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## Echoes of Karl Binding and Franz von Liszt? The Discussion between the ‘Classical School’ and the ‘Positivist School’ in Austria\*

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### Abstract

The contribution deals with the echoes in the Austrian scientific community of the German and international discussion of criminal law between the ‘classical school’ around Karl Binding and the so-called ‘positivist school’ led by Franz von Liszt. After analysing communicative structures and networks which formed the institutional frame for scientific debates (for instance the Austrian branch of the “International Union of Criminal Law” and the “Austrian Journal of Criminal Law”), the paper takes a closer look at individual Austrian legal scholars and their positions. Only a few representatives of Austrian criminal law like Hans Gross and Julius Vargha were open to the new concepts without being mere *Doppelgänger* of von Liszt. Nevertheless, von Liszt’s adversaries in Austria significantly outnumbered his adherents, and the most prominent and convinced opponent of penal positivism was without doubt Hans Hoegel, who also played an important role in the planned reform of Austrian penal law. Some scholars like Heinrich Lammasch and Carl Stooss (who was professor at the University of Vienna starting in 1896) adopted some of the views and theoretical premises of Franz von Liszt without declaring themselves part of the reform movement and without losing their scepticism towards some of his ideas.

### Keywords

Austrian science of criminal law, Austrian criminology, 19<sup>th</sup> century, Julius Vargha, Heinrich Lammasch

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## 1. Introduction

### 1.1. Status of research

The history of criminal law in the Habsburg monarchy is not a flourishing discipline, especially as far as the 19<sup>th</sup> century is concerned.<sup>1</sup> It has only received superficial attention from legal historians, and this poor status of research is in particular evident if we consider the history of the science of criminal law in Austria, which has been widely neglected. Only a few

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<sup>1</sup> Cf. Schennach, M. P., “Einleitung. Wissenschaftsgeschichte und Forschungsstand”, *Österreichische Strafrechtsgeschichte im ‚langen‘ 19. Jahrhundert. Forschungsstand und Perspektiven* (M. P. Schennach, ed.).

prominent representatives have so far been studied more or less intensively, for instance Hans Gross, who has become famous as one of the founding fathers of criminology in Austria,<sup>2</sup> or Heinrich Lammasch, who is widely known as the last prime minister of the Austrian Monarchy in 1918.<sup>3</sup> There are some publications on Carl Stooss, whose scientific career took primarily place in Vienna beginning in 1896.<sup>4</sup> Most other Austrian legal scientists living around 1900 and working on penal law of the period have only got some scattered remarks, usually in publications dealing with the history of a single university or faculty.<sup>5</sup> Thus, it is not astonishing that we know almost nothing about the participation of Austrian scholars in contemporary scientific debates in the second half of the 19<sup>th</sup> century or at the beginning of the 20<sup>th</sup> century, neither in the German-speaking world nor on a European level. As has often been pointed out, there were fierce scientific debates in the German Empire between the adherents of the so-called “classical school” of penal science rallying around Karl Binding on the one hand and fervent supporters of the so-called “modern”, “sociological” or “young German” (*jungdeutsch*) school around Franz von Liszt on the other hand.<sup>6</sup> Very little is

<sup>2</sup> Cf. Becker, P., “Zwischen Tradition und Neubeginn: Hans Gross und die Kriminologie und Kriminalistik der Jahrhundertwende”, *Die Gesetze des Vaters. 4. Internationaler Otto Gross Kongress. Robert-Stolz-Museum Karl-Franzens-Universität Graz. 24.–26. Oktober 2003* (A. Götz von Olenhusen & G. Heuer, eds.), Marburg a. d. Lahn: LiteraturWissenschaft.de, 2005, pp. 290–309; Bock, M., “Hans Gross und Julius Vargha – Die Anfänge wissenschaftlicher Kriminalistik und Kriminalpolitik”, *Rechts-, Sozial- und Wirtschaftswissenschaften aus Graz. Zwischen empirischer Analyse und normativer Handlungsanweisung: wissenschaftsgeschichtliche Befunde aus drei Jahrhunderten* (K. Acham, ed.), Wien/Köln/Weimar: Böhlau, 2011, pp. 329–342; Bachhiesl, Ch. / Kocher, G. / Mühlbacher, Th. (eds.), *Hans Gross – ein „Vater“ der Kriminalwissenschaft. Zur 100. Wiederkehr seines Todestages*, Wien: Lit (Collection “Austria: Forschung und Wissenschaft interdisziplinär” 12), 2015; Bachhiesl, Ch., *Zwischen Indizienparadigma und Pseudowissenschaft. Wissenschaftshistorische Überlegungen zum epistemischen Status kriminalwissenschaftlicher Forschung*, Wien/Berlin: Lit (Collection “Austria: Forschung und Wissenschaft interdisziplinär” 9), 2012, pp. 35–203.

<sup>3</sup> Publications usually do not deal with Lammasch’s work on penal law; cf. Huber, F., *Heinrich Lammasch als Völkerrechtsgelahrter und Friedenspolitiker. Ein Beitrag zur Bestandsaufnahme seiner wissenschaftlichen und politischen Leistungen bis zum Jahre 1917 sowie deren Grundlagen*, Graz: PhD thesis Univ. Graz, 1968; Verosta, St., “Der Bund der Neutralen. Heinrich Lammasch zum Gedächtnis (Vortrag)”, *Anzeiger der phil.-hist. Klasse der Österreichischen Akademie der Wissenschaften* 106 (1969), pp. 175–197; Verosta, St., “Heinrich Lammasch’ Verfassungsentwurf für das Kaisertum Österreich vom September 1918”, *Politik und Gesellschaft im alten und neuen Österreich. Festschrift für Rudolf Neck zum 60. Geburtstag*, vol. 1 (I. Ackerl, W. Hummelberger & H. Mommsen, eds.), Wien: Verlag für Geschichte und Politik, 1981, pp. 365–377; Lehne, F., “Heinrich Lammasch”, *Juristen in Österreich 1200–1980* (W. Brauneder, ed.), Wien: Orac, 1987, pp. 229–233; Oberkofler, G. / Rabofsky, E., *Heinrich Lammasch (1853–1920). Notizen zur akademischen Laufbahn des großen österreichischen Völker- und Strafrechtsgelahrten*, Innsbruck: Wagner, 1993.

<sup>4</sup> Cf. Kaenel, P., *Die kriminalpolitische Konzeption von Carl Stooss im Rahmen der geschichtlichen Entwicklung von Kriminalpolitik und Straftheorien*, Bern: Stämpfli (Collection “Abhandlungen zum schweizerischen Recht” N.F. 466), 1981; Schäfer, F. L., “Carl Stooss (1849–1934) – Eine Geschichte der Strafrechtskodifikation”, *Ad fontes! Werner Schubert zum 75. Geburtstag* (F. L. Schäfer, M. Schmoeckel & Th. Vormbaum, eds.), Berlin: Lit (Collection “Rechtsgeschichte und Rechtsgeschehen” 20), 2015, pp. 33–76; Moos, R., “Carl Stooss in Österreich”, *Schweizerische Zeitschrift für Strafrecht* 105 (1988), pp. 35–79; Gschwend, L., “Carl Stooss (1849–1934) – Originell-kreativer Kodifikator und geschickter Kompilator des schweizerischen Strafrechts – Reflexionen zu seinem 60. Todestag”, *Schweizerische Zeitschrift für Strafrecht* 112 (1994), pp. 26–56.

<sup>5</sup> Cf. for instance Staudigl-Chiechowicz, K., “Strafrecht und Strafprozessrecht”, *Die Wiener Rechts- und Staatswissenschaftliche Fakultät 1918–1938* (Th. Olechowski, T. Ehs & K. Staudigl-Chiechowicz, eds.), Göttingen: Vandenhoeck & Ruprecht (Collection “Schriften des Archivs der Universität Wien” 20), 2014, pp. 420–441; despite its title, the book also portrays scholars working at the University of Vienna in the early 20th century (Carl Stooss, Wenzeslaus von Gleispach, Ferdinand Kadečka, Alexander Löffler).

<sup>6</sup> Cf. Koch, A., “Binding vs. v. Liszt – Klassische und moderne Strafrechtsschule”, *Der Strafgedanke in seiner historischen Entwicklung. Ringvorlesung zur Strafrechtsgeschichte und Strafrechtsphilosophie* (E. Hilgendorf & J. Weitzel, eds.), Berlin: Duncker & Humblot (Collection “Schriften zum Strafrecht” 189), 2007, pp. 127–145; Stäcker, Th., *Die Franz von Liszt-Schule und ihre Auswirkungen auf die deutsche Strafrechtsentwicklung*, Baden-Baden: Nomos (Collection “Kieler Rechtswissenschaftliche Abhandlungen” N.F. 66), 2012; Koch, A. / Löhnig, M. (eds.), *Die Schule Franz von Liszts. Spezialpräventive Kriminalpolitik und die*

known about which point of view was shared by Austrian legal scholars, and even less is known about the impacts of these scientific discussions on contemporary plans for a new Austrian penal code, which had already started in the 1860s and lasted until the 1910s. After all, the existing penal law dated from 1803, and although it had been republished and slightly modified in 1852,<sup>7</sup> it was largely considered outdated and its punishments were seen as much too severe.<sup>8</sup> From the 1860s onwards, various drafts for new penal codes were presented, but none was passed by parliament. It was not until 1975 that a new codification finally came into force. However, when retracing these plans for a new Austrian penal code around 1900, we still rely on testimonies of contemporaries,<sup>9</sup> as no (legal) historian has undertaken the task of thorough archival research on the subject; even the standard reference for Austrian history of criminal law dates from the beginning of the 20<sup>th</sup> century and was written by Hugo Hoegel, one of the most convinced opponents of von Liszt's ideas and their proposed realisations in Austria.<sup>10</sup>

## 1.2. Object of research

The object of research of the present paper is the science of criminal law in the Habsburg monarchy from the second half of the 19<sup>th</sup> century onwards, when new concepts in the fields of criminal law came into being, e. g. concerning the purposes of punishment, general and specific deterrence or preventive custody. The period of investigation ends in 1918, when the Habsburg monarchy (and hence the scientific community of the monarchy) disintegrated.

