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The Hybridization of Punishment and Welfare:

The legal treatment of insane offenders in Switzerland 1890–1970*

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Abstract
This chapter deals with the treatment of insane offenders in Switzerland between the late 19th century and the 1960s, and how it became part of the legal policy agenda. The implementation of the Swiss criminal code after it came into force in 1942 is also examined. From the onset, Swiss psychiatrists were important players in drafting the first Swiss criminal code. Together with other progressives, they developed a set of measures based on earlier forms of administrative detention, while simultaneously advocating important demands of legal positivism aimed at protecting society. This hybrid broke through the traditional demarcation between repression and prevention, at legal, institutional and individual levels. The new Swiss criminal code of 1942, similarly, was a hybrid between repression and welfare provisions in its security and treatment measures. Psychiatry thereby became part of the correctional system, while the majority of mentally ill offenders ended up, de facto, in penal institutions. This led offenders to often be stigmatised as abnormal in criminal proceedings; they were imprisoned for indeterminate periods of time and had little or limited access to psychiatric care. Criminal law thereby became more open to prevention and protection considerations, and hence to public welfare concerns. In retrospect, however, the development is part of an unfinished and inherently ambivalent modernisation process, and an example of the "muddling through" typical of how marginalized groups are dealt with in federalist Switzerland.

Keywords
Insane Offenders, Legal Positivism, Switzerland, Security and Treatment Measures, Dual-Track System, Administrative Detention, Forensic Psychiatry

1. Introduction

Switzerland was one of the first countries to adopt a hybrid system to deal with insane offenders. Building on earlier forms of administrative detention, the first draft for a national criminal code (1893) proposed a set of legal sanctions that combined penalties with security and treatment measures for those judged insane and other groups of "dangerous" and "abnormal" offenders. The layout of the system definitely adopted by the Swiss criminal code of 1937 was a hybrid (or dualist) in that it obliged the judiciary to decide about offenders who were not or only partially accountable for their acts. With the new legislation, courts were given

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the competence to send insane offenders to psychiatric and other social or medical institutions for an indeterminate time period. The introduction of security and treatment measures marked an important step away from the doctrine of classical criminal law, which had left care or prevention considerations to medical or administrative authorities and moved it toward legal positivism.

In the last decades, the history and doctrine of the Swiss criminal code have been much studied, with attention given to the conception and legitimation of its novel security and treatment measures. Another focus has been on the gradual integration of key issues of legal positivism into a multi-faceted penal welfare complex.[1] Scholars have also pointed out that eminent Swiss psychiatrists, along with other proponents of social defence, played a crucial role in redefining the judiciary's handling of insane offenders.[2] In my doctoral thesis, published in 2004, I argued that the progressive intersection of law enforcement and psychiatry from the late 19th century onward not only mirrored the growing weight and status of positivist science, but also tightened and redefined existing forms of cooperation between state agencies and medical institutions preoccupied with protecting and regulating the "social" in a liberal society.[3] Recently, research teams from the Universities of Geneva and Lausanne have conducted further research on the long-term development of psychiatric evaluations before courts in French-speaking Switzerland.[4]

Much of this research deals with either legal or medical aspects, leaving aside broader social and political dimensions. In this chapter, by contrast, I argue that the changing modes of dealing with insane offenders not only reflect the gradual integration of social defence approaches into Swiss criminal law, but in a more general sense also form part of Switzerland's path toward modernity. The problem of insane offenders shows how the assertiveness of legal positivism, with its Janus-faced aspects of 'scientification' and 'juridicalisation', largely depended on political decision-making and implementation processes, both of which were strongly influenced by Switzerland's federalist system.

Drawing on my own and other studies, this chapter focuses on three issues. First, I situate the emergence of the Swiss hybrid system with regard to insane offenders in the broader context of the discussions about legal positivism and forensic psychiatry in the late 19th century. Second, I trace the legal and political debates surrounding the elaboration of the new system, with special attention given to the group of "psychopathic offenders". Third, I elucidate the problems psychiatric institutions faced during the implementation of the new system after the Swiss criminal code came into force in 1942.

2. Criminal law, psychiatry and social defence

[1] Holenstein, S., *Emil Zürcher (1850–1926) – Leben und Werk eines bedeutenden Strafrechtlers,* Zürich: Schulthess, 1996; Rusca, M., *La destinée de la politique criminelle de Carl Stooss,* Freiburg: s. n., 1981; Kaenel, P., *Die kriminalpolitische Konzeption von Carl Stooss im Rahmen der geschichtlichen Entwicklung von Kriminalpolitik und Straftheorien,* Bern: Stämpfli, 1981.

[2] Barras, V., Gasser, J., "Les psychiatres et le code pénal: débats à la Société des médecins aliénistes suisses au tournant du siècle", *Archives suisse de neurologie et de psychiatrie* 151 (2000/Supplementum), pp. . 15–19; Gschwend, L., *Zur Geschichte der Lehre der Zurechnungsfähigkeit,* Zürich: Schulthess, 1996; Bomio, G., "Auguste Forel et le droit pénal", *Schweizerische Zeitschrift für Strafrecht* 107 (1990), pp. 87-105.

[3] Germann, U., *Psychiatrie und Strafjustiz. Entstehung, Praxis und Ausdifferenzierung der forensischen Psychiatrie in der deutschsprachigen Schweiz 1850–1950,* Zürich: Chronos, 2004.

[4] Cicchini, M., Maugué, L., *Le règne du psychiatre. Une histoire suisse de la psychiatrie légale* (Genève et Vaud 1760–1910) (forthcoming).

When the debate on the unification and reform of Swiss criminal law moved into its decisive stage in the 1890s, law enforcement and administrative bodies in Switzerland could already look back on a long tradition of dealing with insane offenders. Much like the legislation existing in other European countries, the criminal codes of the cantons acknowledged the existence of mental states among offenders which excluded any legal liability for their criminal acts. According to the basic rules of liberal law, mentally ill offenders thus were exempted from punishment. The evolution of Swiss criminal law, however, differed in that, unlike the national codifications in France (1810) and Germany (1871), most cantonal legislation retained the notion of limited responsibility. In cases when offenders could be seen to have been at least partially liable for their acts, the courts reduce prison sentences. These provisions provided the courts with a certain flexibility for the assessment of mental states and criminal responsibility.[5]

Several cantonal legislatures also allowed the courts to transfer those offenders deemed not criminally responsible for their acts and judged as "dangerous" to the police authorities for custody in psychiatric asylums. This kind of ruling likely developed out of customary practices dating from even before 1800. According to Zurich's cantonal criminal code (1835), for instance, it was up to the police authorities to apply "precautionary measures for the future" (*Vorsichtsmassregeln für die Zukunft*), when insane offenders were acquitted. Later legislation, such as the cantonal criminal codes of Vaud (1843) or Bern (1866), were even more explicit, giving their courts the competence to transfer those offenders deemed not criminally responsible for their acts or judged as "dangerous" to the police authorities.[6] The Bernese code, for instance, stipulated that:

> "The canton's Executive Council has the power to take appropriate security measures against persons who have been exempted from punishment due to insufficient mental capacity (art. 43 and 45) or who are not subject to prosecution due to their youth (art. 44), if public safety so requires, consisting, if necessary, in detention in an appropriate detention centre or insane asylum."[7]

Even if in hindsight such provisions can be interpreted as the predecessors of later security measures, they still respected the traditional demarcations between the spheres of criminal and administrative law. The decision whether to send "dangerous" persons to psychiatric asylums ultimately remained in the competence of cantonal governments and public administrators. Psychiatric asylums, as places of detention, also did not become a formal part of the correctional sector.

