despite the great innovative character of Picasso's narrative method, the painting still represents forms and figures drawn from reality

Considering criminal law now: is it possible to collect morphological fragments of reality, assemble them according to new compositional methods and ensure that the overall picture still has a prescriptive meaning?

I doubt that this approach will work in criminal law. In criminal law, a Guernica-like aesthetic approach, aimed at maintaining the forms of perceptible reality at all costs, has very little chances of succeeding. Indeed, as we have repeated several times, in criminal law what must be capable of being figured is the entirety of the offense, the *Gestalt* form wrongdoing. Picking single fragments of reality and putting them together into a definition does not describe a crime.

10. *Avant-garde* criminal law cinema

What, then, is the future for the screenplay of evil in criminal law?

In dealing with this question recently, we have suggested some possible scenarios[32].

We summarize here the terms of an articulated discourse and imagine three possible evolutionary directions of the incriminating case.

10.1. Films without light: the disappearance of reality from the offense definition.

A first path is presented in clear discontinuity with the centuries-old history of the offense definition. It functions through a realistic acknowledgement of the epilogue of the iconographic, visual, criminal law parable. From this awareness, the path towards a different way of conceiving and describing the assumptions, the conditions, of criminal responsibility can start. Those who take this path have an awareness: that the world can no longer be ordered according to the appearance of things. What an event looks like is no longer significant. Also in criminal law, we must recognize that it has become impossible to retrace an isomorphy, an analogy of forms, between aggressive conducts that realize a certain kind of unjust; it is difficult to reduce them to unity, to group them according to how they appear morphologically.

The type of aggressive conduct with which we are confronted today (such as organized crime, terrorism, economic crimes, tax crimes, etc.) no longer has a unity of place, nor of time, nor of action. There is no longer the light of an iconography.

One option is to move towards an "iconoclastic" solution: no screenplay makes sense anymore. Offense definitions cannot refer anymore to visual reality.

32 Papa (2019), pp. 237ff.

Criminal law becomes a film without light. When defining the requirements of responsibility, it is inevitable to give up any references to perceptible reality and pay more attention to the purely linguistic dimension of the incriminating norms.

The aim, however, is not to improve the ability to produce, with words, mental images of forbidden facts. Rather, the perspective is that of enhancing the ability of words (and especially *some* words) to communicate their message with "digital" precision.

Therefore, leaving aside any reference to the visible form of a fact and reducing it to a list of conditions of responsibility, the language of criminal law could also be communicated with the digital precision of a bar code or a QR Code. The technical nature of the various notions used (think of the qualification of "entrepreneur", i.e., the definition of "invoice" or "insolvency") allows them to be formalized. The new offense definitions will no longer mirror reality, will no longer be "*facts-species*". They will simply indicate a list of "conditions of responsibility". They could possibly appear like this:

Figs. 6-7 – Bar code and QR code

Alongside the perspective which tends towards a technical-cryptical formalism, it is possible to see another variant of the "film without light" approach to definition. This variant also ignores the shapes of the sensitive world. We can name it "informal". As such, it finds interesting correspondence in the art of the twentieth century.

In the "informal" approach to offense definition, the rejection of the figuration goes to the extreme, rejecting any ordered form, even the abstract and geometric ones. The "informal" offense definition is characterized by mere plastic elements: it offers "matter" ready to be received and modelled by the interpreter and especially by the courts.

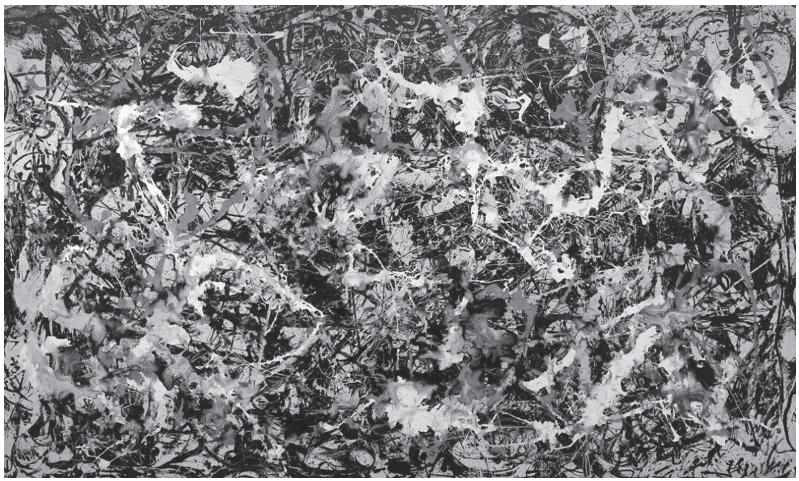

Fig. 8 – An emblematic example of informal art: Jackson Pollock: *Convergence*, 1952