In contrast to nowadays, the science of criminal law in the Habsburg monarchy was characterised by a surprisingly high cross-border mobility of individual researchers. There was an astonishing exchange among Germany, the Austrian Monarchy and Switzerland. Consequently, the question arises of how to define the Austrian scientific community of criminal law during our period of investigation. Franz Exner for instance, one of the best-known disciples of von Liszt, was born in Vienna, got his postdoctoral lecture qualification (*Habilitation*) in Vienna, was appointed full professor first at the University of Czernowitz (1912), then Prague (1916), later on Tübingen (1918), Leipzig and Munich.<sup>11</sup> Most of his

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*Entstehung moderner Kriminalpolitik*, Tübingen: Mohr Siebeck, 2016; Koch, A., "Der unbekannte Franz v. Liszt (02.03.1851–21.06.1919). Schlaglichter auf das Spätwerk anlässlich des 100. Todestages", *Zeitschrift für die Gesamte Strafrechtswissenschaft* 131 (2019), pp. 451–483.

<sup>7</sup> Cf. Olechowski, Th., "Zur Entstehung des österreichischen Strafgesetzes 1852", *Grundlagen der österreichischen Rechtskultur, Festschrift für Werner Ogris zum 75. Geburtstag* (Th. Olechowski, Ch. Neschwara & A. Lengauer, eds.), Wien/Köln/Weimar: Böhlau, 2010, pp. 319–341.

<sup>8</sup> Cf. Ogris, W., "Die Entwicklung von Gerichtsverfassung, Strafrecht und Strafprozeßrecht 1848–1918", *Die Entwicklung der österreichisch-ungarischen Strafrechtsskodifikation im XIX–XX. Jahrhundert* (G. Máthé & W. Ogris, eds.), Budapest: UNIÓ, Zeitung- und Buchverleger-Handlungs-GmbH, 1996, pp. 55–74; Ogris, W., *Die Rechtsentwicklung in Österreich. 1848–1918*, Wien: Verlag der Österreichischen Akademie der Wissenschaften, 1975, pp. 556–562.

<sup>9</sup> Cf. Hoegel, H., *Geschichte des österreichischen Strafrechtes in Verbindung mit einer Erläuterung seiner grundsätzlichen Bestimmungen*, Heft 2, Wien: Manz, 1905, pp. 99–105; Finger, A., *Das Strafrecht. Mit Berücksichtigung des Vor-Entwurfs zu einem österr. Strafgesetzbuch*, vol. 1, Berlin: Heymann (Collection "Compendien des österreichischen Rechts"), 3<sup>rd</sup> ed., 1912, pp. 123–125; Stooss, C., *Lehrbuch des Österreichischen Strafrechts*, vol. 2, Wien/Leipzig: Deuticke, 2<sup>nd</sup> ed., 1913, pp. 47–48; Hiller, K., "Österreich", *Das Strafrecht der Staaten Europas* (F. von Liszt, ed.), Berlin: Liebmann, 1894, pp. 114–161, here pp. 158–161.

<sup>10</sup> Cf. Hoegel, *Geschichte des österreichischen Strafrechtes*.

<sup>11</sup> Cf. Sebald, A. E., *Der Kriminalbiologe Franz Exner (1881–1947). Gradwanderung eines Wissenschaftlers durch die Zeit des Nationalsozialismus*, Frankfurt a. M. et al.: Peter Lang (Collection "Rechtshistorische Reihe" 380), 2008, pp. 43–46.

scientific work was thus done in Germany and only his early publications will be taken into consideration for the present analysis. The same is true for August Finger, who studied law in Prague, where he got his postdoctoral lecture qualification (1890) and was promoted to associate (1891) and full professor (1894) before moving to Würzburg (1900) and Halle (1902).<sup>12</sup> The most prominent example of scientific migration in our field of research is Franz von Liszt himself: He studied law at the University of Vienna (1879–1873) and achieved his postdoctoral lecture qualification in Graz (1875), where he taught as a private lecturer until he was appointed full professor in Gießen (1879), followed by Marburg (1882) and Halle (1889). Apart from his early years, von Liszt’s entire career took place in Germany, so it would be completely misleading to consider Franz von Liszt as an Austrian legal scholar. Emanuel Ullmann also moved to Germany, but only after spending most of his professional life in Austria: He had obtained his *venia legendi* (university teaching qualification) at the University of Prague (1868), where he was appointed associate professor in 1872 before going to Innsbruck as a full professor in the same year; later on he moved to Vienna (1885) and finally to Munich (1889).<sup>13</sup>

There were not only scholars leaving Austria, but also some immigrating to Austria. The most famous example is certainly Carl Stooss, who was appointed full professor in Vienna in 1896 after having finished the draft for a Swiss penal code. He worked in Vienna for the rest of his career and also participated in the reform of the Austrian codification of penal law.<sup>14</sup> Karl Hiller got his postdoctoral lecture qualification in Würzburg in 1873, worked later on as associate professor (1875) and then as full professor (1880) at the newly-founded University of Czernowitz and finally moved to Graz in 1898.<sup>15</sup> Even Adolf Merkel spent some years of his professional life in Austria, where he was appointed professor in Prague (1868) and Vienna (1872) before going back to Germany, where he worked in Straßburg from 1874 onwards.<sup>16</sup>

As we see, there is no final definition of who belongs to the Austrian scientific community in the field of criminal law. For our analysis, we will consider legal scholars who lived, worked and published for a longer period of time in the Austrian Monarchy.

### 1.3. Methodological problems

In order to define a scholar’s position in the *Schulenstreit*, *id est*, in the debates between the “classical” school of criminal law on the one hand and penal positivism on the other hand, there is no alternative to analysing his publications and his statements on crucial issues. There are various theoretical positions which are characteristic for penal positivism<sup>17</sup>: The traditional point of view of the purpose of criminal sanctions consists in imposing retaliation on the culprit. The punishment must be proportional to the perpetrator’s guilt and reflect society’s perception of the criminal behaviour. Von Liszt and his adherents highlight other purposes of criminal sanctions. In their opinion, a sentence must take into account the

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<sup>12</sup> *Neue Deutsche Biographie*, vol. 5, 1961, pp. 157–158; *Österreichisches Biographisches Lexikon*, vol. 1, 1957, p. 136.

<sup>13</sup> *Österreichisches Biographisches Lexikon*, vol. 15, 2018, pp. 77–78.

<sup>14</sup> Cf. Moos, “Carl Stooss in Österreich”, pp. 35–79.

<sup>15</sup> *Österreichisches Biographisches Lexikon*, vol. 2, 1959, pp. 317–318.

<sup>16</sup> *Neue Deutsche Biographie*, vol. 17, 1994, pp. 148–149.

<sup>17</sup> Cf. Koch, “Binding vs. v. Liszt”, pp. 127–145; Koch, A., “v. Liszt-Schule. Personen, Institutionen, Gegner”, *Die Schule Franz von Liszts. Spezialpräventive Kriminalpolitik und die Entstehung moderner Kriminalpolitik* (A. Koch & M. Löhning, eds.), Tübingen: Mohr Siebeck, 2016, pp. 27–56; Stäcker, *Die Franz von Liszt-Schule*, pp. 27–52; Bachhiesl, *Zwischen Indizienparadigma und Pseudowissenschaft*, pp. 47–50.

defendant's personality and in particular his capacity of being transformed and educated into a useful member of society. Thus, their concept results in categorising malefactors into several groups who must be treated in different ways. With regard to the occasional offender on the one hand, an admonishment was considered sufficient, for which the concept of the suspended sentence seemed to be especially useful. Indeed, short-term imprisonments were strongly criticised for their stigmatising effect, making social rehabilitation extremely difficult, whereas Karl Binding and his supporters stressed the importance of the deterrent function, especially of short-term incarceration. On the other hand, representatives of penal positivism emphasised that habitual offenders (those characterised by having already committed various crimes and consequently proven not to be amenable to improvement) should be permanently locked away, without regard to the concrete extent of their individual guilt. This kind of custody aimed at protecting society was not considered a sanction but a preventive measure; nevertheless, it was fervently rejected by Binding and the "classical" school. These drastically different views of the purpose of criminal punishments led to a number of other differences, e. g. concerning the way of approaching juvenile delinquents or petty crime which was generated by social conditions. These controversies were motivated by a fundamentally different view of man and his free will. Under the influence of natural sciences, adherents of penal positivism chose a deterministic approach and denied man's autonomy: A delinquent did not commit a crime because he was an evil person and had deliberately chosen between good and evil, but he was considered a product of social circumstances and predisposition. Therefore, the criminal had not to be punished, but to be supported, and on a larger scale, crime prevention had not to be founded on deterrent sanctions, but on social reforms. The "classical" school defended the theory of man's free will and his autonomy to make the right (or wrong) decisions, so that deviant behaviour was, from such a perspective, always seen as guilt and moral failure that had to be sanctioned.

Another fundamental difference between the two schools concerned their understanding of the science of criminal law. The "classical" approach was much more traditional focussed its work on legal dogmatics, whereas the new scientific movement (as already indicated by some of their contemporary denominations like "sociological school") adopted a much broader view of crime and criminal science, was strongly influenced by natural sciences and claimed that research on the field of criminal behaviour had to be multi- and interdisciplinary: In this opinion, legal science had to take into account the findings of (among others) sociology, (forensic) medicine, biology, anthropology and ethnography. The limitation of legal science to dogmatics and to its unquestioned assumptions (e. g. of man's free will and the moral implications of criminal behaviour) was heavily criticised. It is significant that the scientific journal founded by Franz von Liszt was called "Zeitschrift für die gesamte Strafrechtswissenschaft" ("Journal of the Complete Science of Criminal Law"): Already the title reflected the broader theoretical approach by von Liszt and his supporters.