Recently, scholars have pointed out that the committing of insane offenders following "administrative channels" must be considered in the broader context of policies of prevention and confinement outside the sphere of criminal law. In fact, starting in the mid-19th century, Swiss cantons (or rather, their ruling liberal or conservative elites) employed an extensive arsenal of administrative detention measures. These included deciding over committing the "indolent" or "dissolute" to public workhouses and giving the order to place individuals in psychiatric asylums. Such administrative decisions were made without any supervision

[5] Germann, *Psychiatrie und Strafjustiz*, p. 174. For Germany see: Greve, Y., "Die Unzurechnungsfähigkeit in der 'Criminalpsychologie' des 19. Jahrhunderts", *Unzurechnungsfähigkeiten. Diskursivierung unfreier Bewusstseinszustände seit dem 18. Jahrhundert* (M. Niehaus, H.-W. Schmidt-Hanissa eds.), Frankfurt am Main: P. Lang, 1999, pp. 107-132.

[6] Germann, *Psychiatrie und Strafjustiz*, p. 319.

[7] *Strafgesetzbuch für den Kanton Bern vom 30. Januar 1866* (C. Stooss ed.), Bern: Semminger, 1896, art. 47: "Dem Regierungsrat steht die Befugnis zu, gegen Personen, die wegen mangelnder Zurechnungsfähigkeit von Strafe befreit worden sind (Art. 43 und 45), oder die ihrer Jugend wegen keiner Strafverfolgung unterliegen (Art. 44), wenn es die öffentliche Sicherheit erfordert, geeignete Sicherheitsmassregeln zu treffen, die nötigenfalls in der Verwahrung in einer angemessenen Enthaltungs- oder Irrenanstalt bestehen."

provided by the judiciary, and in practice often occurred without due process.[8] Under these circumstances, it is not surprising that such decisions about administrative detention would become important blueprints for Swiss criminal law reform by the end of the century.

During the 19th century, criminal courts began to rely increasingly on the expertise of doctors for assessing offenders' mental capacity. As recent research by Marco Cicchini and Ludovic Maugué has shown, the practice of assessing offenders whose mental state was considered dubious by public health officers or by general practitioners goes back at least to the 18th century in Switzerland. Psychiatric asylums began being built in the 1830s, leading forensic assessments to increasingly be conducted by state-salaried psychiatrists (or *Irrenärzte* as they called themselves, 'doctors for lunatics'). For state authorities, falling back on psychiatry and its institutions allowed for more time to assess offenders, and helped pre-trial holding facilities out as it freed them of "difficult" inmates. For psychiatry, close cooperation with law enforcement agencies had the advantage that doctors could, to a certain extent, control transfers between detention cells and their own psychiatric institutions. However, psychiatry has no monopoly on forensic expertise, and even in the mid-20th century, in some rural areas, general practitioners were still called in by courts to provide their expertise.[9]

Providing forensic expertise increased the status and function of psychiatry. This became obvious, when, in the 1880s, issues of prevention became a matter of urgent concern for a new generation of psychiatrists; they wanted to position their discipline relative to the broader field of public and social hygiene. Eminent exponents included Auguste Forel, director of Zurich University's psychiatry clinic from 1879 to 1898, and his successor Eugen Bleuler, director from 1898 to 1927. Bleuler coined the term "schizophrenia" (1911) and opened academic psychiatry to psychoanalysis. Together with colleagues, Forel and Bleuler promoted alcohol abstinence, eugenics and sexual reform, with Bleuler's seminal textbook on psychiatry (1916) strongly influencing several generations of Swiss psychiatrists.[10]

These two were also among the most ardent proponents of criminal anthropology and legal positivism in Switzerland. For this "Zurich school", both law enforcement and psychiatry had to protect society from "dangerous" individuals. Psychiatrists strove to transform criminal law into a system of social defence, substituting important axioms of classical criminal law, such as criminal responsibility and proportionate sentencing, to a deterministic conception of human action and behaviour control.[11] For them, the shortcomings of existing legislation were best epitomized by how offenders judged to have diminished capacity were treated. Although psychiatrists fully acknowledged the necessity to consider different levels of responsibility according to the mental condition of the offenders, they criticized the existing practice that insane offenders could benefit from a reduction of prison terms. "When a psychopath's responsibility is limited, he is punished less, but as a psychopath he will probably offend again against society. And just for this reason, he should instead be rendered harmless", the Bernese

[8] Cicchini, Maugué, *Le règne du psychiatres*; Germann, *Psychiatrie und Strafjustiz*, chapter 8; For a comprehensive overview on recent research on administrative detention see: Independent Expert Commission on Administrative Detention, *Mechanics of Arbitrariness. Administrative Detention in Switzerland 1930–1981. Final report*, Zürich: Chronos, 2019, https://www.uek-administrative-versorgungen.ch/resources/E-Book_978-3-0340-1529-5_UEK_10D.pdf (accessed 27 Dec. 2019).

[9] Cicchini, Maugué, *Le règne du psychiatres*.

[10] Bernet, B., *Schizophrenie. Entstehung und Entwicklung eines psychiatrischen Krankheitsbildes*, Zürich: Chronos, 2010.

[11] Germann, *Psychiatrie und Strafjustiz*, 2004, p. 117–138.

psychiatrist Wilhelm von Speyr opined in 1894.[12] Swiss psychiatrists' proposals for reforming the law and addressing the alleged problems with security were to institutionalize offenders for an indeterminate period and to provide adequate medical or preventive treatment instead.[13] In his in his famous pamphlet "The abolishment of punishment" (*Die Abschaffung des Strafmasses*) of 1881, the German psychiatrist Emil Kraepelin had made the same point, one important for disseminating legal positivism in German-speaking psychiatry.[14] Echoing Kraepelin, Forel predicted in 1889 that the treatment of certain class of offenders would in the foreseeable future become "a part of psychiatry" (*Abteilung der Psychiatrie*) as well as "a refined sort of psychology aimed at protecting society".[15]

3. Dangers to the social order: psychopaths, moral idiots and other borderline individuals

The vehemence and alarmism that animated Swiss psychiatrists around 1890 mirrored a specific understanding of mental disorders, one strongly influenced by contemporary degeneration theory. In clinical case studies and serial examinations of patients and prison inmates, Forel, Bleuler and their colleagues posited the existence of a range of "borderline states" (*Grenzzustände*) which affected the control of emotions and behaviour. "There are an infinite number of defective and abnormal individuals, whose minds and bodies are forever marked by nature and who can be considered neither as normal nor as mentally ill," the psychiatrist and director of the University clinic of Basle, Ludwig Wille, put it in 1889.[16] Like their colleagues abroad, Swiss psychiatrists painted an alarming picture of a growing class of "defectives" and "psychopaths", who, given their "inferior traits" and "asocial character", were in conflict with the social order. Forel explicitly referred to Lombroso's atavism theory when he warned of "men's predatory instincts" lurking under the "surface of modern society's cultural patina".[17] Bleuler, in turn, thought, when faced with "morally insane" patients (*Moralische Idioten*) lacking any sense of empathy and justice, that he had identified a clinical variant of Lombroso's "born criminal".[18]

The first national study of prisons in 1893, however, showed that mental disorders were far from the primary concern of the justice system and prison administrators. The proportion of the mentally insane in Bernese cantonal prisons was estimated to be no more than five percent.[19] Nevertheless, the new understanding of mental abnormalities propelled by psychiatry soon

[12] Speyr von, W., "Wie ist die Zurechnungsfähigkeit in einem schweizerischen Strafgesetzbuch zu bestimmen?", *Schweizerische Zeitschrift für Strafrecht* 7 (1894), pp. 183-191, p. 188: "Wenn ein Psychopath vermindert zurechnungsfähig ist, so darf er weniger bestraft werden, aber weil er Psychopath ist, darum wird er sich viel eher wieder gegen die Gesellschaft verfehlen, und darum sollte er um so eher unschädlich gemacht werden."

[13] Germann, *Psychiatrie und Strafjustiz*, pp. 133, 136.

[14] Engstrom, E.J., "Der Verbrecher als wisenschaftliche Aufgabe – die kriminologischen und forensischen Schriften Emil Kraepelins", Kraepelin E., *Kriminologische und forensische Schriften* (Werke und Briefe, 2), München: belleville, 2001, pp. 353-390.

[15] Forel, A., "Zwei kriminalpsychologische Fälle", *Schweizerische Zeitschrift für Strafrecht* 2 (1889), pp. 13-35, p. 16.

