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► To cite this version:

Martine Kaluszynski. The hybrid construction of a European form of penal thinking: From Italian positivism to the birth of French criminology. Reception, resistance and appropriation. *Glossae: European Journal of Legal History*, 2020, Punishment and Social Order : The birth of penal positivism in Europe and Latin-America : rise and resistances, 17, pp.277-302. hal-02626250

HAL Id: hal-02626250

<https://hal.science/hal-02626250>

Submitted on 7 Nov 2020

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GLOSSAE

European Journal of Legal History



ISSN 2255-2707

Edited by

Institute for Social, Political and Legal Studies
(Valencia, Spain)

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Citation

Martine Kaluszynski, “The hybrid construction of a European form of penal thinking. From Italian positivism to the birth of French criminology Reception, resistance and appropriation”, *GLOSSAE. European Journal of Legal History* 17 (2020), pp. 277-302 (available at <http://www.glossae.eu>)

The hybrid construction of a European form of penal thinking

From Italian positivism to the birth of French criminology Reception, resistance and appropriation

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Received: 16.4.2020

Accepted: 15.6.2020

Abstract

How did France welcome the work of Cesare Lombroso? In this article, our aim is to probe how positivist ideas were received, whether there was any resistance to them and whether they were appropriated, even indirectly. In particular, we will consider the reception by the legal community at large. Starting with the successful seduction and the first criticisms of his ideas, we would like to examine the relative tension between Lombroso and (both well- and lesser-known) French legal experts. In so doing, we will pay special attention to the works of Gabriel Tarde and Paul Dubuisson, both of whom studied Lombroso. With the French school, we have a kaleidoscopic range of criminological understandings from the time, including not only the biological explanation but also, above all, the social explanation. Based on this reception, opposition and reciprocal construction, we show how criminology in France, despite facing difficulties, asserted itself in the systems, the policies and the laws while borrowing from Italian conceptions, often despite principled opposition; this was the case, for example, of the notion of “dangerousness”, which was at the heart of France’s 1885 law on the relegation of recidivists.

Keywords

Lombroso, Tarde, Lyon school, Lacassagne, French criminology, 19th century, dangerousness

Summary: 1. Lombroso and criminal anthropology. 2. The origin of the French criminology movement: 2.1. Alexandre Lacassagne and French criminology. 2.2. Lacassagne at the first International Congress of Criminal Anthropology in Rome: a landmark speech. 3. Opposition to Lombroso: 3.1. Social milieu, the breeding ground for criminality. 4. The period of protest, from one lawyer to another. 5. The defence of criminal law. 6. Gabriel Tarde, a strong and distinctive legal figure. 6.1. The views of G. Tarde. 7. An important issue: the criminal’s responsibility: 7.1. The negation of free will: 7.2. The reactions of Tarde and Dubuisson. 8. A recidivist at the centre of the republican penal structure or the continuing debate between science and law: 8.1. In the name of prevention: exclusion. The law of 27 May 1885. 9. Concluding Remarks. Bibliographical References

The focus here will not be on Lombroso, his life or the totality of his work but rather on how he – and positivist ideas more generally – was received in France, what resistance there was to them and whether they were appropriated, even indirectly, by criminal justice circles and among the broader legal community.¹

¹ This text is based on many of our previous works, both published and unpublished; the present paper was drafted in the context of the International GERN Seminar (Groupe Européen de Recherches sur les Normativités) organized by Yves Cartuyvels (University of Saint-Louis – Bruxelles, Belgium) and Aniceto Masferrer (University of Valencia, Spain), and of the research project entitled “Las influencias extranjeras en la Codificación penal española: su concreto alcance en la Parte Especial de los Códigos decimonónicos” (ref. DER2016-78388-P), funded by the Spanish ‘Ministerio de Economía y Competitividad’ (2017-2020) and by the Groupe Européen de Recherches sur les Normativités (GERN) Interlabo (2019-2020).

Exploring the complexity of the time, as well as the scientific background and knowledge, will help to put the criticisms levelled at Lombroso at the time into context. From the successful seduction to the first criticisms of his ideas, we would like to examine the relative tension between Lombroso and (both well- and lesser-known) French legal experts. In so doing, we will pay special attention to the works of Gabriel Tarde and Paul Dubuisson, both of whom studied Lombroso. With the French school, we have a kaleidoscopic range of criminological understandings from the time, including not only the biological explanation but also, above all, the social explanation.

Based on this reception, opposition and reciprocal construction, we will show how criminology in France, despite facing difficulties, asserts itself in the systems, the policies and the laws while borrowing from Italian conceptions, often despite principled opposition; this was the case of the notion of “dangerousness”, which was at the heart of France’s 1885 law on the relegation of recidivists.