## **2. Institutions, associations and journals**

### **2.1. The International Union of Criminal Law and the Austrian Union of Criminal Law**

In order to discuss and spread the ideas of the new positivist criminology on an international level, Franz von Liszt, Adolphe Prins and Gerard van Hamel founded the

International Union of Criminal Law in 1889.<sup>18</sup> From the beginning, a considerable number of Austrian legal scholars and practitioners (such as lawyers, judges, leading officers of penal institutions) joined the new association. Already the first volume of its journal (“Bulletin de l’union internationale de droit pénal” published in French and German) printed a list of its members in different states, Austria among them. In 1889, 43 Austrian members of the association were named, and in the following decades this number rose slowly but steadily. Two years before the outbreak of World War I, 72 Austrian members were counted (not included in this number were members from Hungary and Croatia, who were listed separately).<sup>19</sup>

But it would be misleading to suppose that all members were adherents of Franz von Liszt and his ideas. We cannot even assume that members backed at least most of the concepts propagandised by the reform movement; membership in the association was above all considered as an instrument of professional networking. Hugo Hoegel, for instance, was not only a member, but even vice-president of the Austrian branch of the association for several years.<sup>20</sup> In his publication “On the Categories of Criminals” (1908), he admitted his membership in the association, but clearly stated that he was of a completely different opinion than the protagonists of the reform movement “as far as the basic principles of criminal law are concerned”<sup>21</sup> – which he also pointed out in a very detailed way in the said monography. Indeed, fervent adherents of the new school were quite rare in Austria, the number of decisive opponents like Hugo Hoegel was much larger, and some scholars like Heinrich Lammasch or Carl Stooss formed a third party in between: They adopted some of the views and theoretical premises of Franz von Liszt without declaring themselves part of the reform movement and without losing their scepticism towards some of his ideas. Legal scholars of all of these groups published in the journal “Mitteilungen der Internationalen Kriminalistischen Vereinigung” (“Notes of the International Union of Criminal Law”),<sup>22</sup> although their total number was not too high.

The founding of an Austrian branch of the International Union took quite long, also from a comparative point of view: Whereas the Hungarian association had already been founded in 1889 and the Croatian in 1893, the Austrian association came into being only in

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<sup>18</sup> Cf. Kesper-Biermann, S., “Die Internationale Kriminalistische Vereinigung. Zum Verhältnis von Wissenschaftsbeziehungen und Politik im Strafrecht”, *Internationalisierung von Strafrechtswissenschaft und Kriminalpolitik. (1870–1930). Deutschland im Vergleich. Fachtagung am Centre Marc Bloch, Deutsch-Französisches Forschungszentrum für Sozialwissenschaften in Berlin am 17. und 18. Februar 2005* (S. Kesper-Biermann & P. Overath, eds.), Berlin: BWV (Collection “Juristische Zeitgeschichte, Abt. 2: Forum juristische Zeitgeschichte” 16), 2007, pp. 85–107.

<sup>19</sup> Cf. *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 1 (1889), pp. 12–13; *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 5 (1896), pp. 372–374; *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 13 (1906), pp. XXIX–XXXI; *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 19 (1912), pp. 29–32.

<sup>20</sup> Cf. *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 14 (1907), p. 5; *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 18 (1911), p. 101.

<sup>21</sup> Hoegel, H., *Die Einteilung der Verbrecher in Klassen*, Leipzig: Engelmann (Collection “Kritische Beiträge zur Strafrechtsreform” 2), 1908, p. 64: „[...] bin ich selbst Mitglied der I. K. V., wenn ich auch über die Grundlagen des Strafrechtes wesentlich andere Anschauungen besitze, als die Vorkämpfer der durch diese Vereinigung vertretenen Reformbewegung.“

<sup>22</sup> Cf. for instance Lammasch, H., “Empfiehl sich die Einführung der bedingten Verurteilung (belgisches Gesetz vom 31. Mai 1888) in die Strafgesetzgebung der übrigen Länder und unter welchen Voraussetzungen”, *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 1 (1889), pp. 34–43; Hoegel, H., “Die Haft im österreichischen Verfahren”, *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 5 (1896), pp. 295–299; Gross, H., “Die berufsmäßige Ausbildung der Kriminalisten”, *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 5 (1896), pp. 313–322.

1906,<sup>23</sup> although the lawyers' club of Linz had issued a call for the formation of an Austrian branch of the International Union of Criminal Law as early as 1894.<sup>24</sup> Initially, it was indeed, as Hugo Hoegel explained the fierceness of the *Schulenstreit* that made the founding so difficult.<sup>25</sup> It is noteworthy, but hard to explain that not all members of the International Union of Criminal Law became members of the Austrian Union of Criminal Law.<sup>26</sup> Thanks to the annual reports published in the "Mitteilungen der Internationalen kriminalistischen Vereinigung", we are well informed of the activities undertaken by the Austrian branch. It organised several lectures and debates on current problems of criminal law and aimed at "the broad discussion of fundamental problems of criminal law and criminal procedure with regard to Austrian penal law and to its imminent reform."<sup>27</sup> Supporters of both schools were explicitly invited to join the association and to contribute to a constructive discussion.<sup>28</sup> A look at the topics reveals a close link to the debates between the "classical" and the "modern" school, as adherents and opponents of the reform movement alike were able to present their opinion.<sup>29</sup> The presentations and discussions dealt with the concepts of guilt, preventive custody and conditional sentences, with practical experiences of the prison regime, with the reform of Austrian penal law or with the treatment of juvenile delinquents. In accordance with the wide understanding of "criminal behaviour" shown by von Liszt and his supporters, not only legal scholars but also physicians gave lectures, for instance the psychiatrists Julius Wagner-Jauregg and Richard von Krafft-Ebing.

## 2.2. Journals

What we have just said about membership in the International Union of Criminal Law is also true for contributions to the "Zeitschrift für die gesamte Strafrechtswissenschaft", whose founder and first editor was von Liszt.<sup>30</sup> It is proof of the journal's scientific balanced and objective orientation that it was more than a mere forum of publication for von Liszt's supporters. Hugo Hoegel, Emanuel Ullmann and Anton Finger, who were all three seen as representatives of the "classical school" by their contemporaries, were contributors to von Liszt's journal,<sup>31</sup> which was of course also open for articles submitted by scholars who did not

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<sup>23</sup> The founding years of national association is noted each year in the table of members of the international association (cf. "Mitteilungen der Internationalen Kriminalistischen Vereinigung").

<sup>24</sup> Cf. *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 4 (1894), pp. 315–316.

<sup>25</sup> Cf. Österreichische Landesgruppe der Kriminalistischen Vereinigung, "Österreichische Landesgruppe", *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 14 (1907), pp. 1–21, 425–470 and 509–538, here p. 3.

<sup>26</sup> Cf. *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 19 (1912), pp. 29–32.

<sup>27</sup> Österreichische Landesgruppe der Kriminalistischen Vereinigung, *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 14 (1907), pp. 1–21, 425–470 and 509–538, here p. 3.

<sup>28</sup> Österreichische Landesgruppe der Kriminalistischen Vereinigung: "Österreichische Landesgruppe", p. 4.

<sup>29</sup> Cf. *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 15 (1908), pp. 163–200 and 354–460; *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 16 (1909), pp. 416–450; *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 17 (1910), pp. 118–167; *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 18 (1911), pp. 101–213; *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 19 (1912), pp. 305–342.

<sup>30</sup> Drenkhahn, K., "Criminology in Germany and the Gesamte Strafrechtswissenschaft", *The Handbook of the History and Philosophy of Criminology* (R. A. Triplett, ed.), Oxford: Wiley Blackwell, 2018, pp. 392–405, here p. 396.

<sup>31</sup> Cf. for instance Finger, A., "Chirurgische Operation und ärztliche Behandlung. Kritische Bemerkung zu der unter gleichem Titel veröffentlichten strafrechtlichen Studie des Dr. Carl Stooß, ord. öff. Professor der Rechte an der Universität in Wien", *Zeitschrift für die gesamte Strafrechtswissenschaft* 20 (1900), pp. 12–32; Hoegel, H., "Akzessorische Natur der Teilnahme, mittelbare Täterschaft, Eventualvorsatz", *Zeitschrift für die gesamte Strafrechtswissenschaft* 37 (1916), pp. 651–680 and 826–848; Ullmann, E., "Literaturbericht Österreich", *Zeitschrift für die gesamte Strafrechtswissenschaft* 2 (1882), pp. 579–602; Ullmann, E., "Die



declare their support for one or the other of the two schools, like Edmund Benedikt,<sup>32</sup> or who had, like Hans Gross and Alexander Löffler, stronger sympathies with the new ideas.<sup>33</sup>

A separate journal specifically dedicated to the science of criminal law was founded in the Habsburg monarchy only in 1910 as the “*Österreichische Zeitschrift für Strafrechtswissenschaft*” (“Austrian Journal for the Science of Criminal Law”). Until then, articles dealing with criminal law were published in other law journals like the “*Juristische Blätter*” (“Juridical Journal”), “*Allgemeine Gerichts-Zeitung*” (“General Journal of Justice”) or “*Der Gerichtssaal*” (“The Court of Justice”). However, these journals dedicated much more attention to private and to public than to criminal law and were furthermore characterised by a focus on legal dogmatics (although articles on criminal politics and in particular on discussions of plans for a new penal code were quite frequent).<sup>34</sup> In addition, they were not considered an appropriate forum of publication for broader methodological or theoretical approaches favoured by the new scientific movement. Therefore, our period of research saw the founding of two new journals which were explicitly open for new theoretical concepts. In 1898, the first volume of the “*Archiv für Kriminal-Anthropologie und Kriminalistik*” (“Archives of Criminal Anthropology and Criminalistics”) was published,<sup>35</sup> founded by Hans Gross, professor of criminal law at the University of Graz and one of the earliest and main exponents of modern “criminalistics”.<sup>36</sup> In his introduction to the first volume, Gross outlines his understanding of “criminal anthropology” and “criminalistics”, which were both seen as auxiliary sciences to criminal law.<sup>37</sup> Gross rejects a narrow definition of criminal anthropology as “the science of the physical and psychological peculiarities of criminals”<sup>38</sup>, as this presumption would anticipate that such peculiarities exist and are typical of a criminal. Gross suggests that criminal anthropology should study “all mental and physiological

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wissenschaftlichen Leistungen Deutsch-Österreichs im abgelaufenen Quartale”, *Zeitschrift für die gesamte Strafrechtswissenschaft* 2 (1882), pp. 114–126.

<sup>32</sup> Cf. Benedikt, E., “Noch einmal der Zweckgedanke im Strafrecht”, *Zeitschrift für die gesamte Strafrechtswissenschaft* 5 (1885), pp. 451–472.

