Summaries

Marcello Strazzeri, *Literary figures in the Criminal Trial: Dostoevsky, Musil and Camus*

This research sets out to verify the plausibility of certain writings in literature, in particular Dostoevsky's *Crime and Punishment*, Musil's *The Man without Qualities* and *The Stranger* by Camus, as critiques of how the law relates to crime and punishment. Using Elias' figurational theory, cross-fertilised with the writings of Foucault, the author considers literature because it is capable of visualising and declaring the relationship's complexity, the construction and practical declension of legal paradigms and the problematic juncture between law *in force* and *living* law. As a result, he illustrates how the story told by Dostoevsky in *Crime and Punishment*, in which he defends criminal responsibility as a primary subjective responsibility against all forms of bio-psychic and statistical-social determinism, can make a major contribution to today's criminological debate. Similarly, the interrelated fortunes of the two main characters in Musil's novel, Ulrich and Moosbrugger, the man without qualities and the criminal awaiting sentence, join with those of the chorus of characters from Viennese society that provide the backdrop to the tale to question the legal concept of mental infirmity. Lastly, *The Stranger* features the mechanism of the "pre-judicial" construction of guilt, in the course of legal proceedings that aim to demonstrate chronological continuity between the personality of the accused and the commission of the criminal act.

Anna Pintore, *The Name of Things: Jottings in the Margin of Luigi Ferrajoli's* Principia Juris

The author examines certain aspects of the axiomatic theory of law developed in Luigi Ferrajoli's monumental *Principia Iuris*, dwelling in particular on the theme of lacunae, on the concept of expectation, on conflicts between rights and on the definition of democracy. All these topics orbit around the notion of "subjective law" and how it relates to the notion of democracy, while each one calls attention to an awkward intersection that risks undermining the theory's overall structure: in fact, the author believes that Luigi Ferrajoli's theory of law is based on certain insufficiently justified and therefore questionable theoretical choices.

Morris L. Ghezzi, *Payments of Damages for Libel in the Press: an Empirical Research*

This article describes the results of empirical research that analysed the area of civil cases and criminal proceedings requesting the payment of damages for press

libel deriving from articles and books published by one of Italy's leading publishers. Covering the period from 1 January 2000 to 31 December 2006, the cases total 162 in civil proceedings and 245 for criminal libel. In each case, the document studied was the final one for each level of judicial decision-making, or the act of agreement between the parties, in cases when they reached an out-of-court settlement.

The survey selected two categories from the entire field of people who initiated proceedings, that of magistrates (the judiciary and public prosecutors) and that of politicians, grouping all the remaining ones into a single macro-category dubbed "others".

The statistical results indicate clearly that the quantitatively greater payments of damages are attributable to the category of the magistrates. In addition, the average length of the judicial proceedings also varies with the category to which the plaintiff belongs; in particular, it increases significantly in the case of magistrates taking action for criminal libel and is reduced when the same category takes action for civil libel.

So clear is the reading of the quantitative results in numerical terms that the author preferred to offer no interpretation of the data compiled, leaving them to speak to readers for themselves.

Raffaele De Giorgi, *The Risk of Risk Society and the Limits of Law*

What is represented as risk in the risk society? Does this question concern the operations of society's structure, or does it concern the semantics through which society observes itself? And finally, can law reduce risk, or is it a risk-factor in itself?

The theoretical perspective proposed in this essay is the one offered by Luhmann's theory of society. Indeed, only this perspective enables us to deconstruct current representations of risk and the legal system and to advance a description more attuned to the complexity of modern society.

The article's main hypothesis is that risk is a structural feature of modern society's complexity. Risk is built in the process of temporalisation of modern society, in its symbiosis with the future, in the paradoxical nature of the present, and in the ecology of non-knowledge.

Both risk and law are techniques aimed at constraining time while reducing uncertainty and non-knowledge about the future. Modern society treats the future as a risk that depends on decisions. In turn, modern law's self-recognition relies upon its capacity to control risk. However, the author argues that this process is highly problematic and risky. In fact, law cannot forbid, stop, or prevent risk: it can only resort to strategies aimed at reducing the riskiness of the juridical treatment of risk.

