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LOOKING ELSEWHERE TO UNDERSTAND OURSELVES: COMPARATIVE LAW AS A MAGIC LANTERN FOR RETHINKING THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW (*)

di Michele Papa

This essay takes the ongoing transformation of the principle of legality in criminal law as the starting point for reconsidering the epistemic role of comparative analysis. Comparison is not treated merely as a survey of foreign solutions, but as a method for revealing, through difference, the deeper structures of criminal normativity. The inquiry proceeds along two distinct but interconnected paths. The first examines ***express legal formants*** *and the legislative poetics through which legal systems represent wrongdoing, conceiving the offense definition as a "symbolic form" and a paradigmatic narrative of prohibited conduct. The second investigates* ***cryptic formants****: procedures, institutional arrangements, professional cultures, enforcement practices, and forms of "noise" that concretely shape the attribution of criminal responsibility. The analysis ultimately calls for a renewed legislative poetics capable of combining intelligibility, expressive clarity, and the guarantees associated with legality, while remaining attentive to the often invisible forces that govern the actual operation of criminal justice.*

(*)This essay follows a paper presented some time ago at the biennial conference of the Silvia Sandano Association, held in Rome in June 2022, and subsequently published under the title *Legislazione penale e metodo comparatistico* in the volume edited by C. E. Paliero, V. Mongillo, and R. Bartoli, *La scienza della legislazione penale. Recenti riforme ed istanze di razionalizzazione*, Naples, 2024, pp. 131–146. The topic is thoroughly reconsidered and substantially expanded here, also in anticipation of a contribution to the forthcoming *Festschrift* honoring the Argentine professor and judge Carlos Mahiques.
These pages bring together reflections developed over the past several years, also in connection with lectures and academic discussions at a number of universities in the United States. This also explains the English-language version included here. The essay, however, is not merely an opportunity to revisit and further develop questions in comparative criminal law that have long occupied my work. In the pages that follow, I seek to connect comparative legal analysis with a line of inquiry I have pursued for roughly a decade: the "rendering" of criminal wrongdoing and, more broadly, the aesthetics of criminal law. I began developing this approach in M. Papa, *Fantastic Voyage. Attraverso la specialità del diritto penale*, 2nd ed., Turin, 2019, and have since explored it in a number of essays, the most recent of which is M. PAPA, *"A que será que se destina?" "A cosa è destinata?" Prospettive dell'intelligenza artificiale nel diritto penale contemporaneo*, *Sistema Penale*, May 11, 2026.

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1. Transformations in Criminal Law and the Debate over a "New Legality".

Much has been written about the crisis of legality in criminal law and the need to renew the concepts and categories through which this principle has traditionally been understood. The relationship between enacted law and judicial decision-making is said to be changing dramatically, raising the prospect of a shift from a criminal law organized around statutory offense definitions to one increasingly shaped by precedent and case law. The idea of a "new legality" has emerged as the conceptual and normative space in which to address the profound transformations unsettling contemporary criminal law. Diagnoses abound, as do proposed remedies.[1][2]

The practical setting and theoretical architecture of this "new legality" are by now familiar. Centered on the troubled relationship between legislature and judge, the debate situates criminal-law legality within a transformed constitutional and international order—one that is best described as networked. Sources of law now operate on multiple levels. Above ordinary legislation stand European Union law and the law generated by the European Convention on Human Rights; below it, regulatory and administrative norms increasingly penetrate the fabric of criminal statutes.

Against this background, the interpretive role of those who help create the law in action—prosecutors and judges, but also defense lawyers—has expanded enormously. Put simply, what has broken down is the image of the statute as a completed container of the criminal norm and of the judge as its mere executor.

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[1] The literature is vast. For additional references, see several recent monographs addressing the subject: C. COLUCCI, *Tra ottimizzazione della funzione comando e prospettive di un suo superamento. I nuovi scenari della normatività penale* (Florence, 2025); S. DE BLASIS, *L'intellegibilità come misura oggettiva di prevedibilità della norma penale* (Naples, 2023); D. PERRONE, *Nullum crimen sine iure. Il diritto penale giurisprudenziale tra dinamiche interpretative in malam partem e nuove istanze di garanzia* (Turin, 2019); P. SCEVI, *La prevedibilità della norma penale tra legislatio e iurisdictio* (Turin, 2022); A. SANTANGELO, *Precedente e prevedibilità. Profili di deontologia ermeneutica nell'era del diritto penale giurisprudenziale* (Turin, 2022).