[16] Wille, L., "Zur Frage der verminderten Zurechnungsfähigkeit", *Schweizerische Zeitschrift für Strafrecht* 3 (1890), pp. 1-13, p. 8f.: "Es gibt eine unendlich grosse Zahl solcher von der Natur schon stets geistig, häufig aber auch körperlich gezeichneter Defekt- und abnormer Menschen, die man nicht als geistig normal, aber auch nicht als geisteskrank […] ansehen kann."

[17] Kölle T., *Gerichtlich-psychiatrische Gutachten au der Klinik von Herrn Professor Dr. Forel in Zürich*, Stuttgart: Enke, 1896, IV.

[18] Bleuler, E., *Der geborene Verbrecher*, München: J.F. Lehmann, 1896.

[19] Guillaume, L., "Die Insassen der Berner Strafanstalten und ihre Jugenderziehung", *Schweizerische Zeitschrift für Statistik* 29 (1893), pp. 311-458, pp. 340, 343.

affected daily judicial practice. In the Canton of Bern, the number of offenders sent for psychiatric examination tripled between 1885 and 1920, and that without any significant increase in the number of offenses. In the same period, the proportion of offenders diagnosed by psychiatrists as "constitutionally abnormal" more than doubled. This category of offenders actually corresponded to the group of "defective individuals" described by Wille in 1889. In 60 per cent of these cases, the law enforcement authorities concluded that offenders weren't fully responsible for their criminal acts, and in another 30 per cent, pleaded for acquittal due to a complete lack of criminal responsibility among these offenders.[20]

At first glance, the data available suggests that psychiatrists' concern about security had some basis, especially with regard to offenders judged to have only limited capacity. On closer inspection, however, it is evident that the trends instead mirror a tendency to pathologize offenders who show atypical patterns of behaviour and who, following psychiatric categorizations, live at the margins of society.[21] It is not surprising that the treatment of "psychopaths", "abnormal individuals" and other "enemies of society" became the focus of psychiatry's preoccupation with criminal policy.

Psychiatrists' claims to improve the protection of society through medicalizing crime provoked mixed reactions among legal experts and in the public at large. Critique arose first from the adherents of classical criminal law. During the 1890s, Forel and the conservative judge Placid Meyer von Schauensee clashed several times in the columns of the *Neue Zürcher Zeitung* over the role of medical experts in criminal proceedings.[22] Meyer von Schauensee's reactions showed that there was widespread unease at the time about the power of psychiatry, one furthered by a series of media reports on the (allegedly) arbitrary commitment of respectable citizens to psychiatric asylums.[23] These "anti-psychiatric" voices notwithstanding, the large majority of Swiss lawyers appeared open to cooperating more closely with psychiatry. Among them were not only practitioners (judges, public prosecutors, prison administrators) engaged in daily encounters with medical experts, but also leading proponents of criminal law reform, such as Carl Stooss or Alfred Gautier. They agreed with psychiatrists' assumption that a considerable proportion of offenders, notably "habitual criminals" and other "incorrigible individuals", were affected by congenital abnormalities. As a consequence, they were willing to give psychiatry a more decisive position in the "fight against crime".

The appearance and editorial orientation of the Swiss Journal of Criminal Law (*Schweizerischen Zeitschrift für Strafrecht*) (1888) was another important step toward psychiatry's recognition in the field of criminal law. From its beginning, the journal, edited by Stooss and others, also included articles by eminent psychiatrists. The Psychiatric-Juridical Association (*Psychiatrisch-juristische Vereinigung*), founded in Zurich in 1902, took it even further. The aim of this loose group was to foster the exchange between psychiatry and criminal law. Among its founders could be found Bleuler and the eminent professor of criminal law and liberal politician Emil Zürcher. Zürcher's position among Swiss criminal law reformers was exceptional in that he was one of the few lawyers who had enthusiastically embraced the advent of the *scuola positiva* in the 1880s. Later on, he adopted a more pragmatic, but still progressive

[20] Germann, *Psychiatrie und Strafjustiz*, pp. 199, 203.

[21] Germann, U., "Der Ruf nach der Psychiatrie. Überlegungen zur Wirkungsweise psychiatrischer Deutungsmacht im Kontext justizieller Entscheidungsprozesse", *Verbrecher im Visier der Experten. Kriminalpolitik zwischen Wissenschaft und Praxis im 19. und frühen 20. Jahrhundert* (S. Freitag, D. Schauz eds.), Stuttgart: Steiner, 2007, pp. 273-293.

[22] Germann, *Psychiatrie und Strafjustiz*, pp. 127ff.

[23] Nellen, S., Schaffner, M., Stingelin, M., *Paranoia City. Der Fall Ernst B. Selbstzeugnis und Akten aus der Psychiatrie um 1900*, Basel: Schwabe, 2007.

position. Together with Stooss and Gautier, Zürcher belonged to the core group of the Swiss criminal reform movement.[24]

4. A new paradigm: security and treatment measures for insane offenders

In 1887, the Swiss parliament seized the initiative to try to unify civil and criminal law. Until then, cantonal legislation on criminal matters had been a patchwork. Over the previous 50 years, most cantons had adopted modern criminal codes based on German or French models. Some rural cantons, however, still lacked any written legislation on criminal matters. In 1889, the Swiss Federal Council commissioned Carl Stooss, then professor of criminal law in Bern, to draft a national criminal code. Four years later, Stooss published his draft, one seen by many contemporaries as an important contribution to social defence theory. Stooss's draft was then discussed by several expert commissions and finally submitted to parliament in 1918. After several politically motivated delays, the Swiss Criminal Code was finally enacted in 1937 and went into force in 1942.[25]

Together with Gautier and Zürcher, Stooss belonged to a group of progressive lawyers who aligned themselves with the international criminal law reform movement and the doctrine promoted by the International Union of Criminal Law. In 1890, this association held its annual meeting in Bern, lending Swiss reformers important ideological support and political legitimation. Stooss's ambition to craft a national criminal code was in line with important concerns raised by legal positivists. Key here was a classification of criminals according to their character and living conditions, and sentencing rules taking into account the "dangerousness" of certain classes of offenders. In consequence, Stooss had also to address the issue of insane offenders.[26]

An important part of this involved close consultation between Stooss and the Swiss Psychiatrists' Association (*Verein der Schweizer Irrenärzte*) at its annual meeting in Chur in May of 1893. The year before, this association had established a commission to study legal and forensic issues, and presented its propositions, which had been worked out together with Stooss, on this occasion. The propositions addressed the legal definition of criminal responsibility (of less interest for this chapter) as well as the treatment of insane offenders.[27] For this class of offenders, the commission proposed giving the courts the competence to send those offenders deemed not or only partly responsible for their actions to a psychiatric institution for an indeterminate time.

The explanations given by the commission fully echoed the arguments Forel had made already in 1889. For von Speyr, who acted as the commission's spokesman, the criminal code should not content itself with postulating the partial lack of responsibility of certain offenders:

[24] Holenstein, *Emil Zürcher*.

[25] Gschwend, L., "Carl Stooss (1849–1934) – Originell-kreativer Kodifikator und geschickter Kompilator des schweizerischen Strafrechts – Reflexionen zu seinem 60. Geburtstag", *Schweizerische Zeitschrift für Strafrecht* 112 (1994), pp. 26-56.

[26] Germann, U., *Kampf dem Verbrechen. Kriminalpolitik und Strafrechtsreform in der Schweiz 1870–1950*, Zürich: Chronos, 2015. For a comprehensive overview on legal positivsm and criminal law reform in Switzerland, see: Germann, U., "Toward New Horizons. Legal Positivism and Swiss Criminal Law Reform in the late 19th and early 20th Centuries", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 259-276, http://www.glossae.eu/glossae-17-2020/?lang=en.

[27] The debate on the definition of criminal responsibility is analysed in detail by Gschwend, *Zur Geschichte der Lehre von der Zurechnungsfähigkeit*, pp. 440-614.