<sup>33</sup> Cf. Löffler, A., “Der Begriff der Verantwortlichkeit. Gutachten”, *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 6 (1897), pp. 387–398; Löffler, A., “Unrecht und Notwehr. Prolegomena zu einer Revision der Lehre von der Notwehr”, *Zeitschrift für die gesamte Strafrechtswissenschaft* 21 (1901), pp. 537–582; Löffler, A., “Die Begnadigung jugendlicher Verbrecher in Österreich”, *Zeitschrift für die gesamte Strafrechtswissenschaft* 23 (1903), pp. 806–811; Gross, H., “Die Ausbildung des praktischen Juristen”, *Zeitschrift für die gesamte Strafrechtswissenschaft* 14 (1894), pp. 1–18; Gross, H., “Ein Kurs über Kriminalistik für die Instruktionsoffiziere der k. k. österreichischen Gendarmerie”, *Zeitschrift für die gesamte Strafrechtswissenschaft* 14 (1894), pp. 677–681.

<sup>34</sup> Cf. for example Hoegel, H., “Bemerkungen zum Strafgesetzentwurf”, *Juristische Blätter* 11 (1882), pp. 543–545, 603–604 and 618–619; Friedmann, O., “Kritische Fragmente zum Strafgesetzentwurf”, *Juristische Blätter* 19 (1890), pp. 147–150, 159–162, 171–173, 186–187, 199–201, 210–211, 223–224, 233–235 and 245–247; Glaser, J., “Studien zum Entwurf des Strafgesetzes”, *Allgemeine österreichische Gerichts-Zeitung* 22, N.F. 8 (1871), pp. 73–74, 77–79, 81–82, 85–86, 89–90, 93–94, 97–99, 101–103, 105–106, 109–110, 113–114, 117–118 and 121–122; Lammasch, H., “Ziele der Strafrechtsreform in Österreich”, *Allgemeine österreichische Gerichts-Zeitung* 55 (1904), pp. 303–307; Gleispach, W., “Der österreichische Strafrechtsentwurf”, *Allgemeine österreichische Gerichts-Zeitung* 60 (1909), pp. 337–339, 345–348, 364–366, 385–387, 393–397 and *Allgemeine österreichische Gerichts-Zeitung* 61 (1910), pp. 11–15, 17–18, 65–68 and 73–80.

<sup>35</sup> Cf. Becker, P., “Zwischen Tradition und Neubeginn”; Pollak, St. / Thierauf-Emberger, A., “Hans Gross und seine Zeitschrift. Die Geburt der wissenschaftlichen Kriminalistik um 1900”, *Hans Gross – ein „Vater“ der Kriminalwissenschaft. Zur 100. Wiederkehr seines Todestages* (Ch. Bachhiesl, G. Kocher & Th. Mühlbacher, eds.), Wien: Lit (Collection “Austria: Forschung und Wissenschaft interdisziplinär” 12), 2015, pp. 177–187; Schoßleitner, C., *Der Beitrag Österreichs zur Kriminalbiologie*, Linz: PhD thesis Univ. Linz, 1991, pp. 13–14.

<sup>36</sup> Gross, H., “Aufgabe und Ziele”, *Archiv für Kriminal-Anthropologie und Kriminalistik* 1 (1899), pp. 1–4.

<sup>37</sup> Cf. Schoßleitner, *Der Beitrag Österreichs zur Kriminalbiologie*, pp. 8–10.

<sup>38</sup> Gross, “Aufgabe und Ziele”, p. 2.

characteristics of man that are related to crime”<sup>39</sup>. “Criminalistics” is also defined in a very broad way: Criminalistics comprises all what might be called “practical” knowledge that facilitates the identification of a perpetrator, although Gross’s understanding emphasised the psychological aspects: In particular, criminalistics should qualify police detectives, prosecutors and inquisitors to assess whether a witness or a suspects is telling the truth.<sup>40</sup> Gross’s journal pursued the goal of allowing an interdisciplinary exchange among all sciences linked to criminal behaviour in whatever way, be it forensic medicine, chemistry, biology, sociology or anthropology. In 1912/13, Gross founded the Institute for Criminology at the University of Graz,<sup>41</sup> which existed until 1978 and served as a model for similar institutions worldwide. It was dedicated to the teaching of criminalistics to law students, organising lectures on the subject and submitting expert opinions to courts and prosecutors. A laboratory supplying all technical facilities for criminalistic experiments was also available.<sup>42</sup>

In 1910, Alexander Löffler founded the “*Österreichische Zeitschrift für Strafrecht*” (“Austrian Journal of Criminal Law”). One of its aims was to intensify the exchange between the German and Austrian scientific communities.<sup>43</sup> Although Löffler was a disciple of Franz von Liszt (even if he did not share all his views), the preface of the first volume stated that the new journal should be a mirror of legal science in Austria and avoid the impression of favouring “one or the other side”<sup>44</sup>. However, the fact that Franz von Liszt was the author of the first contribution, dealing with the role of preventive custody in the three drafts of a new penal code in Switzerland, Germany and Austria, has a certain symbolic significance. The journal was open to articles dealing with auxiliary sciences of criminal law like psychiatry,<sup>45</sup> and at least during its first years, most (but not all) of the contributors evidently had some sympathies for modern penal positivism.<sup>46</sup> That the “*Österreichische Zeitschrift für Strafrecht*” did not want to be the main forum of publication of Austrian adherents of von Liszt is demonstrated by the co-editors chosen by Löffler, among whom we find von Liszt himself, Heinrich Lammasch, Hans Gross, Carl Stooss and Adolf Lenz, but also, with Anton

<sup>39</sup> Gross, “Aufgabe und Ziele”, p. 2.

<sup>40</sup> Gross, “Aufgabe und Ziele”, p. 2: Criminalistics “beschäftigt sich in erster Linie in psychologischer Richtung mit dem Verhältnisse des Kriminalisten, des Untersuchungsrichters, Staatsanwaltes und des erkennenden Richters, dann des Polizisten und sonstiger Organe des Justizdienstes zum Beschuldigten, zum Zeugen, Sachverständigen und zum Geschworenen. Gegenstand unseres Studiums soll daher sein, die Verschiedenheit der Auffassung durch Zeugen, Sachverständige und Richter, die Gründe falscher Beobachtungen, der vorgefassten Meinung und der Täuschungen durch das Gedächtnis und die Sinne, sowie die verschiedenen Arten der bewussten und der pathoformen Lüge.”

<sup>41</sup> Cf. Schoßleitner, *Der Beitrag Österreichs zur Kriminalbiologie*, pp. 11–46; Probst, K., *Geschichte der Rechtswissenschaftlichen Fakultät der Universität Graz, Teil 3: Strafrecht – Strafprozessrecht – Kriminologie*, Graz: Akademische Druck- und Verlagsanstalt (Collection “Publikationen aus dem Archiv der Universität Graz” 9/3), 1987, pp. 48–52; Bachhiesl, Ch. / Bachhiesl, S. M., „Kriminologische Theorie und Praxis – Einleitung“, *Kriminologische Theorie und Praxis. Geistes- und naturwissenschaftliche Annäherungen an die Kriminalwissenschaft* (Ch. Bachhiesl & S. M. Bachhiesl, eds.), Wien/Berlin/Münster: Lit (Collection „Austria: Forschung und Wissenschaft. Interdisziplinär“ 7), 2011, pp. 7–15, here pp. 8–9.

<sup>42</sup> Cf. Anonymus, “Das k.k. kriminalistische Universitäts-Institut in Graz”, *Österreichische Zeitschrift für Strafrecht* 3 (1912), pp. 463–465, here p. 464; Lenz, A., “K.K. kriminalistisches Universitätsinstitut in Graz”, *Österreichische Zeitschrift für Strafrecht* 7 (1916–1918), pp. 289–291, here p. 190 (the laboratory was complementary to the laboratories of forensic medicine).

<sup>43</sup> Löffler, A., “Vorwort”, *Österreichische Zeitschrift für Strafrecht* 1 (1910), pp. 1–2, here p. 1.

<sup>44</sup> Löffler, “Vorwort”, p.1: „Die österreichische Zeitschrift für Strafrecht will als Spiegel der Rechtswissenschaft ihrer Zeit dienen und keineswegs das Bild durch absichtliche Bevorzugung einer bestimmten Richtung verfälschen. Jedermann ist willkommener Mitarbeiter, der sich als ernster Fachmann ausweisen kann.“

<sup>45</sup> Cf. for instance Wagner von Jauregg, J., “Über Behandlung gemeingefährlicher Geisteskranker”, *Österreichische Zeitschrift für Strafrecht* 3 (1912), pp. 70–120; Aschaffenburg, G., “Experimentelle Psychologie und Strafrechtspflege”, *Österreichische Zeitschrift für Strafrecht* 8 (1918–1920), pp. 71–86.

<sup>46</sup> For instance Franz Exner, Adolf Lenz, Hans Gross, Carl Stooss.

Finger and Hugo Hoegel, two of the opinion-leaders of the Austrian “classical school”.<sup>47</sup> Nevertheless, neither was keen on publishing in the new journal: Whereas Gross, Stooss, Lenz and Löffler contributed numerous articles until the end of our period of investigation, Hoegel only delivered a short paper of a few pages, Finger nothing.<sup>48</sup>

### 3. Representatives of the positivist tendency

#### 3.1. General remarks

We have seen that Austrian supporters and critics of the reform movement initiated in the German-speaking world by Franz von Liszt were not, despite all scientific discussions and professional differences, fierce opponents. This may also be due to the fact that convinced adherents of von Liszt who shared his views in each and every regard were very rare in Austria. Even Julius Vargha, despite being fundamentally inspired by von Liszt’s ideas, developed his own theories and concepts which appear, from today’s point of view, extremely modern.<sup>49</sup> August Miřička, for instance, from 1907 onwards full professor at the Czech University in Prague, had strong sympathies for the reform movement led by von Liszt, although he rejected the theory of determinism and upheld the assumption of man’s free will.<sup>50</sup> But Vargha and Miřička were exceptions in the Austrian scientific community: Most of his colleagues either had sympathies for some of von Liszt’s ideas without hesitating to criticise him in some regards or were more or less decisive followers of Binding’s “classical school”.

#### 3.2. Adherents of penal positivism

##### 3.2.1. Julius Vargha

Without any doubt, Julius Vargha was the great intellectual pioneer and visionary among Austrian legal scholars in the field of criminal law, but remained an outsider in the community. His career developed slowly and hit many obstacles:<sup>51</sup> Born in 1841 in Hungary, he studied law in Prague and Graz, where he obtained his doctor’s degree in 1866. After having passed a few years in Italy, he got his postdoctoral lecture qualification in 1875. His early works dealing with the dogmatics of theft and with problems of criminal procedure were still quite conventional.<sup>52</sup> The same is true for his overall view of Austrian criminal

<sup>47</sup> Cf. the cover of the magazine. Anton Finger was only appointed co-editor in 1913.