[2] See, among others, R. ALAGNA, *Dialogo breve sulla tipicità penale*, in *Studi in onore di M. Ronco* 3 et seq. (Turin, 2017); G. AMARELLI, *Dalla legolatria alla post-legalità: eclissi o rinnovamento di un principio?*, Riv. it. dir. proc. pen. 1406 et seq. (2018); R. BARTOLI, *Le garanzie della "nuova legalità*, *Sistema Penale*, Mar. 20, 2020; C. BERNASCONI, *Alle radici dell'imprevedibilità del diritto giurisprudenziale*, Criminalia 193 et seq. (2016); M. Donini, *Fattispecie o case law? La "prevedibilità del diritto" e i limiti alla dissoluzione della legge penale nella giurisprudenza*, Questione Giustizia, no. 4, 79 et seq. (2018); F. GIUNTA, *Un diritto penale necessariamente e strettamente giurisprudenziale*, disCrimen, Nov. 18, 2022; id., *Ius legibus solutum. Ovvero, la legge del giudice penale*, disCrimen, Nov. 12, 2020, at 8–9; V. MANES, *Common law-isation del diritto penale? Trasformazione del nullum crimen e sfide prossime future*, Cass. pen. 955 et seq. (2017); ID., *Dalla "fattispecie" al "precedente": appunti di "deontologia ermeneutica,"* Dir. pen. cont., Jan. 17, 2018, at 1 et seq.; F. PALAZZO, *Legalità penale, interpretazione e etica del giudice*, Riv. it. dir. proc. pen. 1249 et seq. (2020); ID., *La "nuova" legalità e il ruolo della Corte di cassazione*, Sistema Penale, Mar. 5, 2020; C. SOTIS, *Vincolo di rubrica e tipicità penale*, Riv. it. dir. proc. pen. 1346 et seq. (2017).

We have long known that this image contained a fictional element. Yet attention to what legality ought to be—to the normative and constitutional role it was expected to perform—often eclipsed inquiry into how it actually worked. It was as though acknowledging legality's operational limits would diminish its normative value; as though endlessly repeating the ideal might somehow make it real.

That world has changed, not only because of the broader crisis of legal formalism and normativism, but also because social and political transformations have placed the judiciary—prosecutorial as well as adjudicative—in an openly central role, in Italy and elsewhere.

This transformation is by no means uniquely Italian. Even a cursory look at debates in other legal systems confirms that legality can no longer be reduced, at least not entirely, to the classical questions through which different legal traditions addressed the sources of criminal law.[3]

Across legal cultures, attention has shifted from the abstract formulation of criminal prohibitions to the process through which those prohibitions are interpreted, refined, and applied. The requirement that a provision be determinate is now accompanied by concern for the foreseeability of its concrete application. The ban on retroactive legislation is joined by the problem of unforeseeable and adverse changes in judicial interpretation. And the principle that crimes must be created by statute now requires us to identify the institutional and practical actors who actually define the scope of punishability—and the limits on their power to do so.

The transformation takes different forms in different systems because constitutional arrangements, traditions of legal sources, and the authority assigned to courts all differ. Yet several structural questions recur: Who concretely determines the meaning of a criminal norm? How far may interpretation develop the statutory text? When does a change in case law become a form of norm creation? What protection is owed to citizens who rely on settled law? And what institutional mechanisms can secure the stability, accessibility, and accountability of the law in action?[4]

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[3] For an updated survey of the European Court of Human Rights' case law, see European Court of Human Rights, *Guide on Article 7 of the European Convention on Human Rights*, available on the Court's official website.

[4] For two systems especially close to the Italian tradition, Spain and France, see, e.g., M. Pérez Manzano & J. A. Lascuraín Sánchez eds., *La tutela multinivel del principio de legalidad penal* (Madrid–Barcelona–Buenos Aires–São Paulo, 2016); J. A. LASCURAÍN SÁNCHEZ, *El principio de legalidad penal: seis retos*, Almacén de Derecho, Aug. 5, 2019; J. P. MONTIEL, *La crisis del principio de legalidad en el nuevo Derecho penal: ¿decadencia o evolución?* (Madrid–Barcelona–Buenos Aires–São Paulo, 2012); ID., *Estructuras analíticas del principio de legalidad*, InDret, no. 1 (2017). On France, see F. HABOUZIT, *La légalité dans l'exécution de la peine privative de liberté. Lumière sur la prévention de l'arbitraire dans le champ pénitentiaire*, Revue de science criminelle et de droit pénal comparé 641–54 (2025); M. BOUCHET, L'éclatement des sources face à l'affirmation du principe de légalité: focus sur la source constitutionnelle, La lettre juridique (Apr. 2024); A. GIUDICELLI, *Le principe de légalité en droit pénal français. Aspects légistiques et jurisprudentiels*, Revue de science criminelle et de droit pénal comparé (2007); M. TOUILLIER, *L'interprétation stricte de la loi pénale et l'article 7 de la Convention européenne des droits de l'homme*, Revue des droits et libertés fondamentaux, chron. no. 08 (2014); and M.-L. DRAGO, *Le principe de normativité criminelle. Reconfiguration du principe de légalité criminelle* (doctoral dissertation, University of Montpellier, 2016). French scholarship often proceeds through chroniques, case notes, Dalloz

Debates over these new dimensions of legality everywhere carry a strong ideological and political charge. In Italy, this is partly connected to the involvement of some scholars in legal practice. Others display a marked cultural and political affinity with an increasingly assertive judiciary and welcome its leading role in attributing criminal responsibility. At times, polemics overshadow the prior cognitive purpose of analysis. That is unfortunate. Our best intellectual resources should be guided by the maxim *primum intelligere*: first understand what is actually happening today within the mysterious kaleidoscope of legal sources.