"An insane person having committed a crime is, under certain conditions, more dangerous than a healthy criminal. It is, therefore, necessary to render him harmless, meaning he must be properly cared for […]."[28] Incapacitation, be it through custody or commitment, was thus declared an important concern for the judiciary. After a brief debate, the commission's proposals were adopted, unanimously. Later, and without substantive changes, Stooss included them into his draft. Accordingly, Article 10 of Stooss's draft stipulated:

"If public safety requires the person deemed not responsible or deemed of diminished responsibility for their actions to be kept in an institution, the court shall order this. The court shall order the release if the reason for the custody has ceased to exist."[29]

Article 11 included a similar formulation for cases in which insane offenders were in need of care or treatment (but not necessarily a danger for public safety).

In his explanations, Stooss concisely noted:

"If the committal of a sick person to an insane asylum is necessary because of the danger [they were deemed to pose] to the community, the judge shall refrain from punishing the person, even if he or she is only of diminished responsibility. Insane persons who are dangerous to the community do not belong in penal institutions." [30]

The agreement between Stooss and Swiss psychiatrists was an important basis for the dual-track system of punishment and security measures. It was, and still is, an important feature of Swiss criminal law, as well as of criminal law elsewhere in Europe. Provisions for detaining insane offenders for the sake of custody (*Verwahrung*) or treatment and care (*Versorgung* or *Behandlung*) were part of a set of sanctions Stooss referred as "security measures" (*Sicherungsmassregeln* or *sichernde Massnahmen*). In the course of the political debates on criminal law reform, other measures – provisions for the committing of repeat or "indolent" offenders into workhouses, treating alcoholics in institutions designed for addicts, or admitting difficult adolescents into reform schools – would become part of this (selective) package of preventive sanctions. A common attribute was – at variance with ordinary penalties – that the duration of commitment was not to be fixed in advance by the courts but depended largely on later examinations by doctors or prison and judicial administrators.[31]

For Stooss, the treatment of insane offenders proposed in his draft exemplified the Swiss model of social defence. His proposal gave the courts the competency to enact preventive measures previously in the hands of the police and public administrators. In many cantons, offenders lacking in responsibility and deemed "dangerous" were referred to the police or other authorities for *administrative* detention. The shift of competencies also corresponded with psychiatrists' proposals. In Chur in 1893, von Speyr suggested that in the near future, judges no longer recommend but order that insane offenders be committed.[32]

[28] Speyr, "Zurechnungsfähigkeit", p. 187: "Ein Geisteskranker, der ein Verbrechen begangen hat, ist unter Umständen gefährlicher als ein gesunder Verbrecher. Er muss darum unschädlich gemacht, d. h. angemessen versorgt werden […]."

[29] Draft 1893, art. 10: "Erfordert die öffentliche Sicherheit die Verwahrung des Unzurechnungsfähigen oder vermindert Zurechnungsfähigen in einer Anstalt, so ordnet sie das Gericht an. Das Gericht verfügt die Entlassung, wenn der Grund der Verwahrung weggefallen ist."

[30] Draft 1893, p. 24. At variance with psychiatrists' proposals, the draft of 1893 provided that offenders in need of treatment who did not pose a threat to public safety continued to be referred to the administrative authorities. It was not until the draft of 1896 that decisions in such cases were also transferred to the courts.

[31] For further references: Germann, *Kampf dem Verbrechen,* pp. 119–148.

[32] Speyr, "Zurechnungsfähigkeit", p. 187.

It is perhaps surprising that Stooss was, on several occasions, quite eager to play down the novelty of his conception and to characterize security measures as a pragmatic adjustment of existing practices. In fact, the transfer of new competencies to the judiciary had severe consequences not only for legal doctrine but also for offenders themselves. The concept of security and treatment measures in criminal law blurred the boundaries between repression and prevention and in consequence hollowed out a fundamental principle of liberal criminal law.

These implications are evident when one compares Swiss to French practice at the time. According to the French *Code pénal* of 1810, courts had to acquit offenders deemed not responsible for their actions. The question whether acquitted offenders could be subsequently sent to a psychiatric institution was regulated by administrative law in 1838. Decisions on a *placement d'office* were, accordingly, in the competency of the *préfets de police*. As the *Code pénal* didn't acknowledge partial responsibility, offenders with minor mental disorders could be sent to psychiatric facilities only after serving their prison sentences.[33] In contrast, Stooss's draft wanted to obligate judges, giving them the duty to explore and decide whether, to prevent relapses, it was necessary to commit or treat insane offenders in a medical institution.

The implications of Stooss's propositions were most severe for offenders found only partially liable for their acts. While the commitment, for an indeterminate time, of those deemed wholly without responsibility for their actions was not controversial, the treatment of those judged only partly responsible led to a heated debate among legal experts and politicians about the relationship between punishment and prevention. From psychiatry's point of view, the issue was crucial indeed. The treatment approach psychiatrists promoted largely depended on the range of options courts had for dealing with the increasing number of borderline cases.

In Chur, von Speyr had insisted that partially responsible offenders could, "under certain circumstances", be treated in the same manner those offenders judged wholly without responsibility.[34] Stooss' considerations went in the same direction. According to the draft of 1893, when partially responsible offenders were sent to a psychiatric facility, their (reduced) prison sentences simply "fell away".[35] Among the experts who discussed Stooss' draft between 1893 and 1896, this idea encountered strong resistance just for this reason. Defenders of classical penal law lamented that a whole class of offenders would profit from unjustified impunity. In turn, they demanded security measures be carried out only after a (reduced) prison sentence had been served. With this prioritization, offenders found partially responsible had to serve a prison sentence before being transferred to a medical institution for an indeterminate period of time.[36]

In the following years, the debate between progressive and traditionalist legal experts continued smouldering. It would take until 1908, and a further commission, to reach a quite sophisticated compromise, one which formed the basis for the regulation finally adopted in the Swiss criminal code. Accordingly, in the case of partially responsible offenders, courts had to pronounce a (fixed) punishment and, provided the offender was found "dangerous" or in need of treatment, an additional security measure. The measures should, however, be executed in first order. If the effective detention time in a psychiatric facility was shorter than the initial prison term, the court had to decide whether the rest of the term had to be served subsequently.

[33] Protais, C., *Sous l'emprise de la folie? L'expertise judiciaire face à la maladie mentale (1950–2009)*, Paris: Edidition EHESS, 2016, pp. 46f. See also the contribution of Martine Kaluszynski in this volume.

[34] Speyr, "Zurechnungsfähigkeit", p. 188.

[35] Draft 1893, art. 9.

[36] Germann, *Psychiatrie und Strafjustiz*, pp. 152–156.

With this compromise, the punishment of partially accountable offenders was, at least theoretically, ensured. Even traditionalist lawyers were aware that the practical effects were very limited: in most cases, the detention in a psychiatric facility lasted much longer than the pronounced prison sentence.[37]

In comparing this to quite similar discussions in the German *Kaiserreich* and the Weimar Republic, it is worth noting that the cumulation of sanctions was never successful in Switzerland. Several drafts of a German criminal code and, finally, the Law on Habitual Criminals (*Gewohnheitsverbrechergesetz*) of 1934, stipulated that security measures were, in principle, preceded by a (fixed) prison sentence.[38] The solution pursued in Switzerland was a hybrid insofar as security and treatment measures could also assume the (legal) function of a punishment.[39] For the defenders of this option, pragmatic considerations came first. Executing security measures allowed the courts to put insane offenders under psychiatric supervision at an early stage.[40] The controversies only partly turned on rigidly formulated alternatives, such as either retribution *or* prevention. Instead, what was at stake was *how* retributive and preventive considerations should be related to each other, in light of formulating a criminal code appropriate to effectively combatting crime. Involving the judiciary with matters of prevention while stressing, at the same time, the retributive character of prevention measures turned out to be a viable basis for finding political compromise.