1. Lombroso and criminal anthropology

In the 1880s, which was a time of economic and industrial upheaval, crime and criminality were two of the key areas that reflected the worries and the fears of a changing society. Criminal anthropology started with Cesare Lombroso, who may arguably be called the father of “scientific” criminology, as it could be defined at the time – that is, one that is based on observation and supported by an interpretation of facts that is verified through intensive, structured testing. Criminology was anchored by the theories of this Italian scholar, in collaboration with Enrico Ferri, who would apply his analytical skills and a capacity for synthesis to sociological factors and would effectively complete the unilateral and exclusive Lombrosian method, as well as Raffaele Garofalo, who transferred into legal doctrine that which, in his view, had been definitively established in science thanks to the recent achievements of criminal anthropology like those of his opponent, Napoleone Colajanni. Lombroso, who was often at the receiving end of some harsh criticism because of his sharp views on criminals and, in particular, the principles that supported these views, was a complex character whose work is often only shown in part, which tends to emphasise the aberrations and the excesses of the morphological theories. However, Lombroso also developed less rigid studies and was behind a truly modern way of thinking in criminology.²

Lombroso behaved like a naturalist inside this world of law and would come up with a new approach to criminal law – not by punishing a moral failing but by penalising it on the basis of society’s self-proclaimed right to defend itself; not freedom of choice, but the potential danger that the criminal represents. In particular, Lombroso drew attention because of his anatomical-biological approach and remains the leading figure in thinking of the criminal type, the born criminal, the atavistic criminal; however, the common feature of all his theories is the major role that these theories attribute to biology and of which the cornerstone

² See Debuyst, C. / Digneffe, F. / Labadie, J.-M. / Pires, A.P., *Histoire des savoirs sur le crime et la peine. 1. Des savoirs diffus à la notion de criminel-né*, Collection “Perspectives criminologiques”, Les Presses de l’Université de Montréal, Les Presses de l’Université d’Ottawa, De Boeck Université, 1995, and J.-M. Labadie, *Les mots du crime. Approche épistémologique de quelques discours sur le criminel*, Perspectives criminologiques, Les Presses de l’Université de Montréal, Les Presses de l’Université d’Ottawa, De Boeck Université, 1995.

is an affirmation of the structural determinism of criminal behaviour and of the fatal consequence of specific remnants of criminality.

2. The origin of the French criminology movement

It was not so much what Lombroso had to say about the nature of the criminal that some French scholars considered problematic but rather what he said about the causes of criminality. Many clung to explanations that were rather sociological and that Lombroso had neglected too much to their liking. In their eyes, a biological explanation alone was not enough. But let's be clear: They did not deny it as such. They just thought that Lombroso had not provided sufficient evidence to support this explanation.

Despite the ambiguity of these works and the criticism that began to grow louder, Lombroso would continue without leading criminal anthropology into turmoil. The controversy would revitalise this very young discipline and, in this regard, Lombroso played a positive role. He generated discussion, stirred passions and prompted criticism, which pointed to the difficulties that had to be overcome and the mistakes to be avoided. In each case, he gave priority to studying the criminal, who had previously been neglected. He was the one who initiated this wave of ideas regarding the phenomenon of the criminal. The Italian school developed a framework of theories that other schools or movements would later use to define and establish themselves as allies or, more frequently, as opponents of the school's thinking. This was the case of the French criminology movement that formed around Alexandre Lacassagne and the *Archives de l'anthropologie criminelle* (AAC) academic journal. The Italian school, by virtue of the innovative character of these theories, drew a heated reaction from the scientific world. It marked the start of movements seeking to affirm their own convictions in the field – often in opposition to those of the Lombrosian School.

2.1. Alexandre Lacassagne and French criminology

While the Italian school caused an uproar, the initial reaction to it was enthusiastic almost across the board. The criticisms came later, following this period of glory due to the considerable “shock”³ that was generated by the publication of Lombroso's *The Criminal Man* (original title: *L'Uomo Delinquente*) and the commitment to applying natural science methods to the issue of criminality. The shock was due not so much to the content or the value of the doctrines exposed as to the methodological novelty in research and the prolific nature of the work and the investigations it has produced. At first, this shock took the form of an enthusiastic welcome.⁴ Taine wrote to Lombroso in 1878:

“The method you use is the only one that works with clear concepts and can lead to reliable conclusions because ‘Criminal Man’ is a complete reality.”

“If we fail to take this datum as a starting point, we are engaged in nothing more than abstract chatter. I pine for the day when all the moral sciences and their conclusions will be sensible and practical. None of them are more practical or more sensible than yours, and by reading you, our half-

³ This was how Marc Ancel put it in his introductory statement to the 100-year anniversary of *The Criminal Man*, RSC, 1978, Vol. 1, p. 266.