2. A Different Way Forward.

Drawn toward what still eludes us, let us move away from the course followed by the main fleet and search for wind in another quarter of the sea.

The first favorable wind blows through the waters of comparative law. Yet, "no wind is favorable for the sailor who deasn't know where to go"[5]. Therefore, we must decide what we are asking comparative criminal law to do and where we want it to take us. In plain terms, we must ask how comparison can help us understand the system of sources that governs the acription of criminal responsibility and the imposition of punishment.

Whether comparison truly offers a favorable wind to the criminal lawyer remains, in part, to be shown. For a long time, the relationship between comparative law and criminal law was treated as oppositional, even dysfunctional. If legality requires the primacy—indeed, the monopoly—of national written law enacted by parliament, why should anything outside that enclosure matter? Foreign rules and foreign legal doctrines might appear only as sources of danger or confusion. On this view, an Italian judge should be indifferent to French, Turkish, or Japanese law unless prepared to violate legality by applying standards drawn from sources that have no authority to speak within the domestic system.[6]

Those claims rest on premises that comparative criminal law has long outgrown. Comparison has an obvious role even in systems committed to a strict statutory monopoly: it can inform reform and help domestic law respond intelligently to international obligations. More important, it allows both tasks to be performed without simplistic copy-and-paste exercises or legal transplants destined for rejection. Nor can the open and fertile world of legal principles—including principles of culpability and rehabilitation—be confined within geographic borders. Principles evolve and regenerate

fiches, and JurisClasseur fascicules rather than large-scale systematic monographs or articles. Any reconstruction of the relevant scholarship must therefore include this ostensibly "minor" literature.

[5] *Ignoranti quem portum petat nullus suus ventus est*. Seneca, *Letters to Lucilius*, Letter 71; see the Italian translation by Giuseppe Scarpat 458–59 (Paideia, 1975).

[6] See F. PALAZZO & M. PAPA, *Lezioni di diritto penale comparato* 2 et seq., 14 et seq. (3d ed., Turin, 2013).

through the circulation of ideas and legal experience, a process that is inevitably international andextends across society.[7]

Even so, comparative criminal law has lately been discussed with less excitement. Excellent books devoted expressly to the subject continue to appear [8]. Substantial discussions of foreign law remain common in criminal-law monographs [9]. Yetthe allure of comparative criminal law seems to have faded. After the flourishing of scholarship in the 1990s, comparative law risks becoming like a guest who is kept on the list rather than genuinely desired: familiar, unobtrusive, always available, useful to the group's moral economy and to the staging of the evening, but no longer capable of arousing interest. For those who find in Marcel Proust's *À la recherche du temps perdu* a gallery of enduring human types, the comparison may call to mind certain habitués of Madame Verdurin's salon.[10].

We should resist that decline. Properly understood, comparison has lost none of its fascination and continues to offer lawyers genuine paths to illumination. The condition is that we embrace, in criminal law as elsewhere, a "new comparison": one that moves beyond surveys of foreign positive law, beyond catalogues of formulas available for legislative borrowing, and beyond the geographic dimension that defined the field for decades. Comparison has immense heuristic power. It would be a mistake to reduce it to a side-by-side inventory of statutory propositions. As we shall see, its resources can also be joined fruitfully to an inquiry into the aesthetic and stylistic dimensions of criminal legislation.

3. "Know Thyself": The Transformative Power of Comparative Criminal Law.

Where, then, can the wind of comparison take us?

I have no doubt: the promised land is the place from which we began. The final harbor lies not on distant shores but, as in Odysseus's return or Magellan's

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[7] F. PALAZZO & M. PAPA, supra note 7, at 33 et seq.; see also M. PAPA, *Metodologia e scopi della comparazione in materia penale*, in *Trattato di diritto penale, Parte generale*, vol. I, 371–96 (A. Cadoppi, S. Canestrari, A. Manna & M. Papa eds., UTET, Turin, 2012).

[8] I have in mind, in particular, A. MADEO, *Lezioni di diritto penale comparato* (Naples, 2021); R. PALAVERA, *Comparazione penale* (Turin, 2023); and, at a more general textbook level, A. Somma, *Introduzione al diritto comparato* (2d ed., Turin, 2019).

[9] Giappichelli publishes a dedicated series, *Quaderni di diritto penale comparato, internazionale ed europeo*, edited by A. Bernardi, M. Donini, V. Militello, M. Papa, and S. Seminara, which is designed to promote a comparative approach in criminal-law monographs.

[10] Madame Verdurin is a character in Marcel Proust's monumental novel *À la recherche du temps perdu (see* Marcel Proust, *In Search of Lost Time,* translated by C. K. Scott Moncrieff and Terence Kilmartin, revised by D. J. Enright, 6 vols., New York, Modern Library, 1992–1993*).* She presides over a bourgeois artistic and social salon frequented by musicians, painters, physicians, intellectuals, and social climbers of varying brilliance. She is not merely a hostess but a social director. In her salon, an invitation is not neutral hospitality but an act of classification: she welcomes, uses, demotes, promotes, and expels, transforming friendship and conversation into a form of petty social domination.

circumnavigation, on the shore from which the journey started. We return after long wandering, deeply changed and therefore, at last, aware.