Instances of this legal drafting approach can be found almost in every criminal justice system. Some of the kind are codified in Italian criminal law. Good examples are the crimes labelled "*Collapse of buildings and other nameless Disasters*" (art. 434.2. Italian penal code), "*Plagiarism*" (former art. 603, Italian penal code), "*Dangerous Jet of Things*" (art. 674, Italian penal code). These statutes present such an informal "normative matter" to make possible all kind of plastic manipulation. The crime of "*Collapse of buildings and other Nameless Disaster*" has been applied, under the heading of the "Nameless Disaster", to causing personal injuries as a consequence of asbestos production. The crime of "*Dangerous Jet of Things"* has been extended, by courts interpretation, so to include the launch of "things" like radio waves or unpleasant smells[33].

10.2. Animation movies: the "poetics" of offense definition renovated by artificial intelligence and augmented reality.

Renovation of the poetics concerning the drafting of offense definition should seek new ways to make the invisible visible: new ways of shaping a shapeless entity such as evil/wrongfulness. The following questions unveil a second evolutionary perspective, which is not necessarily alternative to the one we just talked about, as the choice could depend on the subject-matter.

33 References in Papa (2019), pp. 124ff.

Is it possible to overcome the present crisis of the offense definition through the resources of artificial intelligence? Is it possible to design a new semiotic instrument capable of describing wrongdoing in a more modern and effective way, for example, through the resources of the so-called "augmented reality"[34]?

We know that augmented reality can be used to monitor situations and places (e.g., airports and railway stations) or to reconstruct, at trial, a realistic view of the facts under discussion. Well, in addition to this, can we think of using augmented reality to renovate the poetics of offense definition? Is it possible to conceive a semiotic instrument capable of defining new, "enriched", paradigms of wrongdoing?

It is not easy to answer such questions, which are connected to the most advanced frontiers of artificial intelligence: those of computer vision and computer image recognition. These issues cannot be explored in depth here, but it could be interesting to note that one possibility is using augmented reality to describe some paradigmatic situations, some patterns of conduct that artificial intelligence can recognize when they are realized. This scenario constitutes, to a certain extent, the development of practices that have now been known for a long time, such as the use of cameras to detect those who exceed speed limits or cross an intersection with a red light. This approach is also connected to new scenarios such as that of self-driving cars: self-driving presupposes the automated recognition of typical images and relevant situations[35]. We know that artificial intelligence programs know and recognize, through various sensors and thanks to sophisticated software, patterns of situations and types of behaviours which are much more complex than crossing a red light or speeding.

Can we think of a scenario in which augmented reality intelligence can elaborate paradigmatic situations, being instructed about typical patterns of illegal behaviour and the possibility to recognize them when they occur? Can artificial intelligence, appropriately guided by an augmented vision, identify and evaluate deontologically a list of significant situations?

Probably, yes. In this regard, the "Moral machine" project, conceived and launched by the Massachusetts Institute of Technology (M.I.T.) in Boston, is very interesting and is intended to guide artificial intelligence programs in the perception and solution of ethical dilemmas[36]. For example, dilemmas concerning the choice of the person to sacrifice if, in road traffic, the driver has to make a tragic choice (a modern variant of "the trolley problem"). In view of a possible accident, should the driver/passenger be saved or the passing pedestrian? When considering possible victims, is it better to save a small child or a group

34 *See*, for all: Barfield & Blitz (2018).

35 Beck (2017), pp. 227ff.

36 *See*: http://moralmachine.mit.edu/.

of elderly people? The *Moral machine*, which can be consulted interactively on the web, poses numerous ethical dilemmas and aims to collect, on a planetary level, the opinion of millions of people on the morally preferable choices, so that artificial intelligence programs can be educated accordingly. How to program, for example, the "right" decision in the case of an ethical dilemma such as the one presented in the "vision" below?