<sup>48</sup> Hoegel, H., “Die Strafrechtsfolgen nach der Novelle vom 15. Nov. 1867”, *Österreichische Zeitschrift für Strafrecht* 6 (1915), pp. 113–116.

<sup>49</sup> Cf. the following chapter 3.2.1.

<sup>50</sup> Cf. Miřička, A., *Die Formen der Strafschuld und ihre gesetzliche Regelung*, Tübingen: Mohr Siebeck, 1908, pp. 1–10.

<sup>51</sup> For his biography cf. Bock, “Hans Gross und Julius Vargha – Die Anfänge wissenschaftlicher Kriminalistik und Kriminalpolitik”, pp. 337–338; Probst, *Geschichte der Rechtswissenschaftlichen Fakultät der Universität Graz*, pp. 23–27 and 29–30.

<sup>52</sup> Vargha, J., *Die Vertheidigung in Strafsachen: historisch und dogmatisch dargestellt*, Wien: Manz, 1879; Vargha, J., *Das rechtswidrige Besitzergreifen von beweglichen Sachen (kritische Gesichtspunkte zum österreichischen Strafgesetzentwurf)* (although the latter publication is usually cited among the works for which Vargha got his postdoctoral lecture qualification (cf. for instance Gunter Wesener, Art. “Vargha, Julius”, in: *Österreichisches Biographisches Lexikon*, vol. 15, 2018, pp. 182–183, it cannot be found in Austrian and German library catalogues).

procedure, first published in 1885.<sup>53</sup> He was appointed unpaid associate professor in 1880, in 1882 paid associate professor, and received the title of full professor in 1898. In 1902 he finally became full professor, but significantly for philosophy of law and international law, and only in 1905 was he named full professor for criminal law. His entire career from postdoctoral lecture qualification onwards took place in Graz. Indeed, he was strongly criticised by his colleagues because of his scientific views, which were classified as highly problematic<sup>54</sup>; it was for these reasons that he was never recommended for a professorship at another university.<sup>55</sup> It is also quite singular that Vargha published only monographies and evidently refused to participate in ongoing scientific debates by placing contributions of his own in journals. His *opus magnum*, which provoked so much rejection, was published in two volumes in 1896.<sup>56</sup> The title “Abschaffung der Strafknechtschaft” (“Abolition of Penal Slavery”) was itself a provocation.

Like many of his contemporaries, Vargha had a strong belief in natural sciences and in the application of their methods to legal science. In fact, he was convinced that he was witnessing a fundamental dispute in all fields of research between “the old metaphysical and the new natural scientific *Weltanschauung*”<sup>57</sup>. With regard to criminal law, he distinguished the “ethical, progressive, natural scientific school of criminal law” from those legal scholars who were still under the influence of “medieval ideas”, of “metaphysical dogmata”<sup>58</sup>, infected by “primitive moral and religious doctrines”<sup>59</sup> and who were thus still mixing up “sense of justice” and “desire for vengeance”<sup>60</sup>. Due to new scientific and medical findings, Vargha was a strong opponent of the idea of free will: In his opinion, the “speculative, philosophical method of criminal law, deduced from a metaphysical base” “saw crime as a result of deliberately chosen human wickedness”<sup>61</sup>. Their representatives were, according to Vargha, therefore convinced they were acting rationally and fairly when unrelentingly tormenting and dishonouring the malefactors by imposing harsh punishments.<sup>62</sup> In contrast to this point of view, Vargha believed in the lack of free will in human beings.<sup>63</sup> A man’s actions were in his opinion determined by his biological disposition and by his environment. In his day, as Vargha outlines, natural science and the new criminology had identified crimes as inevitable consequences.<sup>64</sup> According to him, it was uncivilised and even cruel to punish those “most miserable people who had fallen to crime because of hereditary predisposition, neglected education, abnormal irritability, unkindness of their fellow human beings and tragic strokes of

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<sup>53</sup> Vargha, J., *Das Strafprozessrecht: systematisch dargestellt*, Berlin: Heymann (Collection “Compendien des österreichischen Rechtes”), 1885 (2<sup>nd</sup> edition: *Das Strafprozessrecht*, Berlin: Heymann, 1907).

<sup>54</sup> Cf. the review written by Hoegel, H., “Die Abschaffung der Strafknechtschaft”, *Juristische Blätter* 26 (1896), pp. 28–31.

<sup>55</sup> Cf. Goller, P., *Beiträge zur Geschichte der Rechtswissenschaften an der Universität Innsbruck (1792–1965)*, Innsbruck: innsbruck university press, 2019, p. 206.

<sup>56</sup> Vargha, J., *Die Abschaffung der Strafknechtschaft. Studien zur Strafrechtsreform*, 2 vol., Graz: Leuschner & Lubensky, 1896.

<sup>57</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 5.

<sup>58</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 7.

<sup>59</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 15.

<sup>60</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 7.

<sup>61</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 32.

<sup>62</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 32.

<sup>63</sup> Cf. Bock, M., “Kriminelles Verhalten, Kriminologie, Kriminalistik”, *Geschichte der österreichischen Humanwissenschaften*, vol. 3.1: *Menschliches Verhalten und gesellschaftliche Institutionen: Einstellung, Sozialverhalten, Verhaltensorientierung* (K. Acham, ed.), Wien: Passagen, 2001, pp. 241–255, here p. 250; Bock, “Hans Gross und Julius Vargha – Die Anfänge wissenschaftlicher Kriminalistik und Kriminalpolitik”, p. 338.

<sup>64</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, pp. 70–71.

fate”<sup>65</sup>. Vargha emphasised several times that “crime was a social phenomenon”<sup>66</sup> and criminal law used by the elites as a tool to stabilise society even if the social situation was profoundly unjust.<sup>67</sup> It was not the fault of the criminals that their deeds were evil; he conceded that society had to be protected, but not by dishonouring and cruelly punishing malefactors – in accordance with the book’s title, Vargha stressed that in the system of imprisonment of his time, criminals were nothing but slaves who were being purposely tortured!<sup>68</sup> Instead, they should be granted “custodial care and supervision”<sup>69</sup>. In this context, Vargha highlighted a fundamental difference to Franz von Liszt, because in Vargha’s opinion, there was no difference to be made between those perpetrators who were considered amenable to improvement and those who were not.<sup>70</sup> No one was to be punished, and everyone’s human dignity had to be respected.<sup>71</sup>

A few decades ago, Karlheinz Probst valued Vargha as a forerunner and pioneer of the so-called labeling approach developed by critical criminology in the 1960s.<sup>72</sup> According to the labeling approach, a certain behaviour is not *a priori* and immanently “criminal”, but criminality is defined and therefore constructed by society and social interactions which label certain actions as deviant and criminal.<sup>73</sup> Many similarities between Vargha’s and these concepts can be detected. Vargha rejects the idea that criminals have any special characteristics;<sup>74</sup> on the contrary, for him, everyone is a potential criminal.<sup>75</sup> Criminals are not seen as *a priori* “abnormal” by Vargha,<sup>76</sup> but only defined as such by legislation; a crime is simply “an action qualified as harmful to society and therefore penalised by the representatives of a state”<sup>77</sup>. An action is not *per se* criminal, but becomes criminal when another subject perceives it as such on the basis of his sense of justice.<sup>78</sup> Vargha therefore denies any distinct difference between a “criminal” and a “non-criminal”; even a criminal sentence does not fulfil this function, as many actions labelled as crimes by penal law remain undetected.<sup>79</sup>

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<sup>65</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 35.

<sup>66</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 133.

<sup>67</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 71.

<sup>68</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, pp. 75–77.

<sup>69</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 132.

<sup>70</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, p. 132; cf. Bock, “Kriminelles Verhalten, Kriminologie, Kriminalistik”, p. 250; Bock, “Hans Gross und Julius Vargha – Die Anfänge wissenschaftlicher Kriminalistik und Kriminalpolitik”, p. 339.

<sup>71</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 1, pp. 3–4, 14 and 17.

<sup>72</sup> Probst, K., “Der Labeling-approach, eine österreichische kriminologische Theorie”, *Österreichische Richterzeitung* 55 (1977), pp. 45–51, here pp. 50–51; Probst, K., “Die moderne Kriminologie und Julius Vargha“, *Monatsschrift für Kriminologie und Strafrechtsreform* 59 (1976), pp. 335–351, here pp. 335–336; Probst, *Geschichte der Rechtswissenschaftlichen Fakultät der Universität Graz*, pp. 27–29.

<sup>73</sup> Cf. Kunz, K. L. / Singelstein T., *Kriminologie. Eine Grundlegung*, Bern: Haupt, 7<sup>th</sup> ed. (Collection “UTB” 1758), 2016, pp. 168–177; Neubacher, F., *Kriminologie*, Baden-Baden: Nomos, 3<sup>rd</sup> ed., 2017, pp. 111–117.

<sup>74</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 2, pp. 81 and 91.

<sup>75</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 2, pp. 54–55, 62–63 and 65.

<sup>76</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 2, pp. 130.

<sup>77</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 2, pp. 131.

<sup>78</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 2, pp. 123.

<sup>79</sup> Vargha, *Die Abschaffung der Strafknechtschaft*, vol. 2, pp. 118 and 177.