5. Administrative detention and eugenics: prevention outside of criminal law

One should view developments in criminal law in conjunction with the evolution of administrative detention law. In recent years, administrative detention has been the subject of public and political debate in Switzerland. In response to pressure from former administrative detainees, who were often detained as juveniles in prison for adults, the Swiss government officially apologised for this practice in 2010 and 2013 and initiated a reconciliation process. In 2016, an independent experts' commission was set up to explore the extent and context of detention practices before 1981.[41]

In the course of such historical reappraisal, the links between criminal law and administrative detention law have become much clearer. Recent research has shown that in the field of administrative detention, rationales of security, therapy and retribution often meshed and overlapped. Prior to the 1880s, detention by police and administrative authorities (meaning detention without formal conviction by a court and without a direct connection to a criminal act) had been possible either for medical reasons – in most cases through hospitalization in psychiatric institutions– or, in the field of poor law, in workhouses.[42] The latter class of measures were mainly targeted at the poor who were able to work but were stigmatized by

[37] Germann, *Psychiatrie und Strafjustiz*, pp. 154 ff.

[38] Wetzell, R., "Psychiatry and Criminal Justice in Modern Germany", *Journal of European Studies* 39 (2009), pp. 270-289; Müller, C., *Verbrechensbekämpfung im Anstaltsstaat. Psychiatrie, Kriminologie und Strafrechtsreform in Deutschland 1871–1933*, Göttingen: Vandenhoeck & Ruprecht, 2004.

[39] Rusca, *Destinée de la politique criminelle.*

[40] Draft 1893, p. 55; Expert commission 1893-96, vol. 1, p. 66.

[41] Independent Expert Commission on Administrative Detention, *Mechanics of Arbitrariness.*

[42] Bersier, R., *Contribution à l'étude de la liberté personnelle. L'internement des aliénés et des asociaux. La stérilisation des aliénées*, Thèse de doctorat, Lausanne 1968. Bersier is one of the rare authors to mention both strands of administrative detention. For the different forms of administrative detention, see Germann, U., "(Strafrechts-)historischer Rückblick auf das Verhältnis von Straf-, Vormundschaftsrecht und administrativer Versorgung", *Fürsorge oder Präventivhaft? Zum Zusammenwirken von strafrechtlichen Massnahmen und Erwachsenenschutz* (M. Mona, J. Weber eds.), Bern: Stämpfli, 2018, pp. 69-87.

public authorities as "indolent" or "dissolute". The regulations and legal procedures for administrative detention differed considerably from canton to canton.

From the 1890s on, many cantons extended administrative detention to additional marginalized groups, including those addicted to alcohol. For compulsory treatment, they could be sent to closed facilities, and here the canton of St. Gall played a pioneering role. In 1891, on the initiative of Forel and other abstinence promoters, a cantonal law was enacted that allowed for the compulsory treatment of refractory alcoholics. Other cantons took up this lead in subsequent years: Basle (1901), Vaud (1906), Luzern (1910) and Freiburg (1919).[43] This extension of administrative detention developed parallel to the discussion in criminal law about security and treatment measures. Actually, Stooss's first criminal code draft had also included a proposal to introduce the compulsory treatment of convicted "habitual drunkards".[44] Social reformers, legal experts and psychiatrists alike agreed that alcoholism and crime were closely related, so to them, the compulsory treatment of those addicted to alcohol, either ordered by courts or by administrative authorities, appeared as a proper means of social prevention and control.

Various administrative detention acts also targeted those considered to be "foes of society" or who were diagnosed as "psychopaths" or "inferior individuals" by psychiatrists. In this context, the intent to combat crime and deviance using preventive measures was prevalent. The Swiss Civil Code of 1907 gave guardians and guardianship authorities the competence to have persons under tutelage confined in institutions. A 1912 Bernese law policing the poor (*Armenpolizeigesetz*), for instance, stipulated that along with "indolent" and "dissolute" persons, alcoholics, repeated offenders and the "mentally inferior" who posed a severe danger to public order could be sent to detention facilities for an indeterminate time.[45] A Zurich administrative detention law (*Versorgungsgesetz*) from 1925, elaborated with the assistance of Emil Zürcher, used language very similar to that contained in the drafts of the national criminal code. It allowed administrative bodies to send "neglected persons" (*Verwahrloste*) having a "penchant for crime" (*Hang zum Verbrechen*) or deemed "indolent and dissolute" to workhouses.[46] In the 1930s, political elites in the Canton of Freiburg debated passing a further administrative detention act that would target "mentally abnormal persons," among other groups. As enacted in 1942, the law stipulated that every "indolent" or "dissolute" persons posing a danger to public security could be sent to a workhouse.[47]

Cantonal administrative detention acts did not explicitly address insane offenders. However, debates about various legislative acts leaves no doubt that the alcohol "addicts" and the "neglected" and "inferior" persons targeted by cantonal administrators and legislatures belonged to the same "dangerous classes" criminal law reformers and psychiatrists were concerned with. Issues of incapacitation and social defence, and, to a lesser extent of therapy and care, were at stake, and both legal domains were increasingly understood as complementary fields of social control and regulation. While the judiciary had to deal with "dangerous

[43] Gumy C., Knecht, S., Maugué, L., Dissler, N., Gönitzer, N., *Des Lois d'exception? Légitimation et délegitimation de l'internement administratif*, Zürich: Chronos, 2019, pp. 81–206.

[44] Draft 1893, art. 26.

[45] Rietmann, T., *"Liederlich" und "arbeitsscheu". Die administrative Anstaltsversorgung im Kanton Bern 1884–1981,* Zürich: Chronos, 2013, pp. 112, 128.

[46] Christensen, B., "Die rechtlichen Grundlagen der administrativen Anstaltsvesorgung und der fürsorgerischen Zwangsmassnahmen im Kanton Zürich 1879–1981", *Menschen korrigieren. Fürsorgerische Zwangsmassnahmen und Fremdplatzierungen im Kanton Zürich bis 1981* (B. Gnädinger, V. Rothenbühler eds), Zürich: Chronos, 2018, pp.19-74, pp. 41–48.

[47] Gumy et al, *Lois d'exception*, pp. 63–66.

individuals" having committed a crime, police and administrators would focus on prevention measures that lay outside of criminal law.

Swiss psychiatrists were also among the early proponents of eugenics. For Forel, the fight against alcoholism was a way to prevent "inferior offspring" from being born. He was also one of the first doctors in Europe to sterilize women for eugenic reasons. Shortly before World War I, Swiss psychiatrists made strong cases for legally regulating sterilization. In the following decades, other than in the canton of Vaud, legislation on (compulsory) sterilization did not materialize. The lack of binding regulation had as a consequence that sterilization was carried out, mostly on women, in a legal vacuum. That implied many motivations were at work, and at least formally, sterilizations took place with the consent of the persons concerned. Though doctors agreed on the "constitutional inferiority" of many offenders, in Switzerland (unlike in the USA or Germany), the issue of compulsory sterilization was never of great importance to the debate on reforming criminal law.[48]

Swiss psychiatrists also took a pragmatic stance toward castration, though here the social defence approach was much stronger. In the end, this too did not become the object of formal legislation. From the 1930s onwards, nevertheless, psychiatric experts began recommending castrating repeated sex offenders. Doctors proposed surgical intervention (and, after 1970, chemical castration) for sex offenders as an alternative to prolonged prison sentences and security measures. As with women undergoing sterilization, the men concerned had to give their formal consent. In practice, decision-making was hardly ever free of constraints. As it was, detention of indeterminate duration stipulated by the Swiss criminal code, and by cantonal legislation before 1942, gave judges, prison authorities and doctors a further means of exerting pressure on sex offenders to undergo surgery.[49]

6. An unexpected burden: the detention of insane offenders in psychiatric institutions

Even before the Swiss criminal code came into force, the close cooperation between the judiciary and psychiatry resulted in a growing number of offenders being committed to psychiatric facilities instead of being committed to prison. The drafts for the criminal code suggested measures against persons deemed of diminished responsibility be carried out in institutions devoted to care and healing (*Heil- und Pflegeanstalt*). Even though the term was not yet clear, the consensus was that this primarily referred to psychiatric asylums.[50] At least for insane offenders, the correctional system should become a "part of psychiatry," as Forel had suggested.[51] There was also agreement that placement in psychiatric institutions should be both

[48] For a comprehensive overview of the history of eugenics in Switzerland see: Wecker, R., "Eugenics in Switzerland before and after 1945 – a continuum?", *Journal of Modern European History* 10 (2013), pp. 519-538; Ritter, H-J., *Psychiatrie und Eugenik. Zur Ausprägung eugenischer Denk- und Handlungsmuster in der schweizerichen Psychiatrie 1850–1950*, Zürich: Chronos, 2009, pp. 124–141, 198–236.