⁴ See Lombroso, G., “Comment mon père est arrivé à la conception de l'homme criminel”, *RDPC*, 1921.

fatalist, half-humanitarian socialists could learn what a solid foundation the right to punish is built on.”⁵

We owe this extract to Gina Lombroso, and in her article she presents and lists those who “emulated” her father by popularising the notion of the criminal man in France: Alfred Maury, Gabriel Tarde, Maxime du Camp, Alfred Espinas, Charles Letourneau, Théophile Roussel, Charles Richet, Théodule Ribot, Joseph Reinach and Alexandre Lacassagne.⁶

While Lombroso’s thinking was rich in detail and led to the formation of other schools, the aim was not necessarily to “continue” similarly oriented work. Although Lacassagne created his journal in a spirit of opposition, he (like others) had had “the Lombrosian temptation” from the very beginning. He wrote:

“In 1878, when the second edition of *The Criminal Man* was published, I enthusiastically adopted Lombroso’s ideas, notwithstanding some reservations on my part. Two years later, I went to visit the professor of Turin.”⁷

The first works by Lacassagne were *directly* inspired by Lombroso: a study on the criminality of animals (*Revue scientifique*, 1881, II, p. 34), an article on “the criminal man” (*Bulletin de la Société d’anthropologie de Lyon*, 1881) and, more interesting in terms of the deductions made, his anthropological observations of 800 criminals in “Rapport de la taille et de la grande envergure, étude anthropologique sur 800 hommes criminels”.⁸

These studies give a good indication of the kind of welcome that Lombroso’s theories initially received. A large part of the scientific world greeted the Italian works very favourably. These evolutionist and positivist theories were “in keeping with the times”, and the idea of applying experimental methods to the criminal sciences offered something pleasing to the minds of this era of scientism. These theories moved in the direction of progress or, at least, in the direction of what was regarded as progress.

2.2. Lacassagne at the first International Congress of Criminal Anthropology in Rome: a landmark speech

It was at the International Congress of Criminal Anthropology in Rome in 1885 that Lacassagne “waded into” the issue by taking a stance against Lombroso. His speech and his presentation at this congress were a clear expression of a will and a conviction, perhaps a strategy, too. While it was courteous, there was also a glimpse of brewing opposition. Following this episode, Lacassagne would start an academic journal to present his ideas while remaining very open to all ideas enriching the debate.

⁵ Quoted by Lombroso, G., “Comment mon père est arrivé à la conception de l’homme criminel”, *RDPC*, 1921, p. 917.

⁶ We can also mention Brouardel, Motet and Roussel, who seemed to remain “faithful” since the second edition of *Criminal Anthropology and Its Recent Progress* (original title: *L’Anthropologie criminelle et ses récents progrès*), published in 1892, was dedicated to them.

⁷ Lacassagne, A., Discours d’inauguration du monument de Tarde à Sarlat, AAC, 1909, p. 895.

⁸ *Rapport de la taille et de la grande envergure, étude anthropologique sur 800 hommes criminels*, Study carried out with Dr. Vincens and published in the *Bulletin d’anthropologie de Lyon*, 1882.

Organised by the Italian school, this congress⁹ was originally conceived as a national congress. It was “repurposed” as an international congress, but the Italians still had a very strong presence (two-thirds of the members were Italian), and “the influence of Lombroso’s theories” was complete and overwhelming.

Representatives from Germany, Austria, England, Russia, France and England were all in attendance, including Senator Roussel, Dr Motet, Magitot, Bertillon and Tarde, who was a member of the organising committee. Although he was unable to participate in the congress, he was nonetheless its honorary president. At the inaugural session, after a speech in Italian by Lombroso who took the chair, a speech in French by Professor Moleschott and a speech in Italian by Dr. Roussel, the floor was given to Lacassagne. His presentation was a reminder of previous French work in the field: “I have the pleasure of recognising the profound influence of Lombroso and the Italian school, but I also have to be fair in saying that the movement began in France with the work of Gall, Broussais, Morel and Despine. These names ought to be mentioned here at this time at the beginning of the sessions.”¹⁰

He rehabilitated Gall and his work, challenging those who mentioned it with a tone of disaffectedness or mockery. He spoke with great admiration of this scholar and said his work could be compared to that of Galileo. This preamble allowed Lacassagne to advance some moderate criticisms of “criminal anthropology”:

“The same can be said of our work. There are no crimes, there are only criminals; and it is them you want to study and get to know. To do this, we must avoid going too fast. We have to be fearful of solutions that are too quick and easy and be wary of hasty generalisations...”