Alberto Febbrajo, *For a socio-legal theory of risk*

This article aims to offer an overview of some contributions to a socio-legal theory of risk. Starting from the presupposition that risk is a concept that plays a central role in sociological as well as in legal theory, it underlines the thesis that, from the point of view of the general system theory, the application of three different strategies of risk-management can be recognised in the legal system: a substantial strategy, which comprises shielding a core of legal contents from the risk of sudden and drastic changes; a social strategy, whereby risks are externalised by creating virtual figures ("legal persons) which relieve "natural" persons from those risks that are particularly severe and hard to sustain in the sphere of economic activity; and a temporal strategy, in which risks are diluted by implementing procedures, i.e. sequences of operations, featuring relevance criteria of their own and by a time-frame that, to a certain extent, can be pre-determined.

Moreover, in every advanced legal system, there is a need for tools for reducing or avoiding the risks produced by the current legal strategies for risk absorption. One of the main learning processes concerning the risks produced by law is democracy, which is also in turn exposed to risks.

Because the present situation features profound changes in the structure of world society as a whole, which dramatically transform the types of risks confronting the legal system, the concept of law oriented to an imperativistic approach is no longer adequate. Instead, it needs to be based on a communicative approach, according to which the treatment of risks trespasses on the borders of the individual state and takes on a cultural and communicative, rather than a practical, dimension, characterised by symbolic legitimisation, virtual effectiveness and increased openness to risks stemming from other subsystems.

Volkmar Gessner, *Towards a Socio-Legal Theory of Contractual Risk*

This paper deals with the risk of opportunism – the usual risk in economic exchanges. Breach of contract is probably the most common event in daily life and has therefore attracted research and debates in many disciplines of the social sciences. This discussion deals with the current knowledge of the ways in which societies are coping with the risk of opportunism, distinguishing between three approaches with ascending degrees of complexity: theories of institutional support of contractual exchanges, theories of relational trust and theories of social systems of trust. As demonstrated in Fig. 1 these theories are chosen among many other competing approaches. Rather than being replaced by institutional economics or economic sociology, socio-legal knowledge is a necessary and valuable ingredient for theories of contractual risk. Without our knowledge of the protection of property rights in a particular society, of choices between formal and informal modes of conflict resolution made by business people or consumers, of obstacles in court proceedings and of problems when a lawyer is consulted, our neighbour disciplines

come to either over-optimistic conclusions as regards institutional trust or to over-simplified models as regards personal trust and relationships.

Diana Young, *Risk, Propriety, and Sexual Assault*

Legal theorists often conceive of the law as a closed system of reasoning, and as the central mechanism through which the uses of power are conferred and circumscribed. However, social theory challenges this conception of law by telling us that a great deal of power is non-juridical in nature, operating through discursive practices that define and normalize conduct. This raises doubts as to whether juridical power can be used to achieve social transformation. Risk theory uncovers discursive practices that operate as non-juridical sites of power, by showing how risk analyses normalize contingent values through the use of value-neutral terms of statistical probabilities. For example, feminist criminologists, drawing on risk theory, have shown us how risk discourses can be used to reinforce traditional norms of femininity, particularly by responsibilizing women for minimizing the risk of sexual assault. Using an example from the Canadian law of sexual assault, this paper considers whether the law inevitably reproduces the very discourses of femininity that many law reformers are trying to disrupt, or whether it might act as a site wherein these discourses may be challenged.

Maria Rosaria Ferrarese, *Transjudicial Dialogue and Constitutionalism: A Risk or an Opportunity for Democracy?*

After briefly explaining how constitutional dialogue works and has mostly been elaborated, together with how it is encouraged and made possible by some of the institutional characteristics of the judiciary, this paper addresses a specific issue: the link between the position adopted by the courts with regard to this practice and the different kinds of legitimisation which they refer to, whether democracy or constitutionalism. Legitimacy may be based more on democracy, with the idea that national sovereignty is its almost exclusive source, or on the idea that, in matters of rights, universal standards may or must pass through different democracies. As usual parlance is of course about "constitutional democracies", it reconciles the potential opposition between the two aspects. However, globalisation, with the challenges it sets towards national sovereignty, is strengthening this opposition, pushing it toward the one or the other aspect. Courts and especially constitutional courts are thus becoming the places where decisions are made about the ambivalence between the risk of de-nationalising national constitutional law and the opportunity to take part in creating new cosmopolitan forms of law and universalising a constitutional protection of fundamental and human rights. Two possible answers to this ambivalence are highlighted by focusing particularly on the example of two national constitutional courts, that of South Africa and that of the United States, starting from their different attitudes towards involvement in the constitutional dia-

logue. Their different, even opposite, ways of approaching transnational dialogue lead to paradoxical results.