[49] Imboden, G., Entmannung: Paradoxe Herstellung von Männlichkeit. Formierung der kriminalpräventiven Kastration und ihre Praxis in Basel zwischen 1935 und 1960, unpublished Ph.D. Thesis, Basel; Delessert, T., "Des testicules au cerveau. Convertir chirurgicalement un corps homosexual (1916-1960)", *Sexuer le corps. Huit études sur des pratiques médicales d'hier et d'auj*ourd'hui (H. Martin, M. Roca i Escoda eds), Lausanne: Editions HETSL, 2019, pp. 17-32; Germann, U., "Entmannung oder dauerhafte Verwahrung? Die Kastration von Sexualstraftätern in der Schweiz zwischen 1930 und 1970. Zum Stand der historischen Forschung", *Sexualität, Devianz, Delinquenz* (D. Fink, S. Steiner, B. Brägger, M. Graf eds.) Bern: Stämpfli, 2014, pp. 119-135; Gerodetti, N., *Modernising Sexualities. Towards a Social-Historical Understanding of Sexualities in the Swiss Nation*, Bern: Peter Lang, 2005.

[50] Draft 1894, p. 127.

[51] Kölle, *Gerichtlich-psychiatrische Gutachten*, p. 7.

"cure" and "preventive detention" at the same time, though it is also true that the drafts for the criminal code (and later the Swiss criminal code) distinguished between custody (*Verwahrung*) and care or therapy (*Versorgung*). Given the limited therapeutic options psychiatry had until the introduction of modern neuroleptics in the 1950s, in practice the boundaries between custody and treatment remained fluid both under cantonal law and after the Swiss criminal code was introduced.[52]

It became clear at an early stage that the increasing number of offenders being committed was becoming a burden for psychiatry. Swiss psychiatric facilities had been chronically overcrowded since the turn of the century, and plans for expanding asylums increasingly met with financial constraints. The main cause for complaint were those "borderline cases," meaning those who did not suffer from a clear mental illness - precisely that group of "psychopaths" and "inferiors" whose control and treatment psychiatrists had been loudly claiming for themselves for some time. As early as 1906, Leopold Frölich, director of the Königsfelden asylum in the Canton of Argovia, described the oppressive situation in telegraphic form:

> "Numerous sick criminals in an overcrowded institution; among them many troublesome and dangerous elements, making free, non-coercive treatment difficult, resulting in suffering for others who are sick; the impossibility of finding appropriate tasks for so many criminals; many intrigues; frequent escapes."[53]

Disciplinary problems and the resulting restrictions for other patients in terms of (occupational) therapy, along with the quality of the facility's conditions, formed basic constants in psychiatrists' complaints about institutionalized patients. These complaints barely changed over the following decades.

Since the turn of the 20th century, Swiss psychiatrists and lawyers repeatedly discussed possible alternatives. As in neighbouring countries, there suggested both to creating special institutions for insane offenders and to building annexes at prisons or psychiatric institutions. The approaches differed as did basic assessments, and not all psychiatrists shared the view that special institutions or departments were the best solution.[54]

An important step in this debate was an expert opinion prepared by the Zurich psychiatrist Friedrich Ris in 1914 on behalf of the federal authorities. In his report, Ris distinguished between two groups of mentally disturbed offenders. For a first group of "severely mentally ill persons" (*ausgesprochen Geisteskranke*), he considered treatment to be an "internal affair of the asylums". The appropriate treatment would not significantly differ from that for regular patients. For patients in the "highest danger category", he considered the construction of annexes to existing asylums to be appropriate. Transfers to these secure wards should take place, irrespective of whether the patients in question had previously committed a criminal offence. Ris's second group included the "difficult area of borderline cases", including many "psychopaths", epileptics and "imbeciles". This category of offenders, although regularly sent to psychiatric facilities by the authorities, were hardly considered in "average public

[52] That court decisions after 1942 regularly referred simultaneously to article 14 and article 15 of the Swiss criminal code indicates how blurred the boundaries were between security and treatment.

[53] Protocol of the Swiss Psychiatrists' Association, 1904, p. 4, quoted in Germann, *Psychiatrie und Strafustiz*, p. 363: "Zahlreiche kriminelle Kranke bei überfüllter Anstalt, darunter viele lästige und gefährliche, Erschweren der freien, zwanglosen Behandlung, worunter auch andere Kranke leiden müssen, Unmöglichkeit, viele Kriminelle passend zu beschäftigen, viele Intrigen, öffentliche Entweichungen."

[54] Germann, *Psychiatrie und Strafjustiz*, pp. 358-379.

perception" to be ill. Among them were "habitual criminals" who disturbed the "organism of the asylum". According to Ris, constructing "detention centres for habitual criminals," as already envisaged in the drafts of the criminal code, was the most suitable solution.[55] As a result of this distinction, Ris placed a large proportion of insane offenders in the same category as chronic recidivists, and he was by no means an exception in so doing. By the First World War, the view that recidivists – as well as many administrative detainees – were also "psychopathic personalities" was widespread among Swiss lawyers, prison administrators and politicians concerned with social welfare.

Ris's report had considerable consequences. By refraining from demanding new institutions, it minimized the need for political action. This was in the interest of the cantons, which were responsible for the penal system and had to provide the necessary facilities. At the same time, the report strengthened the autonomy and control of psychiatry over its own facilities. Finally, Ris argued that at least some of the insane offenders who caused problems for psychiatry should in future be left to the (non-medical) penitentiary system. Among the facilities that seemed suitable for this were, in particular, the workhouses for "indolent" and "dissolute" recidivists envisaged in the drafts of the criminal code.

In fact, debates in the interwar period strongly focused on multifunctional institutions that could accommodate different categories of prisoners, including both convicted offenders and administrative detainees. Such facilities were known (and feared) for their harsh regimes and provided only rudimentary medical-psychiatric care. The Witzwil prison complex, established in the 1890s in the canton of Bern, served as a model. A project to establish a similar facility in eastern Switzerland failed due to disagreement among the cantons potentially involved.[56]

When the Swiss criminal code came into force in 1942, the calamity of psychiatric facilities was acute. At various meetings in the 1940s, psychiatrists called for active resistance against the increasing referrals of "criminal psychopaths" to such facilities, as they not only resisted treatment but also because the framework conditions had changed little since the interwar period. The various proposals made referred to models provided by other countries, including the Belgian observation wards that had been set up on the basis of the Law on social defence (*Loi de défense sociale*) of 1930. But there was little willingness on the part of the cantons to provide relief by providing financial resources and building special institutions or wards. Psychiatrists were also still not unanimous in their assessments of the problems.[57] In the following decades, however, federal authorities did meet psychiatry's needs at least in part. Several rulings by the Swiss Federal Court interpreted the law's provision for adequate "care and healing institutions" (*Heil- und Pflegeanstalten*) quite flexibly and permitted the detention of insane offenders in non-medical institutions. Under certain conditions, such offenders could even be held in prisons or in detention centres for "habitual offenders". A revision of the Swiss criminal code in 1971 definitively sanctioned this increased flexibility by prescribing custody be in a "suitable institution."[58]

[55] Ris., F., "Gutachten vom August 1914 über die Behandlung von Unzurechnungsfähigen und vermindert Zurechnungsfähigen", *Schweizerisches Strafgesetzbuch. Beilagenband zum Protokoll der zweiten Expertenkommission,* Bern: Stämpfli, 1916, pp. 186-201.

[56] Germann, U., "Verbrechensbekämpfung als Kulturarbeit. Das Projekt einer interkantonalen Verwahrungsanstalt in der Linthebene in den 1920er-Jahren", *traverse. Zeitschrift für Geschichte* (2/2007), pp. 110–124.