The purpose of comparison is to understand ourselves: our own legal system as an ordering structure of concrete experience—and, potentially, every legal system as such a structure. At a still more general level, comparison allows us to understand the legal system itself as a way of ordering lived reality.

Comparative analysis rests on a dialectical epistemology: we understand by identifying and measuring differences. We use the same method in ordinary life. We grasp what the river flowing through our city—whether the Arno in Florence or the Tiber in Rome—really is only when we compare it with things both similar and different, from a mountain stream to the Amazon. Through difference, properties concealed by the domestic horizon become visible. Comparison with a mountain stream reveals seasonal variation in flow, gradient, riverbed erosion, and the downstream movement of debris. Comparison with the great rivers of the world brings into view a relatively constant water mass, multiple sources of water, the riverbed and floodplain, navigability, and the wider hydrographic network in which the river functions as a principal or secondary channel. We finally understand our river; more deeply, we begin to understand what a river is[11].

In law, comparison can likewise become an indispensable means of grasping the depth, complexity, and networked character of normativity—both express and hidden. That understanding is necessary not only for particular doctrines and mechanisms—offense definitions, general-part rules, critical procedural stages, anddiscretion in selecting cases for prosecution—but also for the criminal system as a whole: the larger process through which responsibility is attributed and punishment may ultimately be imposed.[12]

Comparative criminal law is not a beauty contest among legislative solutions. It is a technique for taking law apart and putting it back together. It protects us from the fantasy of the magic formula—the belief that importing a foreign or supranational model will solve problems rooted deeply in the structure of a legal system.

4. Comparison as a Method for Understanding Normativity, Both Express and Hidden.

Comparative criminal law permits us to explore the universe of normativity along two connected but conceptually distinct axes.

The first remains within verbalized positive law. It concerns express legal formants: statutes, judicial decisions, scholarship, drafting techniques, vocabularies, doctrinal structures, and normative styles.

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[11] For an extensive bibliography, see R. Palavera, supra note 9, especially at 97 et seq. and 163 et seq.

[12] M. Papa, *Metodologia e scopi della comparazione in materia penale*, supra note 8, at 371 et seq.; M. Papa, *Quale statuto condiviso per il concorso di persone nel reato?*, Criminalia 299 et seq. (2021); M. Papa, in F. Cingari, M. Papa & A. Vallini, *Lezioni di diritto penale. Parte speciale* 10 (2d ed., Turin, 2023).

The second moves beyond verbalized positive law toward cryptic formants: factors often unspoken, and sometimes not even perceived as legal, that nonetheless shape the concrete attribution of responsibility and the actual imposition of punishment.

5. Comparing Express Legal Formants.

It is useful to begin with the first perspective because it remains within the lawyer's traditional territory. In its most visible form, criminal law presents itself as written law; comparison therefore begins by setting side by side the express forms of normativity. But comparison must not stop at the lexical surface of legal provisions. It is not enough to ask how a system defines theft, sexual assault, corruption, complicity, or attempt. Each doctrine must be connected to the system's other formants and to the culture of its legal setting. One cannot understand intent without considering the available categories of mens rea and the underlying conception of personal responsibility and culpability. Nor can one understand theft without considering the overall architecture of criminal protection for property and—because theft is frequent but only selectively investigated and punished—the rules governing investigation and prosecution. These points are familiar. Serious comparative inquiry uses differential analysis to identify the mechanisms that actually govern the definition and attribution of criminal responsibility.

5.1. Styles of Rendering and Legislative Poetics.

Once this is clear, we may take a further step and examine how legal systems develop and realize the expressive and stylistic choices embodied in positive law. What conceptual and stylistic tools do lawmakers use—successfully or unsuccessfully—to produce an express, verbal rendering of normativity? In what forms, and in what literary style, is criminal wrongdoing described in France, Spain, Japan, or India?

This is a new and promising field of inquiry, one that brings comparative law into conversation with the study of law as literature.[13]

The inquiry is not limited to individual offenses. It also extends to the general part, especially to doctrines located at the boundary with the special part—doctrines in which the form of wrongdoing is joined to the criteria for attributing responsibility.

Complicity provides a particularly revealing example. A doctrine that appears unified and compact in domestic legal language becomes, under comparative scrutiny, a constellation of models, subcategories, sources, and practices. Comparing unitary and differentiated models across civil law, common law, international criminal law, and European law reveals more than definitional differences. It exposes different expressive

[13] See M. PAPA, *La fattispecie incriminatrice come "forma simbolica,"* disCrimen, Apr. 17, 2025, and the author's other works cited there.

capacities; different architectural choices about the structure of responsibility; different forms of literary rendering; different distributions of authority among legislature, courts, and scholarship; and different relationships between the general and special parts.