Javier De Lucas, *Migration, Law and Society: Identifying Where the Risk Is*

This paper focuses on migration, law and democracy in order to identify where risk lies. The author concentrates on studying a recent case, the Directive on the Return of so-called "illegal immigrants" (*sans papiers*) approved by the European Parliament on 18 June 2008.

The usual point of view, that of the dominant discourse, maintains that today's migratory movements constitute one of the structural factors that justify the definition of our societies as the "Risk Society". According to this point of view, the migratory flows entail a risk for social cohesion and even a destabilising potential for both democracy and the rule of law. The risk is illustrated by the menacing image of invasion threatening at our doors, hence the classical argument of the "demographic bomb" as the resource of poor countries.

The author's thesis sustains that it is precisely our responses, in the form of migratory policy tools, that constitute a risk factor. Some of these tools, including this Directive, have become destabilising elements of the rules of the game and, moreover, of the values of the rule of law and of democracy.

Pascal Lokiec, *The Distribution of Risks in the Employment Relationship in the Light of French Law*

A business enterprise, in which most employment relationships take place, is a considerable source of risk for its members, both partners or shareholders and employees, especially if it takes the legal form of a company quoted on the stock exchange. The law has established a clear distinction between the actors who are involved in the company, with regard to the distribution of risks. Shareholders should bear the risks (though the risks they bear are limited in certain companies), while employees are risk-free. The evolutions coming from both employment and company law tend to modify this traditional way of distributing risks in companies: more and more pressure is put on employees to shoulder some of the risks of production, either by buying shares in the company or by adapting their remuneration or their working hours to its financial and productive health. The distribution of risk is evolving towards a transfer of some of it to employees.

Angelo Abignente, *The Ethics of the Legal Profession*

The positive law tradition has hitherto had nothing to say about the legal profession's role and function, focusing more interest on questions of justice, of the legitimisation of power and of the genesis and organisation of normative material.

This trend is now subject to a reversal promoted by new, neo-constitutionalist, narrativist, analytical and hermeneutic experiences, which no longer focuses attention on the moment when law is produced, but on the one when it is applied, reappraising and revitalising the function of the judge, of the attorneys and of other legal professionals. The attorney becomes an active protagonist, an intermediary not only between conflicting interests in a controversy, but also between opposing public interests, while the reappraisal of his role stimulates thinking about the ethical dimension of how the legal profession is practised. Referring to the theories of Habermas and of Alexy, the author treats the reasonable status of argumentation as the supreme ethical instance necessary for a decision that interferes in the sphere of another person's action. At the same time, however, the control of the reasonable status of the respective arguments on both sides is the ethical instance required of the attorneys taking part in the legal proceedings. It takes the form of compliance with the rules characteristic of the practical discourse, primarily the rule of free discursive participation that enables the onus of the argumentation to be explained.

Ernesto de Cristofaro, *A Man of Glass in the Prism of Truth*

The author takes a fresh look at a legal case that took place in the early 1970s and has recently been used as the source of a novel and a film, finding useful tools for commenting on the truth of legal proceedings as a result of the interaction between different discursive regimes.

The case of Leonardo Vitale, the first member of the Sicilian Mafia to turn informant, can be observed not only with reference to its specific content – the story of a member of "Cosa Nostra" who broke the bond of silence, offered a description of the Mafia as seen from the inside and so delivered himself up to an inexorable vendetta – but also as a potential paradigm of the relationship between law and truth.

The factual truth that the rules of the criminal proceedings enable us to reconstruct seems to depend, in this story, on a more extensive theoretical syntax than the one that can be derived from the legal codes alone: a predicative system that admits certain topics and objects, while relegating others to a status of irrelevance. In a cultural framework in which there are even those who question whether the Mafia exists at all, while its members' destiny is subject to their unmitigated fidelity, the words of an informer run the risk of rapidly being sidelined as the ravings of a madman, while their message is totally ignored and has no effect.

Lucio Meglio, Francesco M. Battisti, *Ignorance of the Law and Education for Legality in a Complex Society*

The aim of this article is to detect the opinions that people hold about the law, using the finely-tuned tools available from public opinion surveys. The problem of familiarity with the law, i.e. of laws that not only target the legal experts, but can also be under-

stood by everyone, is becoming increasingly pressing in today's multicultural society, which features a far greater social heterogeneity than in a well-ordered, homogeneous society, such as might have been the case of Italy in the sixties. Combating ignorance of the law and facilitating a gradual but constant education for legality is the only way to guarantee that conflicts will be reduced and the rights of all members of society safeguarded.

(English texts revised by Pete Kercher)

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