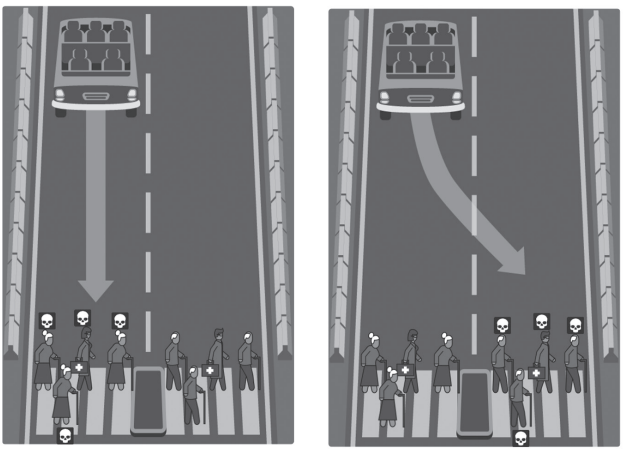

Fig. 9 – Moral Machine MIT autonomous car crash game
(http://moralmachine.mit.edu/)

Interesting perspectives. We must surely look at all of this with an open mind, but also using due caution. Undoubtedly, augmented reality technologies, and more generally all forms of artificial intelligence, favour new interactions between the mind (both human and artificial) and the morphology of the perceivable world. The "Internet of things", the global connection of things-sensors, enable us to insert, in the augmented representation of the world, information that natural morphology will not be able to express directly. All minds can take advantage from such an amazing enrichment and concentration of the information available on the screen view. Artificial intelligence, interacting with the environment through various types of sensors and combining a great deal of information, is able to give a vision of the world that is omniscient, albeit within the limits of human knowledge. This kind of new cognitive and descriptive synaesthesia will certainly influence the way in which normativity will be structured in forthcoming years.

Despite these promising features, I remain quite sceptical about the possibility that augmented reality and artificial intelligence will be able to provide satisfying solutions to the problem of offense definition. Indeed, artificial intelligence, even if advanced and sophisticated, is not really able to "understand the

world" as a sequence of concrete unprecedented events. Artificial intelligence is not capable "to live", to experience life factuality as a unique and unrepeatable phenomenon.

Artificial intelligence codifies and manages its interaction with the world according to algorithms. When facing historical happenings, it detects and appraises the relevance of a fact only in terms indicated by a quantitative model, by an algorithm. The recognition of the relevant fact takes place under standard parameters, which are always previously set. No matter how sophisticated and intelligent the informatics system is, and even if it can evolve and learn very rapidly, we can proverbially say that, like Achilles, it will never reach the turtle. In the field of law, artificial intelligence will never be able to reach, to live in the present. It will always interpret historical happenings depending on a mechanism of reminiscence.

I will try to better explain this point. Traditional offense definitions deal with future happenings. We spoke about apocalypses and prophecies. However, when the future forecast by the definition comes true as "present", it is a judge, a human being, who has to draw due consequences. With his/her human mind, the judge has to select and evalutate the relevant facts, interactively combining them with the law. From this combination, something new occurs: a judicial decision is born. This decision is not totally implied by law, nor was hidden, already packaged, in the facts of the case. Human decisions that apply the law are never tautological. They are always the outcome of "a fertile intercourse" between the interpreter and the case under evaluation.

Artificial intelligence proceeds in a different way. If a factual paradigm (such as an offense definition) is formalized and stored in an algorithm, the software will use it as a something to recognize. It is a reminiscence. The case is very different from the one of a human being that appraises a fact "in the present", identifying and interpreting such a fact in the unique and unrepeatable moment of the decision. The algorithm does not live, does not experience the unprecedented mystery of the present time, the unfathomable unicity of each moment of life.

For artificial intelligence, the historical happenings, the present, is always a past time that comes true. The present is a set of conditions foreseen by the quantitative model stored in its memory. For artificial intelligence, history is not a sequence of unique, never-seen-before facts, but only a set of predetermined stimuli that the algorithm is able to identify, to recognize and to process in light of its stored data and its instructions. I previously said that this is a "reminiscence" process. When used by artificial intelligence, the offense definition turns from a prophecy concerning the future into a cluster of memory, stored in the artificial mind and mechanically retrieved when instructed to do so.