Article 110 of the Italian Criminal Code, in minimalist prose, states the equivalence of contributions and the unity of accomplice liability. Practice, doctrine, and case law, however, reveal a far more mobile body of law—one that changes depending on whether the issue involves liability by omission or negligence, encouragement, conspiracy, criminal-association offenses, complex organizations, economic crime, corporate crime.[14]

Comparative observation broadens the picture further. Common-law systems distinguish, with many variations, among principals, accessories, aiding, abetting, counseling, procuring, and conspiracy. Civil-law systems move between unitary and differentiated models. International criminal law works with modes of liability and joint criminal enterprise. European law frequently requires the punishment of participation while leaving Member States to supply the content of the formula. The methodological lesson is decisive: comparing words, definitions, or abstract models is not enough. We must identify the expressive devices through which each system constructs a model and crafts strings of language that guide, with varying degrees of effectiveness and constraint, the attribution of responsibility.[15]

The inquiry becomes still more revealing when we move from the general part to the special part. There we encounter the countless "bonsai narratives" contained in offense definitions—the principal express formant through which criminal wrongdoing is described.

An offense definition is not merely a normative formula. It is the place where a legal order represents the prohibited act, selects its salient features, arranges the scene, and constructs its typical face. To compare offense definitions is therefore to compare different ways of giving form to wrongdoing: different legislative poetics, different ways of modeling prohibited conduct, and different techniques for making visible—or at least recognizable—what deserves punishment.

Comparison can thus become a morphological atlas of criminal-law styles, a kind of natural history devoted to cataloguing, observing, and classifying living legal forms: species, genera, families, variations, and adaptations. The point is an atlas of styles, not a sample book of linguistic solutions—an atlas that belongs to literary aesthetics before it belongs to law.

More concretely, comparison reveals systems and regulatory fields that favor an iconographic, almost realistic description of wrongdoing; others that proceed through

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[14] On complicity as an apparently unitary but actually fragmented doctrine, see M. PAPA, *Quale statuto condiviso per il concorso di persone nel reato?*, disCrimen, Dec. 1, 2022, especially §§ 1–2; and M. PAPA, *La compartecipazione criminosa*, in *Trattato di diritto penale*, vol. I, 609 et seq. (A. Cadoppi, S. Canestrari, A. Manna & M. Papa eds., Wolters Kluwer, Milan, 2022).

[15] For the comparative framework encompassing common law, civil law, international criminal law, and European law, see M. Papa, *Quale statuto condiviso per il concorso di persone nel reato?*, supra note 15, § 3. On the general comparative model, see also M. DUBBER & T. HÖRNLE, *Criminal Law: A Comparative Approach* 304 et seq. (Oxford, 2014).

highly conceptual and abstract definitions; and still others that delegate much of the norm's content to administrative cross-references, general clauses, technical standards, or clusters of illustrative cases.

Each choice embodies a different poetics of criminal legislation—a different idea of how wrongdoing should be seen, understood, communicated, and judged. Some lawmakers render wrongdoing with Canaletto's photographic realism; others with Hokusai's minimal line. Some reverse perspective, like the icon painters Andrei Rublev or Theophanes the Greek; others abandon the sensible world for abstract conceptual representation. Under the pressure of modernity, lawmakers sometimes venture into the informal aesthetics of Burri, Fontana, or Pollock.

A few examples may make the point clearer. Theft under Article 624 of the Italian Criminal Code retains a strongly narrative and iconographic character: the scene is the taking of another's movable property from the person who possesses it, with intent to profit. English theft addresses the same property harm through more elastic and conceptual categories—dishonesty, appropriation, property, belonging to another, and intention permanently to deprive. The physical scene of taking recedes as the center of gravity shifts toward a functional definition of the invasion.[16]

The contrast between Italian fraud and English fraud is even sharper. Article 640 of the Italian Criminal Code tells a relatively compact dramatic sequence: artifice or deception, inducement into error, unjust gain, and another's loss. The Fraud Act 2006 instead constructs a general offense around three modes—false representation, failure to disclose information, and abuse of position—and links them primarily to dishonesty and the intent to make a gain or cause a loss. Gain and loss need not occur as objective elements; it is enough that they be intended. Here again, what changes is not merely the statutory formula but the way the property offense is seen—the rendering of the wrong itself.[17]

The comparison between furto and theft, and between truffa and fraud, shows how the study of express formants can become an inquiry into the legislative poetics through which different systems shapethe same underlying harms. The special part is the privileged site of that inquiry because it is there that wrongdoing receives a face.

Comparing express formants also helps us see that the contemporary crisis of legality is not caused solely by the rise of precedent or by greater judicial creativity. The crisis reaches the very form of positive law: the lawmaker's diminishing ability to represent wrongdoing through formulas capable of guiding citizens and constraining judges at the same time.

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[16] See Italian Criminal Code art. 624; Theft Act 1968, c. 60, § 1 (UK). At the definitional level, the English provision centers theft on dishonesty, appropriation, property belonging to another, and an intention permanently to deprive.

[17] See Italian Criminal Code art. 640; Fraud Act 2006, c. 35, §§ 1–4 (UK), which constructs fraud as a general offense comprising three modes: false representation, failure to disclose information, and abuse of position.