[57] Germann, *Psychiatrie und Strafjustiz*, pp. 377–379, 428–437.

[58] Germann, *Psychiatrie und Strafjustiz*, pp. 432 ff.

The course set by the Ris report of 1914 and confirmed after the Swiss criminal code came into force meant there were no special facilities for insane offenders in Switzerland until well into the post-war period. First tentative steps in this direction were taken with the construction of a pavilion for forensic patients in Rheinau in the canton of Zurich (1960) and the St. Johannsen centre in the canton of Bern (1982). In Geneva, efforts were made already in the mid-1970s to create a therapeutic ward within the prison complex of Champ-Dollon, but it would only be carried out by 2014. Until then, mentally ill offenders were kept and cared for in psychiatric clinics or, depending on the case, institutions of the (non-medically managed) prison system. From the 1930s on, many cantons began to establish regular psychiatric consultation hours in prisons.[59]

Offenders with diminished mental capacity were particularly affected by being placed in penal and custodial institutions. According to a study published in 1972, 41 per cent of those of reduced responsibility who were placed in custody between 1960 and 1965 never spent time in a medically supervised institution. 58 per cent spent more than half of their time in a penal facility.[60] For these persons (mostly men), the lack of a specialised institution meant they were usually stigmatised as "psychopathic criminals" or "feeble-minded" in the course of criminal proceedings and were locked away for an indefinite period of time. They ultimately ended up in penal facilities or workhouses where there was barely any access to adequate psychiatric and psychotherapeutic care.

7. Conclusion: Multifaceted hybridizations

The emergence of legal positivism in the late 19th century significantly changed the treatment of insane offenders in Switzerland. Emblematic of this was the implementation of a new system of security and treatment measures. Hybridity was a fundamental feature of this layout finally adopted by the Swiss criminal code.

In the approach taken to insane offenders, one can distinguish between three levels of hybridity. First, there is a kind of hybridisation that can be observed at the level of legislation. With the entry into force of the Swiss criminal code (and partly even earlier), the courts could pronounce not only punishment but also declare measures whose aim was custody, treatment or care. The dual-track system thus expanded the scope of the judiciary to include aspects of (special) prevention. Judges now also decided on therapeutic and educational aspects and, indirectly, on the access to welfare state services, understood broadly.

Second, on the institutional level, the amalgamation of repression and prevention had the consequence that psychiatry became part of the penal and correctional system. However, this does not mean that detention in psychiatric institutions had the legal character of a punishment. Rather, admitting offenders to psychiatric care meant the measures taken were given a new status, now called security or treatment measures. In contrast to ordinary legal punishment, the duration of the deprivation of liberty remained at the discretion of the

[59] Germann, U., "Sonderfall Verwahrung", in: *Strafrecht, Strafvollzug, Gefängnis. Ein Handbuch zur Entwicklung des Freiheitsentzuges in der Schweiz* (D. Fink, P. Schulthess eds.), Bern: Stämpfli, 2015, pp. 198-215, pp. 205–209.

[60] Aebersold, P., *Die Verwahrung und Versorgung vermindert Zurechnungsfähiger in der Schweiz*, Basel: Helbing und Lichtenhahn, 1972, p. 135.

authorities and, de facto, of the leading doctors of the institution.[61] Even if psychiatrists began to distinguish between regular patients and "measures" patients (*Massnahmenpatienten*), psychiatry kept its autonomy from the correctional sector. At the same time, a considerable number of sanctions against insane offenders were carried out in regular prisons and workhouses. In such facilities, little distinction was made between different categories of inmates. Hybridization was reciprocal: to some extent, psychiatric institutions became part of the penitentiary system, and at the same time, the penitentiary system was receiving a growing number of inmates labelled as insane. As a consequence, and in practice, aspects of security and treatment increasingly merged.

Third, a hybridisation also took place at the level of the persons concerned, whereby the growing number of offenders found only partially responsible were especially affected. According to the Swiss criminal code, offenders of limited responsibility were sentenced to both a penalty and a "measure" if they were found to be "dangerous" or in need of treatment. Since there was hardly any distinction between the two sanctions, the result was a de facto deprivation of liberty of indeterminate duration. This was given the label of a security or therapeutic measure by the law. In practice, however, access to therapeutic care was severely restricted for such persons until the 1970s. This was particularly the case for persons who were not suffering from psychosis or other severe mental disorders. For the majority of lawbreakers who came into contact with psychiatry in the course of criminal proceedings, this meant they received a stigmatising diagnosis such as "psychopathic" or "imbecile", but no access to appropriate psychiatric care.

For many legal experts, doctors and social welfare politicians, the introduction of the Swiss criminal code represented a great leap forward and the fulfilment of the hopes of advocates of legal positivism and social defence in the late 19th century. The dual-track system broke the "artificial separation" between criminal law and the correctional (and medical) system. It opened up criminal law to considerations of prevention and protection. However, in retrospect, the development appears unfinished, part of an inherently ambivalent modernisation process. It has also led to highly problematic results, especially with regard to the fundamental rights of convicted persons. Symptomatic of this were the long and finally inconclusive debates within Swiss psychiatry about the creation of special facilities for carrying out "measures". Concerns about high costs, fears about the loss of professional autonomy, disagreement about the paths to take and widespread indifference towards persons who had little social capital had the effect that the treatment of insane offenders after 1945 became a pragmatic yet chaotic "muddling through". Critical voices against these tendencies remained in the minority until the 1960s. It was only in the following decades that progressive lawyers, doctors, social workers and journalists began to criticise the correctional system. While the history of administrative detention had yet been subject of historical reappraisal, to this day, advocating for the rights and concerns of people in the correctional system is not very popular in Switzerland.

Bibliographical References

Aebersold, P., *Die Verwahrung und Versorgung vermindert Zurechnungsfähiger in der Schweiz*, Basel: Helbing und Lichtenhahn, 1972.

[61] This constellation be distinguished from cases when "ordinary" prisoners were temporarily transferred from prisons to psychiatric facilities for the purpose of treatment or care. These patients did not lose their legal status as prison inmates.

Barras, V., Gasser, J., "Les psychiatres et le code pénal: débats à la Société des médecins aliénistes suisses au tournant du siècle", *Archives suisse de neurologie et de psychiatrie* 151 (2000/Supplementum), pp. 15–19.

Bernet, B., *Schizophrenie. Entstehung und Entwicklung eines psychiatrischen Krankheitsbildes*, Zürich: Chronos, 2010.

Bersier, R., *Contribution à l'étude de la liberté personnelle. L'internement des aliénés et des asociaux. La stérilisation des aliénées*, Thèse de doctorat, Lausanne 1968.

Bleuler, E., *Der geboreneVerbrecher*, München: J.F. Lehmann, 1896.

Bomio, G., "Auguste Forel et le droit pénal", *Schweizerische Zeitschrift für Strafrecht* 107 (1990), pp. 87-105.

Cicchini, M., Maugué, L., *Le règne du psychiatre. Une histoire suisse de la psychiatrie légale* (Genève et Vaud 1760–1910) (forthcoming).

Christensen, B., "Die rechtlichen Grundlagen der administrativen Anstaltsvesorgung und der fürsorgerischen Zwangsmassnahmen im Kanton Zürich 1879–1981", *Menschen korrigieren. Fürsorgerische Zwangsmassnahmen und Fremdplatzierungen im Kanton Zürich bis 1981* (B. Gnädinger, V. Rothenbühler eds.), Zürich: Chronos, 2018, pp.19-74.

Delessert, T., "Des testicules au cerveau. Convertir chirurgicalement un corps homosexual (1916-1960)", *Sexuer le corps. Huit études sur des pratiques médicales d'hier et d'auj*ourd'hui (H. Martin, M. Roca i Escoda eds.), Lausanne: Editions HETSL, 2019, pp. 17-32.

[Draft 1893] *Motive zum dem Vorentwurf eines Schweizerischen Strafgesetzbuches. Allgemeiner Teil*, Basel: Georg, 1893.