10.3. Fantastic cinema: the offense definition as a metaphor of the evil

Given the uncertain scenarios offered by the previously illustrated options, it is probably wise to seek other paths.

I think that one fruitful research path may be directed towards a deeper knowledge of the nexus between law and metaphors[37]. In particular, and this is really a new perspective, towards a closer analysis of the relationship that exists between the pattern, the image of evil/wrongdoing depicted in the definition and the evil, the wrongfulness, behind it[38].

We have repeated several times that offense definitions are drafted as screenplays of evil. If this is true, the capacity to elaborate screenplays of evil, to dramatize wrongdoing, could be enhanced by developing prohibitions which are iconic metaphors of evil, metaphors of wrongfulness. In other words, the relationship between the offense definition, and the evil behind it, should be better detected and described as a metaphorical relationship. We know that metaphors can work here as bridges from the species (the conduct described in the offense definition) and the genus (the evil, the wrongfulness behind). Indeed, the *species* is able to make the *genus*, i.e., the evil which is the basis of criminalization, concrete and visible. Writing an offense definition is a way of visualizing, of showing in clear and definite forms the impalpable and shapeless entity which stands behind the prohibition: the evil, the wrongful, the unjust. The *species*, i.e., the conduct described in the offense definition, acts as a cognitive bridge. It is a bridge towards the *genus*: the evil, the wrongful, the unjust. The *species*, as a metaphor, puts the *genus* "under the eyes" of the reader.

The metaphorical connection that exists between *species* and *genus* is known since ancient philosophy[39]. Aristotle discusses it extensively, recalling the example of the "ten thousand enterprises of Odysseus", where "ten thousand" (the species) stands for a generic "many" (the genus). "Ten thousand" brings before the eyes of the reader what the word "many" cannot express, because of its level of abstraction[40].

In light of this – how can criminal law identify, the species (i.e., the conduct to be described in the offense definition) capable of *effectively rendering*, of concretely expressing, through metaphorical figuration, the essence of the *genus*, i.e., the essence of the evil, of the wrongful, of the unjust? How can we conceive

37 *See*, among others: Hanne & Weisberg (2018); Lakoff & Johnson (1980); Walton (1990); AA.VV. (2016); Winter (2001).

38 Papa (2019), 111ff.

39 *See*, for example: Eco (1984), pp. 164ff.; Eco (2007), pp. 67ff., 115ff.; Ricoeur (1975).

40 Aristotle (334-330 B.C.), 21, 1457b 5-10.

and describe offense definitions capable of representing evil metaphorically, allegorically and hence in visible, empirically verifiable form?

We believe that an essential (a fundamental) part of future reflection on offense definition should focus on the metaphorical relationship between the *species* described and the *genus* behind it. A new "poetics" can be based on metaphors and allegories. Of course, it will be necessary to understand better the mentioned relation and to become capable of mastering the "evocative" capacity of metaphors, their ability to link a visible form of wrongdoing to the invisible evil behind it.

This phenomenon is well known, since it is very evident in those metaphors named "metaphors by analogy". Romeo speaks about Juliet and calls her "the sun" of his life. This is a metaphor by analogy. People talk about old age as "the sunset of life". One cannot say exactly what love is and what old age is, they are abstract and invisible entities. But we are all able to express both notions by using metaphors.

It is time to give an example. In the effort to criminalize "mafia", the Italian legislator knew that mafia is an elusive and hard to grasp notion. What is the mafia? The related socio-criminological literature is extensive. In the face of such elusive notion, the ad hoc statute, enacted in 1982, chose to define mafia trying to make the invisible visible. The invisible *genus*, the notion of mafia, was grasped with a metaphor describing a species. According to art. 416 *bis* of the Italian penal code, mafia is the association in which "those who are part of it use the force of intimidation of the associative bond and the conditions of subjugation and the resulting conspiracy of silence to commit crimes, to acquire the management or control of economic activities, to make an unfair profit or advantage […]'.