### 3.2.2. Hans Gross

The Austrian founder of criminology is often listed among the supporters of the reform movement,<sup>80</sup> and such a categorisation corresponds to Gross's own view of his position among his colleagues.<sup>81</sup> Therefore, it is not astonishing that he was president of the Austrian branch of the International Union of Criminal Law.<sup>82</sup> Nevertheless, as we will see, this did not mean that he shared von Liszt's opinion one hundred percent. What is inspired by von Liszt's doctrine of criminal law is without any doubt Gross's comprehensive view of criminal behaviour. In this regard, he explicitly criticises the narrow approach of the "classical school"<sup>83</sup>. He had no pronounced interest in legal dogmatics, but stressed the importance of natural sciences and their methods as well as of interdisciplinary cooperation, which he wishes to intensify in his journal "Archiv für Kriminal-Anthropologie und Kriminalistik", founded in 1898. In explicit accordance with von Liszt, Gross stresses that legal science should and must not be limited to a mere technical and isolated interpretation of paragraphs and legal definitions,<sup>84</sup> and of course, Gross as author of a work entitled "Criminal Psychology" is enthusiastic about von Liszt's support for this discipline.<sup>85</sup> As in the case of Vargha, Gross's career was delayed by the scientific scepticism of his contemporaries and colleagues. Whereas his early works after his postdoctoral lecture qualification were still very conventional,<sup>86</sup> his "Handbook for Inquisitors and Police Officers"<sup>87</sup> (first edition printed in 1893) shows his very practical approach to criminal law; nevertheless, his attempts to obtain his postdoctoral lecture qualification in Graz remained fruitless for years.<sup>88</sup> This was due to the resistance of both the Ministry of Education and the faculty members. Nevertheless, and without postdoctoral lecture qualification, he was appointed full professor in Czernowitz in 1899 and later on in Prague (1902), before returning to Graz in 1905 thanks to the efforts of his future colleague Vargha.<sup>89</sup>

From the 1890s onwards, his publications predominantly deal with criminalistics and to a lesser extent with dogmatics of criminal law.<sup>90</sup> But Gross does not participate extensively in the fierce discussions between modernists and traditionalists concerning fundamental

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<sup>80</sup> Bachhiesl, Ch., "Kriminalwissenschaftliche Erkenntnisgewinnung. Historisch-epistemologische Bemerkungen zu Hans Gross", *Hans Gross – ein „Vater“ der Kriminalwissenschaft. Zur 100. Wiederkehr seines Todestages* (Ch. Bachhiesl, G. Kocher & Th. Mühlbacher, eds.), Wien: Lit (Collection "Austria: Forschung und Wissenschaft interdisziplinär" 12), 2015, pp. 155–175, here p. 155.

<sup>81</sup> Bachhiesl, *Zwischen Indizienparadigma und Pseudowissenschaft*, pp. 172–173.

<sup>82</sup> Cf. *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 14 (1907), p. 5; *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 18 (1911), p. 101.

<sup>83</sup> Cf. Gross, H., *Criminalpsychologie*, Graz: Leuschner & Lubensky, 1898, p. 7.

<sup>84</sup> Gross, H., "Zum Commissionentwurf des schweizerischen Strafgesetzbuches", *Gesammelte Kriminalistische Aufsätze*, vol. 1 (H. Gross), Leipzig: Vogel, 1902, pp. 57–64, here pp. 59–60; cf. Bachhiesl, *Zwischen Indizienparadigma und Pseudowissenschaft*, pp. 173–175; Bachhiesl, Ch., "Wahrheit(en) in der Kriminalwissenschaft. Überlegungen zum epistemischen Status kriminalwissenschaftlicher Forschung", *Kriminologische Theorie und Praxis. Geistes- und naturwissenschaftliche Annäherungen an die Kriminalwissenschaft* (Ch. Bachhiesl & S. M. Bachhiesl, eds.), Wien/Berlin/Münster: Lit (Collection „Austria: Forschung und Wissenschaft. Interdisziplinär“ 7), 2011, pp. 81–115, here pp. 85–86.

<sup>85</sup> Gross, "Zum Commissionentwurf des schweizerischen Strafgesetzbuches", p. 59.

<sup>86</sup> Cf. Probst, *Geschichte der Rechtswissenschaftlichen Fakultät der Universität Graz*, p. 33.

<sup>87</sup> Cf. Gross, H., *Handbuch für Untersuchungsrichter, Polizeibeamte, Gendarmen u.s.w.*, Graz: Leuschner & Lubensky, 1893; cf. Pollak / Thierauf-Emberger, "Hans Gross und seine Zeitschrift. Die Geburt der wissenschaftlichen Kriminalistik um 1900", pp. 182–184.

<sup>88</sup> Probst, *Geschichte der Rechtswissenschaftlichen Fakultät der Universität Graz*, pp. 34–47.

<sup>89</sup> For his biography cf. *Neue Deutsche Biographie*, vol. 7, 1966, pp. 139–141; *Österreichisches Biographisches Lexikon*, vol. 2, 1959, p. 74 Probst, *Geschichte der Rechtswissenschaftlichen Fakultät der Universität Graz*, pp. 33–56.

<sup>90</sup> Cf. Gross, H., *Gesammelte Kriminalistische Aufsätze*, 2 vol., Leipzig: Vogel, 1902–1908.

questions like preventive custody, conditional sentences or determinism versus free will. When Gross exceptionally does so, his statements are at times conservative and do not show an unconditional sympathy for von Liszt's theoretical positions. Yes, he appreciates von Liszt's categorisation of criminal subjects<sup>91</sup>; yes, he is of von Liszt's opinion that some criminals are incorrigible and society must be protected (but for fulfilling this purpose, Gross excludes not only the death penalty, but also life sentences); yes, like von Liszt and in partial accordance with von Liszt's argumentation, he welcomes Stooss's draft of a Swiss criminal code;<sup>92</sup> yes, he shares von Liszt's view that the judge has to evaluate the perpetrator's personality exhaustively and diligently before delivering a sentence.<sup>93</sup> With regard to determinism versus freedom of will, Gross is of the opinion that science may never decide this question for sure.<sup>94</sup> Nevertheless, in consideration of the role of incarceration for general prevention, he is an opponent of the conditional release from prison and of suspended sentences.<sup>95</sup>

To sum up: The theoretical background of Gross's approach to criminal law is indeed strongly influenced by penal positivism, but in contrast to von Liszt himself, Gross is not a theoretical writer, but a practitioner. When he participates in actual debates of criminal politics, he shares many but not all of von Liszt's views. Briefly, neither Vargha nor Gross are Austrian *Doppelgänger* of von Liszt.

### 3.3. The middle way: Heinrich Lammasch and Carl Stooss

#### 3.3.1. Heinrich Lammasch

Whereas it is quite difficult to find pronounced supporters of von Liszt in the Austrian scientific community, there are some legal scholars in Austria who do not consider themselves as part of the new school but are definitely inspired by some of its concepts. The most prominent example for this type of legal scholar is probably Heinrich Lammasch, whose career – in contrast to Vargha's and Gross's – was fulminant.<sup>96</sup> After his postdoctoral lecture qualification in Vienna in 1879 he was appointed full professor for criminal and international law as well as for philosophy of law in Innsbruck in 1882. He returned to Vienna as a professor in 1889. In his postdoctoral lecture qualification on the criminal liability of attempt, he treated the reasons for the punishment of criminal behaviour in general.<sup>97</sup> Lammasch referred in a quite traditional way to the necessity of general and special prevention and discussed Karl Binding's "theory of norms" (*Normentheorie*): According to Binding, the only reason for the state's claim that malefactors should be punished was the violation of a law (which of course is a welcome explanation for the criminal liability of an attempt which has

<sup>91</sup> Cf. Gross, "Zum Commissionsentwurfe des schweizerischen Strafgesetzbuches", p. 61.

<sup>92</sup> Cf. Gross, H., "Undecima hora", *Gesammelte Kriminalistische Aufsätze*, vol. 1 (H. Gross), Leipzig: Vogel, 1902, pp. 1–11.

<sup>93</sup> Cf. Gross, H., "Neunundzwanzig Thesen zum künftigen Strafgesetzentwurfe", *Gesammelte Kriminalistische Aufsätze*, vol. 1 (H. Gross), Leipzig: Vogel, 1902, pp. 46–57, here pp. 55–56.

<sup>94</sup> Cf. Gross, "Neunundzwanzig Thesen zum künftigen Strafgesetzentwurfe", p. 51; Bachhiesl, *Zwischen Indizienparadigma und Pseudowissenschaft*, pp. 174–176.

<sup>95</sup> Cf. Gross, "Neunundzwanzig Thesen zum künftigen Strafgesetzentwurfe", pp. 55–56.

<sup>96</sup> Cf. *Österreichisches Biographisches Lexikon*, vol. 4, 1993, pp. 415–416; *Neue Deutsche Biographie*, vol. 13, 1982, p. 447.

<sup>97</sup> Cf. Lammasch, H., *Das Moment objektiver Gefährlichkeit im Begriffe des Verbrechenversuches*, Wien: Hölder, 1879, pp. 52–67.

not yet evoked any consequences).<sup>98</sup> Although Lammasch criticises details of Binding's argumentation, he does not reject his "theory of norms" in his early publications. Later on, Lammasch becomes more and more sceptical. This scepticism was motivated by his Catholicism, as Lammasch stressed the necessary link among law, ethics and morals which, in his opinion, was denied by Binding's theory.<sup>99</sup> Furthermore, he was convinced that the "classical legal science in Germany" with its focus on legal terms and legal dogmatics had lost all understanding of "what criminals, crimes and punishments mean in the real world"<sup>100</sup>. Lammasch evidently favoured a broader sociological view of deviant behaviour, and this attitude made him open to the concepts of penal positivism – which he calls the "positivistic school"<sup>101</sup> – especially in the 1880s and early 1890s. He considered von Liszt and his International Union of Criminal Law as "saviours from the danger of intellectual fossilisation"<sup>102</sup>. In Lammasch's opinion, it was the lasting merit of von Liszt to have "rebuilt a bridge between the science of criminal law and reality" and to raise once again fundamental questions concerning the purpose of punishment or interdisciplinary exchange, especially with social and natural sciences.<sup>103</sup> He outlines this in his "Studies on Criminal Politics" in 1891.

Nevertheless, he stresses that these new approaches must still be revised in a critical way, which he explicitly tries in his "Studies". He vigorously opposes the idea of determinism and highlights man's free will with reference to individual introspection into one's own soul: Such an analysis would clearly prove man's capability to decide what to do and what not to do.<sup>104</sup> With regard to his reflections on the purpose of punishment,<sup>105</sup> he distinguishes quite conservatively between "constant" and "variable" functions. In Lammasch's opinion, general and special prevention as well as, to a lesser degree, vengeance for the victim are "constant" functions. Lammasch also adopts von Liszt's concepts of preventive custody and social defence: He thinks that if a person is a constant threat to society, the dangerous subject must be locked away. The most important "variable" goal is the social rehabilitation ("*Besserung*") of the perpetrator; this is why Lammasch states that the court has to know the criminal's motives and personality; nevertheless, he rejects von Liszt's demand for flexible penalties. After all, von Liszt suggested that the exact duration of imprisonment had to be fixed in correspondence with the inmate's behaviour in prison, which seemed unsuitable to Lammasch. He emphasised that the idea of general and special prevention was incompatible with an indeterminate sentence which did not state a precise period of incarceration.<sup>106</sup> He was also sceptical about von Liszt's proposition to abolish all short-term imprisonments (those of under six weeks' duration), once again for reasons of general and special prevention.<sup>107</sup>

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<sup>98</sup> Schneider, A. / Wagner, M. (eds.), *Normentheorie und Strafrecht*, Baden-Baden/Wien/Zürich: Nomos-facultas-Dike (Collection "Grundlagen des Strafrechts" 5), 2018.