[Draft 1894] *Schweizerisches Strafgesetzbuch. Vorentwurf mit Motiven im Auftrage des Bundesrates ausgearbeitet von Carl Stooss*, Basel: Georg, 1894.

Engstrom, E.J., "Der Verbrecher als wisenschaftliche Aufgabe – die kriminologischen und forensischen Schriften Emil Kraepelins", Kraepelin E., *Kriminologische und forensische Schriften* (Werke und Briefe, 2), München: belleville, 2001, pp. 353-390.

Forel, A., "Zwei kriminalpsychologische Fälle", *Schweizerische Zeitschrift für Strafrecht* 2 (1889), pp. 13-35.

[Expert Commission 1893-96] *Schweizerisches Strafrecht. Verhandlungen der von dem Eidgenössischen Justiz- und Polizeidepartement einberufenen Expertenkommission über den Vorentwurf zu einem Schweizerischen Strafgesetzbuch*, Bern: Stämpfli, 1896.

Germann, U.:

- *Psychiatrie und Strafjustiz. Entstehung, Praxis und Ausdifferenzierung der forensischen Psychiatrie in der deutschsprachigen Schweiz 1850–1950*, Zürich: Chronos, 2004.
- "Der Ruf nach der Psychiatrie. Überlegungen zur Wirkungsweise psychiatrischer Deutungsmacht im Kontext justizieller Entscheidungsprozesse", *Verbrecher im Visier der Experten. Kriminalpolitik zwischen Wissenschaft und Praxis im 19. und frühen 20. Jahrhundert* (S. Freitag, D. Schauz eds.), Stuttgart: Steiner, 2007, pp. 273-293.
- Germann, U., "Verbrechensbekämpfung als Kulturarbeit. Das Projekt einer interkantonalen Verwahrungsanstalt in der Linthebene in den 1920er-Jahren", *traverse. Zeitschrift für Geschichte* (2/2007), pp. 110–124.
- Germann, U., "'Entmannung' oder dauerhafte Verwahrung? Die Kastration von Sexualstraftätern in der Schweiz zwischen 1930 und 1970. Zum Stand der historischen Forschung", *Sexualität, Devianz, Delinquenz* (D. Fink, S. Steiner, B. Brägger, M. Graf eds.) Bern: Stämpfli, 2014, pp. 119-135.
- Germann, U., *Kampf dem Verbrechen. Kriminalpolitik und Strafrechtsreform in der Schweiz 1870–1950*, Zürich: Chronos, 2015.
- "Sonderfall Verwahrung", in: *Strafrecht, Strafvollzug, Gefängnis. Ein Handbuch zur Entwicklung des Freiheitsentzuges in der Schweiz* (D. Fink, P. Schulthess eds.), Bern: Stämpfli, 2015, pp. 198-215.
- "(Strafrechts-)historischer Rückblick auf das Verhältnis von Straf-, Vormundschaftsrecht und administrativer Versorgung", *Fürsorge oder Präventivhaft? Zum Zusammenwirken von strafrechtlichen Massnahmen und Erwachsenenschutz* (M. Mona, J. Weber eds.), Bern: Stämpfli, 2018, pp. 69-87.

- "Toward New Horizons. Legal Positivism and Swiss Criminal Law Reform in the late 19th and early 20th Centuries", *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 259-276, http://www.glossae.eu/glossae-17-2020/?lang=en.

Gerodetti, N., *Modernising Sexualities. Towards a Social-Historical Understanding of Sexualities in the Swiss Nation,* Bern: Peter Lang, 2005.

Greve, Y., "Die Unzurechungsfähigkeit in der 'Cirminalpsychologie' des 19. Jahrhunderts", *Unzurechnungsfähigkeiten. Diskursivierung unfreier Bewusstseinszustände seit dem 18. Jahrhundert* (M. Niehaus, H.-W. Schmidt-Hanissa eds.), Frankfurt am Main: Peter Lang, 1999, pp. 107–132.

Gschwend, L.

- Carl Stooss (1849–1934) – Originell-kreativer Kodifikator und geschickter Kompilator des schweizerischen Strafrechts – Reflexionen zu seinem 60. Geburtstag", *Schweizerische Zeitschrift für Strafrecht* 112 (1994), pp. 26-56.
- *Zur Geschichte der Lehre der Zurechnungsfähigkeit,* Zürich: Schulthess, 1996.

Guillaume, L., "Die Insassen der Berner Strafanstalten und ihre Jugenderziehung", *Schweizerische Zeitschrift für Statistik* 29 (1893), pp. 311-458.

Gumy C., Knecht, S., Maugué, L., Dissler, N., Gönitzer, N., *Des Lois d'exception? Légitimation et délegitimation de l'internement administratif,* Zürich: Chronos, 2019.

Holenstein, S., *Emil Zürcher (1850–1926) – Leben und Werk eines bedeutenden Strafrechtlers*, Zürich: Schulthess, 1996.

Imboden, G., Entmannung: Paradoxe Herstellung von Männlichkeit. Formierung der kriminalpräventiven Kastration und ihre Praxis in Basel zwischen 1935 und 1960, unpublished Ph.D. Thesis, Basel.

Independent Expert Commission on Administrative Detention, *Mechanics of Arbitrariness. Administrative Detention in Switzerland 1930–1981. Final report,* Zürich: Chronos, 2019, https://www.uek-administrative-versorgungen.ch/resources/E-Book_978-3-0340-1529-5_UEK_10D.pdf (accessed 27 Dec. 2019).

Kaenel, P., *Die kriminalpolitische Konzeption von Carl Stooss im Rahmen der geschichtlichen Entwicklung von Kriminalpolitik und Straftheorien,* Bern: Stämpfli, 1981.

Kölle T., *Gerichtlich-psychiatrische Gutachten au der Klinik von Herrn Professor Dr. Forel in Zürich*, Stuttgart: Enke, 1896.

Müller, C., *Verbrechensbekämpfung im Anstaltsstaat. Psychiatrie, Kriminologie und Strafrechtsreform in Deutschland 1871–1933,* Göttingen: Vandenhoeck & Ruprecht, 2004.

Nellen, S., Schaffner, M., Stingelin, M., *Paranoia City. Der Fall Ernst B. Selbstzeugnis und Akten aus der Psychiatrie um 1900*, Basel: Schwabe, 2007.

Protais, C., *Sous l'emprise de la folie? L'expertise judiciaire face à la maladie mentale (1950–2009)*, Paris: Edidition EHESS, 2016.

Rietmann, T., *"Liederlich" und "arbeitsscheu". Die administrative Anstaltsversorgung im Kanton Bern 1884–1981,* Zürich: Chronos, 2013.

Ris., F., "Gutachten vom August 1914 über die Behandlung von Unzurechnungsfähigen und vermindert Zurechnungsfähigen", *Schweizerisches Strafgesetzbuch. Beilagenband zum Protokoll der zweiten Expertenkommission*, Bern: Stämpfli, 1916, pp. 186-201.

Ritter, H-J., *Psychiatrie und Eugenik. Zur Ausprägung eugenischer Denk- und Handlungsmuster in der schweizerichen Psychiatrie 1850–1950*, Zürich: Chronos, 2009.

Rusca, M., *La destinée de la politique criminelle de Carl Stooss*, Freiburg: s. n., 1981.

Speyr von, W., "Wie ist die Zurechnungsfähigkeit in einem schweizerischen Strafgesetzbuch zu bestimmen?", Schweizerische Zeitschrift für Strafrecht 7 (1894), pp. 183-191.

Strafgesetzbuch für den Kanton Bern vom 30. Januar 1866 (C. Stooss ed.), Bern: Semminger, 1896.

Wecker, R., "Eugenics in Switzerland before and after 1945 – a continuum?", *Journal of Modern European History* 10 (2013), pp. 519-538.

Wetzell, R., "Psychiatry and Criminal Justice in Modern Germany", *Journal of European Studies* 39 (2009), pp. 270-289.

Wille, L., "Zur Frage der verminderten Zurechnungsfähigkeit", *Schweizerische Zeitschrift für Strafrecht* 3 (1890), pp. 1-13.