We are faced here with a visual species of an invisible genus. The offense definition is the result of a "metaphorical rendering " of the invisible. The words of the definition try to express that indefinite and elusive concept of mafia, a concept that social sciences still need to articulate, with concrete and specific references. The invisible was made visible through a metaphorical creation.

11. A conclusion

As we have discussed earlier, the images of evil depicted in the offense definitions can no longer be modelled as mimetic representations of physical reality – a reality that, today, is more and more difficult to order according to its appearance.

As we have seen, when searching a new poetics for offense definition, one possibility is to frame crime paradigms by getting rid of all reference to perceptible

reality. Bar or QR codes can take the place of elaborated fact-related descriptions. However, as we saw, wiping out tangible reality from criminal statutes is highly controversial. Another option is building on the resources of new technologies, such as artificial intelligence or augmented reality. As an alternative, legal drafting can develop more "informal" ways of depicting the prohibition, as in the mentioned case of the Italian crime of "Dangerous Jet of Things". We discussed these possible evolution paths, but none of these seems to be satisfactory.

Having exhausted the poetics of documentary narration, having exhausted the expressive resources of the subsequent neo-realist fictional approach, will we find in metaphorical creativity – and therefore in allegorical, imaginative, symbolist poetics – the way to keep the criminal law connected to the way things look? If so, what kind of artistic reference can criminal lawyers, and legislators, have in their search? What kind of aesthetics can help renovation of the poetics of offense definition?

Art has been able, throughout the 20th century, to overcome the increasing difficulties in dealing with a more and more protean reality: James Joyce, Arnold Schönberg, Pablo Picasso were, together with others, the pioneers of the new explorations. They managed to express, with their innovative art, the dramatic changes which affected, since the beginning of the last century, the relation between the human mind and the world.

For the renovation of criminal law, should we follow a similar aesthetic reference?

I do not think so. While rethinking the poetics of offense definitions, the aesthetic reference to be followed can hardly be something like Picasso's "Guernica". It is not that expressive twisting of perceivable reality which can guide the renovation of our law. Offense definition should always maintain the capacity to establish rules of conduct and rules of adjudication. They cannot portray a distorted reality. They have a fundamental role in protecting the individual against the power of the public authority.

What else then?

In a recent book, I referred to the figurative art of sacred icons, the religious paintings or mosaics, developed, since the 7th century, in the culture of the eastern Christian religions (mainly inside the Orthodox Church)[41]. Sacred icons are said to be "images of the invisible"[42]. They are not, in the strict sense, "representations" of persons of objects, but symbolic "doors", "gates" capable of connecting the Human being with the spiritual essence of God.

41 Papa (2019), pp. 121ff.

42 *See*: Evdokìmov (1972), pp. 169ff.; Sedler (1981), pp. 75ff.

Maybe, the figurative art that could better inspire the necessary renovation of criminal law is just the art of the sacred icons. Offense definitions could be designed to perform a similar cognitive function. As icons, offense definitions should rely more on *symbolic communication* and less on literal, photographic, representation of wrongdoing.

Forging effective and illuminating metaphors may be a good way to walk this path. Metaphors, as we said, have the ability of "putting before the eyes" of readers the visible images of the invisible. In the case of criminal law, metaphors should be able to put before the eyes of citizens and adjudicators the visible images of evil, the recognizable images of wrongfulness. Playing the same cognitive role as sacred icons, metaphors should function as a "stargate" to the shapeless kingdom of the invisible – which in the case of criminal law is the kingdom of evil, the kingdom of the wrongfulness that we want to counter.

Bibliography

AA.VV. (2016). "Law's Metaphors: Interrogating Languages of Law, Justice, and Legitimacy". *Journal of Law and Society*, Special Issue, vol. 43, pp. 1-165.

Aristotle (334-330 B.C.). *Poetics*, 21, 1457b 5-10. Text in English (William Hamilton Fyfe, translation) available at: *http://www.perseus.tufts.edu/hopper/text?doc=aristot.+poet.+1447a*

Arnheim, Rudolf (1969). *Visual Thinking*. University of California Press: Berkeley--Los Angeles.

Ballinger, Gill (2004). "Law and Nineteenth Century Literature", *Literature Compass*, vol. 1, pp.1-6.