5.2. The Offense Definition as a "Symbolic Form" of Wrongdoing

The first comparative path considered here—the comparison of express formants—invites us to view the offense definition differently. Cross-system comparison makes clear that an offense definition is a symbolic form of wrongdoing. From within a single legal order it may appear to be an objective, almost photographic description of prohibited conduct. Yet it is symbolic because it conveys an intentionally constructed representation, fashioned through expressive choices and often highly sophisticated stylistic conventions adopted, with varying degrees of aesthetic self-awareness, by lawmakers and legal cultures. The offense definition gives criminal wrongdoing a visible form in which a culturally specific way of conceiving the world becomes objectified.[18]

An offense definition is symbolic because it says more than it literally describes. That surplus arises because the structure of representation expresses—translates into perceptible and stylistically particular form—a conception of reality. The formula for theft does not merely refer to taking another's movable property. It evokes a scene, a disruption of the established order of possession and control, a rupture in the order of belonging. Trespass into a dwelling likewise describes more than bodily movement through space; it constructs the image of intrusion into the protected sphere of the home.

The offense definition is, first of all, a literary text—though a literary text of a very unusual kind. It generally does not command in the imperative. It does not say "do not steal," "do not kill," or "do not enter another's home." Instead, it tells a story. It narrates a micro-story, a bonsai tale, capable of bringing the prohibited event to life in the reader's mind. Its communicative force lies in the overall plot, not in the isolated sum of its words.

This narrative dimension often relies on an ancient rhetorical technique: hypotyposis, the power of language to place things before the eyes. Traditional offense definitions—especially those governing old and familiar crimes—engage the reader's imagination. They make visible the thief, the robber, the rapist, the intruder. It is no accident that the "special" part of criminal law is special even in the etymological sense tied to seeing: specio or spicio, species, image.

The story told by an offense definition is also prophetic. It does not recount an event that has already occurred. It announces what will happen if the narrated scene materializes in life: the protagonist of the micro-story will be brought to judgment and, if the remaining conditions are satisfied, punished. That is why the literary dimension of the offense definition must never be mistaken for aestheticism. The criminal-law story

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[18] M. PAPA, *La fattispecie incriminatrice come "forma simbolica,"* supra note 14; M. PAPA, *La définition de l'infraction comme "forme symbolique,"* L'Irascible 259 et seq. (2022). The expression "symbolic form" invokes, of course, E. PANOFSKY, *Perspective as Symbolic Form* (Christopher S. Wood trans., Zone Books 1991) (1927).

ends badly—and it ends badly in the real world, not a fictional one, especially when a person is convicted and confined to serve a sentence.

5.3. The Crisis of the Offense Definition and the Renewal of Normative Styles.

Comparative analysis, with its varied stylistic repertoire, confirms that the offense definition is the fundamental express formant of criminal wrongdoing. Yet that formant is now in deep crisis. Faced with the complexity of contemporary life, offense definitions often fail to represent paradigmatic forms of wrongdoing through adequate words, images, and symbolic structures. They fail both to inform citizens adequately and to constrain the judge's power to punish effectively.[19]

The causes of the crisis are familiar, but they look different from the present perspective. First, it has become increasingly difficult to order the world by the appearance of things. Contemporary societies contain objects, conduct, and relationships whose visible form no longer communicates their meaning with sufficient immediacy. A sword, a spear, the physical taking of property, and a bodily assault were comparatively eloquent forms. Cyberfraud, insider trading, self-laundering of criminal proceeds, and many environmental or financial offenses have no stable and immediately recognizable face.

Second, socially significant reality has become dematerialized. Globalization, digital networks, financial flows, virtual environments, and remote interaction make it increasingly difficult to construct offense definitions around a physical staging of aggression. In many fields there is no longer a place, object, gesture, or bodily sequence capable of condensing the wrong.

Third, legally protected interests have proliferated and come into conflict. Environment, health, labor, markets, landscape, technological innovation, freedom of enterprise, and collective security intertwine in ways that often make it impossible to sculpt the prohibited conduct once and for all. Criminal law consequently leans on administrative procedures, permits, technical standards, and variable balancing, diminishing the offense definition's centrality as a self-standing image of wrongdoing.

This is precisely where comparison has much to offer. It shows how different legal orders respond to the crisis of express formants: some remain committed to the

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[19] On the themes discussed here, see M. PAPA, Fantastic Voyage, supra note 1; M. PAPA, *La fattispecie come sceneggiatura dell'ingiusto. Ascesi e crisi del diritto penale cinematografico*, Criminalia 181 et seq. (2019–2020); M. PAPA, *The Offense Definition as a Screenplay of Evil: The Rise and Fall of Visual Criminal Law*, 4 Católica Law Review 145 et seq. (2020); M. PAPA, *Appearance in Criminal Law: Illusion and Reality in the Description of Evil*, in *Aparenta in Drept. In Honorem Flavius Antoniu Baias* 682 et seq. (Bucharest, 2021); M. PAPA, *La créativité imaginante du droit pénal*, in *Cheminer avec Mireille Delmas-Marty. Mélanges ouverts en l'honneur de Mireille Delmas-Marty* 83 et seq. (Le Kremlin-Bicêtre, 2022); M. PAPA, "Speciale," in *Studi in onore di Carlo Enrico Paliero*, vol. III, 1885 et seq. (C. Piergallini et al. eds., Milan, 2022); M. PAPA, *La définition de l'infraction comme "forme symbolique,"* supra note 19, at 259 et seq.; M. PAPA, *La forza immaginante del diritto penale*, Sistema Penale, Feb. 14, 2025; M. PAPA, *La fattispecie incriminatrice come "forma simbolica,"* supra note 14.

iconographic tradition of the offense definition; others intensify abstract definitional technique; still others multiply cross-references, flexible clauses, special regimes, or case-based models.