<sup>99</sup> Cf. Lammasch, H., "Criminalpolitische Studien", *Der Gerichtssaal* 33 (1891), pp. 147–248, here pp. 158–159.

<sup>100</sup> Lammasch, "Criminalpolitische Studien", pp. 148–149.

<sup>101</sup> Lammasch, "Criminalpolitische Studien", p. 151.

<sup>102</sup> Lammasch, H., "Offener Brief an Professor von Liszt, Halle a. d. S.", *Deutsche Juristenzeitung* 3 (1898), pp. 92–94, here p. 92.

<sup>103</sup> Lammasch, "Criminalpolitische Studien", pp. 150–151.

<sup>104</sup> Lammasch, "Criminalpolitische Studien", pp. 152–158.

<sup>105</sup> Lammasch, "Criminalpolitische Studien", pp. 170–181.

<sup>106</sup> Lammasch, "Criminalpolitische Studien", pp. 181–192.

<sup>107</sup> Lammasch, "Criminalpolitische Studien", pp. 226–227.



As we can see, Lammasch had, at least at the beginning, some sympathies for the new school, although he rejected many of its propositions.<sup>108</sup>

This attitude changed fundamentally in the second half of the 1890s. The immediate cause for his open dispute with von Liszt was the latter's speech on mental incapacity in front of a convention of psychologists in Munich in 1907.<sup>109</sup> Lammasch expressed his rebuttal very explicitly and directly:<sup>110</sup> von Liszt's idea that the handling of insane and sane perpetrators had to be the same with regard to their dangerousness to society and that there was no real difference between punishment and preventive custody was called a "vain delusion" by Lammasch and an abandonment of all ethical and moral standards; criminal law would be reduced to an instrument of "mere brutal repression"<sup>111</sup>. Von Liszt's reply was harsh: He objected that Lammasch had only made an "emotional statement" but had not given a single argument for his rejection of von Liszt's concept.<sup>112</sup> In an open letter to von Liszt, Lammasch specified his view.<sup>113</sup> He openly acknowledged von Liszt's merits for criminal law in the past, but diagnosed a current lack of scientific prudence and highlighted the risks of his recent suggestions. For Lammasch, they destroyed the ethical fundament of criminal law, endangered the personal freedom of everyone who got involved in an even minimal conflict with penal law, entailed a complete dependence of criminal justice on variable opinions of psychiatrists and psychologists and undermined people's ability to know right from wrong."<sup>114</sup> The function of general and special prevention would be completely lost.

The break between von Liszt and Lammasch was not so serious, as Lammasch focussed his work in the following years more and more on international law, and he did not abandon all the inspiration he had obtained from von Liszt's work. In his "Compendium of Criminal Law", Lammasch maintained the categories of "constant" and "variable" functions of criminal punishment.<sup>115</sup> He upheld von Liszt's concept of a durable neutralisation ("*Unschädlichmachung*") of malefactors who could not be reintegrated in society. But Lammasch stressed the difference between someone who was of unsound mind and a criminal, and he demanded that such a neutralisation only be applied when an individual had committed a number of serious crimes. But Lammasch did not only vary and in considerable parts reject von Liszt's ideas, he also criticised the other side, those who saw retaliation as the primary function of criminal law.<sup>116</sup>

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<sup>108</sup> Cf. Lammasch, "Offener Brief an Professor von Liszt, Halle a. d. S.", pp. 92–93 („[...]weil ich den Ausgangspunkt [...] für richtig hielt und auch jetzt noch für richtig halte, und weil ich eine Zeit lang denselben Weg mit Ihnen gegangen bin [...].“

<sup>109</sup> Cf. Liszt, F. von, "Die strafrechtliche Zurechnungsfähigkeit", *Zeitschrift für die gesamte Strafrechtswissenschaft* 17 (1897), pp. 70–83.

<sup>110</sup> Lammasch voiced his opinion in a review of a new edition of Binding's main work "Compendium of Criminal Law in Germany", cf. Lammasch, H., "Rezension zu: Karl Binding: Grundriss des gemeinen deutschen Strafrechts.<sup>5</sup> Leipzig 1879", *Schweizerische Zeitschrift für Strafrecht* 10 (1897), pp. 244–245.

<sup>111</sup> Lammasch, "Rezension zu: Karl Binding [...]", p. 245 (first quotation), 244 (second quotation).

<sup>112</sup> Cf. Liszt, F. von, "Die strafrechtliche Zurechnungsfähigkeit", *Zeitschrift für die gesamte Strafrechtswissenschaft* 18 (1898), pp. 229–266 (quotation p. 263).

<sup>113</sup> Cf. Lammasch, "Offener Brief an Professor von Liszt, Halle a. d. S.", pp. 92–94.

<sup>114</sup> Lammasch, "Offener Brief an Professor von Liszt, Halle a. d. S.", p. 92.

<sup>115</sup> Lammasch, H., *Grundriß des Strafrechts*, Leipzig: Duncker & Humblot (Collection "Grundriß des österreichischen Rechts" 2/4), 4th ed., 1911, pp. 2–4.

<sup>116</sup> Lammasch, *Grundriß des Strafrechts*, p. 4.

### 3.3.2. Carl Stooss

“Laws are made for life and not for schools.”<sup>117</sup> This is how Carl Stooss described a very pragmatic approach to preparatory legislative works, and it reflects his view of the *Schulenstreit*. With regard to Stooss, historical research has already shown that he took an eclectic position between the “classical” school and penal positivism.<sup>118</sup> A look into his “Textbook on Austrian Criminal Law” confirms this diagnosis.<sup>119</sup> He is convinced of the interdisciplinary character of the science of criminal law, which has to take into account sociology, anthropology, psychiatry, etc.; although he is of the opinion that the sentence must be in accordance with the deed and the perpetrator’s individual guilt, he pleads for provisional or protective measures in order to protect society from dangerous subjects, and Stooss also sympathises with von Liszt’s categorisation of types of criminals.

## 4. Austrian representatives of the “classical school”

### 4.1. Hugo Hoegel

Already contemporary observers were aware of the fact that most Austrian legal scholars in the field of criminal law were supporters of the “classical school”. This is true for instance for Karl Brunnenmeister,<sup>120</sup> Emanuel Ullmann,<sup>121</sup> Ferdinand Lentner,<sup>122</sup> Anton Finger<sup>123</sup> and Otto Friedmann.<sup>124</sup> The most prominent, resolute and sometimes provocative adversary of the new tendencies in criminal law was without any doubt Hugo Hoegel,<sup>125</sup> who

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<sup>117</sup> This dictum of Carl Stooss is quoted by Gleispach, W., “Der österreichische Strafgesetzentwurf und das Schuldproblem”, *Österreichische Zeitschrift für Strafrecht* 2 (1911), pp. 209–249, here p. 215; cf. Kaenel, *Die kriminalpolitische Konzeption*, p. 78.

<sup>118</sup> Cf. Koch, “Binding vs. v. Liszt”, p. 143; Schäfer, „Carl Stooss (1849–1934) – Eine Geschichte der Strafrechtskodifikation“, pp. 71–73; Moos, “Carl Stooss in Österreich”; Kaenel, *Die kriminalpolitische Konzeption*, pp. 85–86, 91–92, 98, 100, 102–103, 106, 111–112 and 115–116 (on the differences between Stooss and von Liszt); Gschwend, L., “Carl Stooss (1849–1934) [...]”, p. 53.

<sup>119</sup> Cf. Stooss, C., *Lehrbuch des Österreichischen Strafrechts, vol. 1: Allgemeiner Teil*, Wien/Leipzig: Deuticke, 2<sup>nd</sup> ed., 1912, pp. 1–27.

<sup>120</sup> Cf. Lammasch, H., “Nachruf auf Emil Brunnenmeister”, *Allgemeine österreichische Gerichts-Zeitung* 42 (1896), pp. 61–62, here p. 61: „Er war ein scharfer, streng logisch geschulter Jurist, ein Anhänger derjenigen Richtung, welche, mit Winding an der Spitze, das formale Element in der Jurisprudenz schärfer betont, als dies die meisten der neueren Criminalisten thun. Auch wer sich selbst nicht zu dieser Schule bekennt, wird nicht läugnen können, daß dieselbe und so in ihr auch unter Brunnenmeister ein werthvolles, vielleicht unentbehrliches Gegengewicht gegen manche einseitige Uebertreibungen der Modernsten unter den Modernen bedeutete und bedeutet.“

<sup>121</sup> Anonymus: “Nachruf auf Geheimrat Professor Emanuel von Ullmann”, *Innsbrucker Nachrichten*, 8. April 1913, Nr. 79, p. 6: „[...] vermochte er es doch nicht, der agitatorischen Richtung, welche die kriminalistische Bewegung in den letzten Jahrzehnten einschlug, zu folgen, und als Schlagworte und ein allzu lebhaftes Bestreben nach Popularisierung wissenschaftlicher Streitfragen wachsend um sich griffen, hielt Ullmann umso entschiedener an der klassischen Richtung der Strafrechtslehre fest.“ For his biography cf. Oberkofler, G., “Die Lehrkanzeln für Strafrecht und für gerichtliches Verfahren an der Innsbrucker Rechtsfakultät”, *Studien zur Geschichte der österreichischen Rechtswissenschaft* (G. Oberkofler), Frankfurt a. M. et al.: Peter Lang (Collection “Rechtshistorische Reihe” 33), 1984, pp. 173–290, here pp. 189–194.

<sup>122</sup> Cf. Oberkofler, “Die Lehrkanzeln für Strafrecht und für gerichtliches Verfahren an der Innsbrucker Rechtsfakultät”, pp. 200–204.

<sup>123</sup> Schmied, E., “Die Strafrechtswissenschaft an der Prager Universität”, *Bohemia* 25 (1984), pp. 5–89, here p. 84.

<sup>124</sup> *Österreichisches Biographisches Lexikon*, vol. 1, 1957, p. 365.