Barfield, Woodrow, & Blitz, Marc Jonathan, (eds.) (2018). *Research Handbook on the Law of Virtual and Augmented Reality*. Elgar: Cheltenham – Northampton.

Beck, Susanne (2017). "Google Cars, Software Agents, Autonomous Weapons Systems – New Challenges for Criminal Law", in Hilgendorf, Eric & Seidel Uwe. (eds.), *Robotics, Autonomics and the Law*. Nomos: Baden-Baden, pp. 227ff.

Brooks, Peter & Gewirtz, Paul (eds.) (1996). *Law's Stories*. Yale University Press: New Haven-London.

Cardozo, Benjamin (1925). "Law and Literature". *Yale Law Review*, vol. 14, pp. 699-719.

Cover, Robert (1983). "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative". *Harvard Law Review*, vol. 97, number 1, pp.1-68.

Dan-Cohen, Meir (1984). "Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law". *Harvard Law Review,* vol. 97, pp. 625-677.

Davis, Cushman (1883). *The Law in Shakespeare*. Washington Law Book Co.: Washington.

Eco, Umberto (1984). *Semiotica e filosofia del linguaggio*. Einaudi: Torino.

Eco, Umberto (2007). *Dall'albero al labirinto*. Bompiani: Milano.

Eco, Umberto (2014). "Metafore scientifiche, ekfrasi, ipotiposi", in *Metafore e simboli della scienza*. Scienza e Lettere: Roma, pp. 77-88.

Evdokìmov, Paul N. (1972). *L'art de l'icône. Théologie de la beauté*. trad. it, *Teologia della bellezza. L'arte dell'icona*. 8.ª ed. Roma: Edizioni Paoline, 1984.

Fletcher, George P. (1976). "The Metamorphosis of Larceny". *Harvard Law Review*, vol. 89, pp. 469-529.

Fletcher, George P. (1978). *Rethinking Criminal Law*, reprint (2000). Oxford University Press: Oxford.

Forti, Gabrio *et al*. (eds.) (2012). *Giustizia e letteratura*, vol. I. Vita e pensiero: Milano.

Forti, Gabrio *et al*. (eds.) (2014). *Giustizia e letteratura*, vol. II. Vita e pensiero: Milano.

Forti, Gabrio *et al*. (eds.) (2016). *Giustizia e letteratura*, vol. III. Vita e pensiero: Milano.

Frank, Cathrine O. (2010). *Law Literature and the Transmission of Culture in England, 1837-1925*. Abington-New York: Routledge.

Gargani, Alberto (1997). *Dal Corpus delicti al Tatbestand. Le origini della tipicità penale*. Giuffrè: Milano.

Guyora, Binder & Weisberg, Robert (2000). *Literary Criticism of Law*. Princeton Univ. Press: Princeton.

Hanne, Michael & Weisberg, Robert (eds.), (2018). *Narrative and Metaphor in Law*. Cambridge University Press: New York.

Hassemer, Winfried (1968). *Tatbestand und Typus. Untersuchungen zur strafrechtlichen Hermeneutic*. Karl Heymanns Verlag, Köln-Berlin-Bonn-München.

JCS (1865). 'Law and Literature'. *The St. James Magazine*, vol. 14, pp. 194-8.

Jiménez de Asúa, Luis (1965). *Tratado de Derecho penal*, vol. III, 4.ª ed. Losada: Buenos Aires.

Katz, David (1948). *Gestaltpsychologie*. trad. it. *La psicologia della forma* (1979). Bollati Boringhieri: Torino.

Lakoff, George & Johnson, Mark (1980). *Metaphors We Live By*. trad. *it Metafora e vita quotidiana* (1998). Bompiani: Milano.

Mitchell, William John Thomas (1994). *Picture Theory*. The University of Chicago Press: Chicago-London.

Muñoz Conde, Francisco & García Arán, Mercedes (2010). *Derecho Penal, Parte General*, 8.ª ed. Tirant Lo Blanch: Valencia.

Palazzo, Francesco (1979). *Il principio di determinatezza nel diritto penale*, Cedam: Padova.

Papa, Michele (2019). Fantastic Voyage. *Attraverso la specialità del diritto penale*. 2.ª ed. Giappichelli: Torino.