Comparison thus becomes a comparison of styles for rendering wrongdoing, not merely a comparison of normative solutions.

New technologies add another layer. The movement from text-driven law to code-driven law—from norms designed for human interpretation to formalized, machine-consumable rules—alters normativity's symbolic code itself. Law may increasingly be written not only for human beings but also for machines, algorithms, and artificial-intelligence systems.[20]

The problem for criminal law is obvious. Traditional offense definitions live through natural language, references to experience, evaluative judgments, mental images, and context. Translating them into computational code risks losing the very qualities that support their communicative and rights-protective functions. For the foreseeable future, therefore, we may need a demanding form of bilingualism, in which legal norms are expressed in two parallel codes: one intelligible to human beings and, where genuinely necessary, another computable by machines.

This first axis of comparison remains within the world of express formants. It does not yet seek what operates behind positive law; it studies positive law itself as form—as text, image, symbol, communicative architecture, and poetics of wrongdoing. Elsewhere I have explored this field at greater length. Here it is enough to repeat that the highest stylistic wisdom lies in the ability to perceive and render the type. This is true in criminal law as in art. To grasp the face of a criminal type—whether theft, sexual assault, self-laundering, or stalking—requires intuition, creativity, and narrative intelligence: the same gifts needed to draw, with lucid clarity, the typical universality of characters such as Lady Macbeth, Ebenezer Scrooge, or Holden Caulfield. The variety of literary styles and expressive forms developed across centuries and places allows us to appreciate the value and effectiveness of aesthetic choices.

6. Comparing Cryptic Legal Formants: Structures, Procedures, and Submerged Normativity.

The second axis along which comparison can lead us is very different. Here analysis no longer confines itself to texts, styles, formulas, or legislative poetics. It moves beyond verbalized positive law and asks what actually determines whether a person is investigated, charged, acquitted, convicted, or subjected to punishment.

We thus enter the world of cryptic formants: factors not immediately visible in normative texts but nonetheless capable of shaping the criminal system in stable ways. Some remain recognizably legal, though not reducible to the offense definition:

[20] M. PAPA, *"A que será que se destina?" "A cosa è destinata?" Prospettive dell'intelligenza artificiale nel diritto penale contemporaneo*, supra note 1, especially § 5, discussing the transition from text-driven law to code-driven law and the Rules as Code movement.

procedural rules, priority criteria, investigative practices, charging mechanisms, evidentiary regimes, and alternative procedures. Others lie at law's borders: office organization, available resources, professional culture, institutional mindsets, relations among police, prosecutors, and judges, quality of defense, and duration of proceedings. Still others lie beyond law altogether and consist of factual data and correlations—sometimes, as we shall see, correlations that have no intelligible meaning for the human mind.[21]

Here comparison displays its most disruptive power. It can show that two systems with similar legal rules produce very different outcomes, while systems with markedly different statutory formulas may function in surprisingly similar ways. The reason is that criminal law in action is produced not only by express formants but also by structures, procedures, habits, material constraints, and institutional cultures.

At this level, comparison no longer searches only for linguistic formulas. It reconstructsthe real-world processes through which criminal responsibility is constructed and attributed. It asks not merely, "What does the law say?" but "What factors, within and beyond the law, cause a particular event to be classified, prosecuted, proved, adjudicated, and punished?"

This second axis also helps explain the widening distance between the statutory offense and the concrete punitive response. The offense definition says that a person who commits a specified act will receive a specified punishment. But between that normative prophecy and the sentence actually imposed lies an increasingly dense web of substantive, procedural, and organizational institutions: unlawfulness, culpability, punishability, procedural prerequisites, alternative proceedings, extinction of the offense, minimal seriousness, restorative justice, substitute sanctions, and sentence administration. The concrete fate of the case depends on the combination of all these factors.

The internal organization of a criminal code also operates as a formant. Locating a rule in the general part rather than the special part is not neutral. The general part, the special part, the code, and legislation outside the code are structures, artifacts, and forms of legal design. Before any individual word speaks, they orient the way lawyers think, search, connect, and interpret. Comparison across legal systems reveals that the topography of law is already normative.

Complicity again provides an illuminating example. Its operation depends not only on statutory formulas defining principal, participant, accomplice, instigator, or co-offender. It also depends on whether the doctrine is located in the general or special part, the authority assigned to precedent, prevailing forms of criminality, evidentiary rules, prosecutorial discretion, criminal-association offenses, charging strategies, and professional cultures. A purely textual comparison would therefore mislead.

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[21] On the CONCEPT of a legal formant in comparative law, see R. SACCO, *Introduzione al diritto comparato* (Turin, 1989); R. Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 American Journal of Comparative Law 1 et seq. (1991). For the category's use in criminal law, see M. PAPA, *Metodologia e scopi della comparazione in materia penale*, supra note 8; R. PALAVERA, supra note 9, at 177 et seq.