<sup>125</sup> *Österreichisches Biographisches Lexikon*, vol. 2, 1959, p. 355; his scepticism against the new reform movement points out Neumair, M., *Erziehung und Strafe. Rechtshistorische Untersuchung über Herkunft und*

was not a legal scholar working at a university, but a practitioner: After having obtained his doctor's degree in 1877, he travelled to England, Belgium and Germany to get to know foreign prison systems. He returned to Austria and was appointed judge at various courts in Styria but continued to participate in scientific debates. Beginning in 1897, he worked for the Ministry of Justice in Vienna: There he had a leading role in the preparation of a new Austrian penal code and cooperated with Heinrich Lammasch and Carl Stooss. His career flourished and finally in 1915 he became Chief Public Prosecutor.

He did not conceal his deep antipathy for penal positivism: "Today's radical movement in the field of criminal law", as Hoegel points out, "threatens the fundament of science of criminal law. In general, their claims and ideas have to be rejected, even if in some regards they may be taken into account, as they correspond to present-day living conditions."<sup>126</sup> Despite this concession, he did not find many aspects in von Liszt's works that he considered noteworthy. Von Liszt's dictum of the penal code as the criminal's Magna Charta was, for Hoegel, nothing more than a buzzword<sup>127</sup>; he was an advocate of man's free will and an opponent of every form of biological or social determinism.<sup>128</sup> Hoegel polemicized against Gross's "criminal psychology", the scientific character of which he openly denied.<sup>129</sup> He was against the possibility of suspended sentences, which he declared incompatible with the principles of general prevention as well as of equality under the law. In addition, a suspended sentence would be, in his opinion, a neglect of the victim's need for compensation for his suffering. Anyhow, he did not reject the suggestion that with regard to a few crimes, the possibility to impose suspended sentences could be taken into account.<sup>130</sup> Furthermore, Hoegel was against undetermined sentences: It was unacceptable for him that the length of imprisonment should depend of the inmate's behaviour in prison,<sup>131</sup> especially because the detained criminal's behaviour was not significant for the time after his release.<sup>132</sup> In addition, he was convinced that retaliation was a crucial element of every kind of punishment; criminal law must not be reduced to an institution of social self-defence that did not care for ethics or morality.<sup>133</sup> However, he conceded that other purposes of punishment than retaliation were imaginable. He did not exclude – in particular with regard to juvenile perpetrators – that social rehabilitation could be another effect of penal sanctions, and he did not dispute that in certain cases a neutralisation (*Unschädlichmachung*) by lifelong imprisonment was indispensable. Nevertheless, he outlined that such a neutralisation was only to be imposed in correlation with a perpetrator's committed crimes and personal guilt. Hoegel considered the concept of preventive custody as an instrument of social defence as extremely dangerous. For him, it is evident that the incorrigible criminal cannot be clearly distinguished from other classes of criminals and it would be improper to put him in prison without regard to a certain crime only because of a vague prediction of his future behaviour. Each punishment must be imposed in reaction to a certain deed and in accordance with the malefactor's individual guilt: "It is obviously inadmissible that a person is submitted to incarceration without having committed a crime, only as a protective measure in order to

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*Entstehung des österreichischen Jugendgerichtsgesetzes von 1928*, Wien: PhD thesis Univ. Wien, 1996, p. 171; Moos, "Carl Stooss in Österreich", pp. 61–62.

<sup>126</sup> Hoegel, H., *Straffälligkeit und Strafzumessung*, Wien: Perles, 1897, p. 4.

<sup>127</sup> Hoegel, H., "Die Strafrechtsreform", *Juristische Blätter* 25 (1896), pp. 601–602, 613–614, here p. 601.

<sup>128</sup> Cf. Hoegel, *Straffälligkeit und Strafzumessung*, p. 23.

<sup>129</sup> Hoegel, "Die Strafrechtsreform", pp. 601–602; Bachhiesl, *Zwischen Indizienparadigma und Pseudowissenschaft*, p. 172.

<sup>130</sup> Hoegel, *Straffälligkeit und Strafzumessung*, pp. 117–130.

<sup>131</sup> Hoegel, *Straffälligkeit und Strafzumessung*, pp. 130–144.

<sup>132</sup> Hoegel, *Die Einteilung der Verbrecher in Klassen*, pp. 86–89.

<sup>133</sup> Cf. Hoegel, "Bemerkungen zum Strafgesetzentwurf", p. 543.

protect society”<sup>134</sup> Hoegel consequently not only pleaded against the concept of criminal law as a utilitarian tool for protecting society against vaguely defined incorrigible criminals, but also against the categorising of various types as developed by von Liszt in his “Marburg Programme”.

Hoegel especially questioned the statistical foundation of the new school which referred to rising crime rates and more and more habitual offenders that regularly committed crimes.<sup>135</sup> By doing so, supporters of von Liszt wanted to prove the ineffectiveness of the existing criminal law based on the principles of retaliation and deterrence. Hoegel, on the other hand, points out that criminal statistics do not depict reality and do not allow a diagnosis of recent developments: The legislator creates new delicts, public security forces persecute violations of law with a varying intensity, public awareness for certain types of crime plays an important role whether witnesses report transgressions to the police, etc. Different national statistics, e. g. of the United Kingdom and Austria, cannot be compared seriously because of different surrounding conditions. According to Hoegel, Austrian criminal statistics gave no proof of rising crime rates.<sup>136</sup>

#### 4.2. Alois Zucker

His contemporaries saw Zucker as a representative of the “classical school”<sup>137</sup>, although he rejected Binding’s “theory of norms”<sup>138</sup>. Like Hoegel, he welcomed a few of the ideas of the new movement, but he himself stood firmly on the ground of the “classical school”: He upheld the conviction that retaliation and general prevention by deterrence was the most important purpose of criminal law,<sup>139</sup> he was a pronounced opponent of concepts of criminal law such as self-defence and preventive custody,<sup>140</sup> he criticised von Liszt’s categories of criminals – Zucker raises the question of how they can be distinguished<sup>141</sup> –, he rejects the concept of suspended sentences,<sup>142</sup> and he highlights the advantages of short-time imprisonment,<sup>143</sup> which is, in his opinion, even “indispensable”<sup>144</sup>.

<sup>134</sup> Hoegel, *Die Einteilung der Verbrecher in Klassen*, p. 85.

<sup>135</sup> Cf. Hoegel, *Die Einteilung der Verbrecher in Klassen*, pp. 2–38; Hoegel, “Die Haft im österreichischen Verfahren”, pp. 295–299.

<sup>136</sup> Cf. Hoegel, *Die Einteilung der Verbrecher in Klassen*, p. 11; Hoegel, H., “Die gesetzliche Regelung der Strafzumessung”, *Der Gerichtssaal* 71 (1908), pp. 378–402, here pp. 382–383.

<sup>137</sup> Cf. Finger, A., “Nachruf auf Alois Zucker”, *Der Gerichtssaal* 70 (1907), pp. 1–5, here pp. 2–3; for Schmied, “Die Strafrechtswissenschaft an der Prager Universität”, Zucker ranges among the supporters of the „sociological school“.

<sup>138</sup> Cf. Zucker, A., *Über Schuld und Strafe der jugendlichen Verbrecher*, Stuttgart: Enke, 1899, pp. 15–20; Zucker, A., “Einige Bemerkungen über Norm und Strafgesetz”, *Zeitschrift für die gesamte Strafrechtswissenschaft* 9 (1889), pp. 270–281, here p. 272.

<sup>139</sup> Zucker, *Über Schuld und Strafe der jugendlichen Verbrecher*, pp. 5–6 and 8–9; Zucker, A., *Ueber Strafe und Strafvollzug in Uebertretungsfällen. Ein Beitrag zur Strafrechtsreform in Oesterreich*, Wien: Perles, 1905, p. 81.

<sup>140</sup> Cf. Zucker, A., “Einige criminalistische Zeit- und Streitfragen der Gegenwart”, *Der Gerichtssaal* 44 (1891), pp. 1–108, here p. 49: „Die Strafrechtspflege, deren Selbständigkeit durch die sittliche, weil immanente Vergeltungsidee verlangt wird, darf nicht in der allgemeinen Wohlfahrtspflege aufgehen, und es sollte ihr weiterhin nicht zugemuthet werden, Maßregeln zu ergreifen, die über das Ziel, gegen die strafbaren Handlungen wirksam zu reagieren, weit hinausreichen. Ein solches System, welches durch die von uns charakterisierte Verkennung des Strafgrundes hervorgerufen, gestützt und gefördert wird, muß nachdrücklich bekämpft werden.“

<sup>141</sup> Cf. Zucker, A., *Über Kriminalität, Rückfall und Strafgrund. Nähere Ausführungen eines im Oktober 1905 im böhmischen Juristenverein zu Prag gehaltenen Vortrages*, Wien: Deuticke, 1907, p. 43.

<sup>142</sup> Cf. Zucker, A., *Einige dringende Reformen der Strafrechtspflege. Mit besonderer Rücksicht auf die Verhältnisse in Oesterreich*, Leipzig/Wien: Deuticke, 1896, pp. 35–38.

<sup>143</sup> Zucker, *Ueber Strafe und Strafvollzug in Uebertretungsfällen*, pp. 30–31 and 125.

## 5. Conclusion

As we have seen, the discussion between the “classical” school and penal positivism also had a remarkable response in the Austrian scientific community. There are legal scholars who share more conservative views like Alois Zucker, some are rather eclectic, and a few like Julius Vargha and Hans Gross are very open-minded. If antipodes are to be detected in the Austrian scientific community at that time, it is probably Hugo Hoegel, who is more than sceptical towards almost all ideas of the new “sociological” school on the one hand, and diametrically opposed Julius Vargha on the other hand. Nevertheless, due to the very particular and individual character of his ideas, Vargha cannot be simply considered as a supporter of von Liszt. When considering Vargha’s outstanding work, we easily become aware that the Austrian response to the *Schulenstreit* is more than a simple echo of German debates. To sum up, most representatives of criminal law have a very pragmatic approach to both theories and are more or less inspired by at least some of the concepts of the reform movement. This tendency of choosing and combining elements from both schools is also reflected during the continuous work on a new penal codification at the end of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> centuries, although there is still much research to be done on this topic.

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<sup>144</sup> Cf. Zucker, *Ueber Strafe und Strafvollzug in Uebertretungsfällen*, p. 32.

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