Perkins, Rollin M. & Boyce, Ronald N. (1982). *Criminal Law*, 3.rd ed., Foundation Press: New York.

Posner, Richard (2009). *Law and Literature*, 3rd ed., Cambridge Mass-London: Harvard Univ. Press.

Prato, Alessandro (2017). "L'ipotiposi retorica. Il far vedere e l'effetto di presenza". *Lexia, Rivista di semiotica*, vol. 27-28, *Aspectuality,* pp. 267-280.

Quintero Olivares, Gonzalo (2010). *Parte General del Derecho Penal*, 4.ª ed. Aranzani: Pamplona.

Ricoeur, Paul (1975). *La Métaphore vive*. Seuil: Paris.

Robinson, Paul H. (1990). "Rules of Conduct and Principles of Adjudication". *University of Chicago Law Review*, vol. 57, pp. 729-771.

Robinson, Paul H. (1994). "A Functional Analysis of Criminal Law". *Northwestern University Law Review*, vol. 88, pp. 857-913.

Robinson, Paul *et al.* (1996). "Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication". *Journal of Criminal Law & Criminology*, vol. 86, pp. 304-365.

Rodriguez, Béatrice (2010). *The Chicken Thief*. Enchanted Lion Books: Brooklyn NY.

Roselli, Orlando (2018). *Cultura giuridica e letteratura nella costruzione dell'Europa*. Torino: Giappichelli.

Roselli, Orlando (2020). *Cinema e diritto, La comprensione della dimensione giuridica attraverso la cinematografia*. Napoli: ESI.

Sage Heinzelman, Susan (2006). *Representing Justice: Stories of Law and Literature*. The Teaching Company: Chantilly, Va.

Schenck, Mary Jane (2013). "Reading Law as Literature, Reading Literature as Law: A Pragmatist's Approach". *Cahiers de recherches médiévales et humanists*, vol. 25, pp. 9-29.

Sedler, Egon (1981). *L'icône, image de l'invisible. Eléments de théologie, esthétique et technique*. trad. it. *L'icona: immagine dell'invisibile. Elementi di teologia, estetica e tecnica*, 7.ª ed., 2007. Milano: San Paolo.

Stephen, James Fitzjames (1857). "The License of Modern Novelists". *Edinburgh Review* vol. 106, pp. 124-156.

Thomas, Valerie (2019). "Mental Imagery", in *The Stanford Encyclopedia of Philo-*

sophy (Summer 2019 Edition), Edward N. Zalta (ed.) (*https://plato.stanford.edu/archives/sum2019/entries/mental-imagery/*).

Vassalli, Giuliano (1992). "Tipicità, diritto penale", in *Enciclopedia del diritto*, vol. XLIV. Milano: Giuffrè, pp. 535ff.

Walton, Kendall L. (1990). *Mimesis as Make – Believe*. trad. it. *Mimesi come far finta. Sui fondamenti delle arti rappresentazionali* (2011). Mimesis: Milano--Udine.

White, James Boyd (1985). *The Legal Imagination*. University of Chicago Press: Chicago.

White, James Boyd (1989). "What Can a Lawyer Learn from Literature". *Harvard Law Review*, vol. 102, pp. 2014-47.

White, James Boyd (1982). "Law as Language: Reading Law and Reading Literature". *Texas Law Review*, vol. 60, number 3, pp. 415-445.

Wigmore, John H. (1907-1908). "A List of Legal Novels". *Illinois Law Review*, vol. 2, number 9, pp. 574-593.

Wigmore, John H. (1922-1923). "A List of One Hundred Legal Novels". *Illinois Law Review*, vol. 17, number 26, pp. 26-41.

Weisberg, Richard (1976). "Wigmore's 'Legal Novels' revisited: New Resources for the expansive Lawyer". *Northwestern University Law Review*, vol. 71, pp. 17-28.

Weisberg, Richard (1984). *The Failure of The Word: The Protagonist As Lawyer In Modern Fiction*. Yale University Press: New Haven.

Winter, Stephen (2001). *The Clearing in the Forest*. *Law, Life, and the Mind*. University of Chicago Press: Chicago.

Wunenburger, Jean-Jacques (1997). *Philosopie des images*. trad. it. *Filosofia delle immagini*. Torino: Einaudi, 1999.