6.1. Justice and "Noise": The Criminal Lawyers's Tinnitus.

The legal, organizational, and factual variables that govern the attribution of responsibility and the imposition of punishment remain, as noted, largely unexplored territory. That world is made of hidden causal links, apparent coincidences, spurious correlations, and what Daniel Kahneman called "noise"[22].

"Noise" is a defect in judgment distinct from bias. Bias tends to operate in a consistent direction—against a particular group, in favor of a particular kind of defendant, or according to a stable ideological or cultural inclination. Noise produces unpredictable variation. It is a scale that gives a different weight each time the same object is placed upon it. It is a decision that changes, for no apparent reason, even when all relevant conditions remain the same.

For those working in the criminal justice system, "noise" resembles tinnitus: a continuous disturbance, difficult to locate, that alters perception of the system. We see similar cases treated differently; we suspect that recurring factors affect outcomes; at times we identify correlations between decisions and seemingly irrelevant circumstances. Converting those correlations into causal explanations, however, is extraordinarily difficult.

Artificial intelligence enters this scene ambiguously. On the one hand, it may identify regularities invisible to the human mind by processing vast quantities of data and uncovering recurring patterns. On the other, the same capacity may push us toward troubling forms of statistical governance in which the human meaning of the individual case is displaced by opaque correlations.

Comparative analysis—together with sociology, statistics, behavioral economics, and practical legal experience—therefore becomes indispensable in determining whether, and how, individual rights and safeguards are actually at risk. It is not enough to defend legality in legal texts. We must ask whether legality survives in the actual operation of institutions.

7.What Kind of Poetics Should Guide the Criminal Lawmaker?

The distinction between these two axes allows us to return more clearly to the final question. If comparison among express formants reveals the crisis of the offense definition and the variety of normative styles, while comparison among cryptic formants reveals the complex forces that determine the fate of cases, what poetics should guide the criminal lawmaker today?

The answer cannot be a nostalgic return to the nineteenth-century offense definition. Contemporary society often makes a purely naturalistic and iconographic description of wrongdoing impossible. But neither can the answer be an abandonment

[22] D. KAHNEMAN, O. SIBONY & C. SUNSTEIN, *Noise: A Flaw in Human Judgment* (Little, Brown Spark, 2021).

of form—a refusal to represent the prohibited act or a surrender of criminal law to technical, cryptic, or wholly computational formulas.

The lawmaker should instead develop a genuine aesthetic theory of the special part: a poetics capable of selecting, case by case, the most appropriate style. At times iconographic realism will be needed; at others, a more conceptual construction; elsewhere, a procedural regime; and sometimes more elaborate narrative forms, perhaps even scripts or multimedia representations. In every case, however, criminal law must preservea coherent and intelligible expressive form—one capable of guiding citizens and constraining judges.

In this respect, the lesson offered in the late 1970s remains especially valuable: the core of legality as determinacy does not lie in the merely naturalistic descriptiveness of the prohibition, but in the ability to bring the criminal type into focus—a form of conduct expressing a coherent and recognizable kind of wrong. Determinacy is therefore not a photograph of reality. It is the construction of a coherent, recognizable, and controllable paradigm of wrongdoing.[23]

The distinction drawn here does not close an inquiry; it opens one. It also clarifies a methodological misunderstanding. Even the best possible offense definition remains an expressive form of wrongdoing: a human, symbolic, linguistic, and literary product designed to make visible and communicable what a community regards as criminally intolerable. It may succeed more or less fully; it may be more or less iconographic; it may guide citizens and judges more or less effectively. Yet two truths must remain in view. First, the offense definition is not wrongdoing itself; it only represents wrongdoing. Second, no representation can capture everything that in fact matters to the attribution of criminal responsibility.

Finding the most appropriate legislative poetics would not end the inquiry. We would still need to ask what lies before, after, and around the offense definition. What exactly is it trying to represent? What invisible world is it attempting to make knowable? The same question arises downstream. What practices, procedures, organizational arrangements, professional cultures, material resources, and forms of "noise" actually shape the attribution of responsibility? Here comparison takes its second step. Beyond comparing texts and styles—beyond comparing expressive forms of wrongdoing—it becomes an inquiry into reality, a method for discovering how things work behind the normative representation [24].

Comparative analysis pursues this inquiry in both directions. At the level of express formants, it shows how legal systems have given wrongdoing a face through different legislative poetics. At the level of cryptic formants, it reminds us that no textual poetics can suffice when the actual operation of justice is shaped by structures,

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[23] F. PALAZZO, *Il principio di determinatezza nel diritto penale* 356 et seq. (Padua, 1979); see also F. Palazzo, *Corso di diritto penale* (latest ed., Turin), on the relationship between the general part and the offense's structural template.

[24] On the related risk that criminal law may become a symbolic-media narrative or a "fairy tale" detached from the actual operation of criminal justice, see M. PAPA, *Com'è che il diritto penale è diventato una favola?*, *Sistema Penale*, May 26, 2025.

procedures, practices, and forms of “noise” that may reshape or distort the law’s stated message, obscuring the processes through which criminal responsibility is actually ascribed.