“Because we’re only foot soldiers, it may very well be pointless to engage in a fight against the big battalions. Let’s gather the materials and make them ready; others will come and make good use of them one day.”¹¹

A debate followed this presentation, but it was only when Lacassagne made a few subsequent remarks that Lombroso, who had been challenged so little until then, began to feel the force of the attack and the criticism. After giving careful advice regarding methodology and showing modesty about ongoing research, Lacassagne struck a blow against atavism, the very cornerstone of the entire system, as “an exaggeration, a faulty interpretation” ... and dismantled the Italian superstructure bit by bit. Lastly, he put forward his hypothesis (the importance of the social milieu) and vocally defended it, along with the hypotheses of his entourage. He ended his speech by stating that “in this age, there are no longer any schools. There is only the truth, and it is ours.”¹² By taking a stand against Lombroso and by so adamantly asserting his views, Lacassagne went on the offensive. Having previously avoided full-out conflict, this time he crossed the Rubicon.

Subsequently, Lacassagne would very often intervene,¹³ adding his voice and perspective to debates that had previously been dominated by Italian theories and speakers.

⁹ Incidentally, the Prison Congress took place on the same date, also in Rome.

¹⁰ Lacassagne, A., *International Congress of Criminal Anthropology*, 1885, AAC, 1886, p. 169.

¹¹ Lacassagne, *International Congress of Criminal Anthropology*, 1885, p. 170.

¹² Lacassagne, *International Congress of Criminal Anthropology*, 1885, p. 183.

¹³ Following the presentation by Professor E. Morselli of Turin: “Is the number of suicides on the rise for the opposite reason than it is for the number of homicides?” Lacassagne was delighted about this relationship but added: “In France, the social milieu is of great import when it comes to interpreting statistical results.”

— In response to a question from Frigerio and Lombroso: “epilepsy and moral madness in prisons and insane asylums”. For these speakers, there was a fundamental identity between moral madness and instinctive crime on

Lacassagne was the only one to oppose not only Lombroso's theses¹⁴ but also their subordinate Italian theses.

But to be clear, despite Lacassagne's forceful opposition, this congress in fact reinforced the triumph of the Italian school's ideas on the international scene. Nevertheless, it was more than wasted breath for Lacassagne and those for whom he was symbolically the spokesman... A clash was taking shape. The words went farther and dug deeper than a mere controversy: There were opposing convictions and principles. Two trends, two movements, two men... At this congress in Rome, Lacassagne took the first "official" step against the Lombrosian School. Without anger, without excessive passion, brimming with an idea while knowing full well that he is surrounded... he would take a second, more positive step by taking an instrument to welcome and spread his thinking.

3. Opposition to Lombroso

"Men ought not to be regarded as individuals that are distinct, isolated beings, but rather as parts of the same organism. It is on the basis of these principles that I have a different idea about crime and criminals than my colleague Lombroso."¹⁵

What we already know to be true is confirmed here and clearly shows the reactive origin of Lacassagne's ideas, which he would continue to express throughout his life. Lombroso first argued that the criminal is a savage lost among us in our civilisation. He then assimilated the offender into moral madness and proclaimed that the criminal could just be an epileptic. Lacassagne, by contrast thought that both the individual who commits the wrongful act and the society that suffers from it have a hand in any criminal behaviour. By committing a criminal act, the individual demonstrates his "maladjustment" to the world, but the causes are not exclusively from the domains of atavism, degeneration or a pathogenic structure that can be isolated in its anatomical and physiognomic parts.

Consequently, "the French school, based on Gall, Broussais, Morel and Despine, had different principles and reached other conclusions. We do not accept this fatalism or this original defect and rather believe that it is society that makes and develops criminals."¹⁶ This way of thinking came from one man but would constitute the ideology of the group.

For Lacassagne, crime is, if not social rubbish, at least the product of an individual's "social milieu".¹⁷ This generic term encompasses not only all the external, climate-related, physical and chemical actions but also the educational and environmental influences that are prone to awaken "criminal" tendencies existing in a latent state in "hereditarily defective" individuals or to create them in "normal" subjects. Lacassagne did not believe in fatalism, in the original defect. "We can, therefore, define crime as follows: any act that is detrimental to

the one hand, and epilepsy on the other. Lacassagne pointed out that the term "masked epilepsy" had not been sufficiently defined to make it the equivalent of criminality....

"The future of anthropology would be threatened if, in front of a jury or magistrates, a comparison were made or words were used whose meaning was in question."

¹⁴ Dr Albrecht's "original" proposals should be noted.

¹⁵ Lacassagne, A., Discours d'ouverture, *IIème Congrès du patronage des libérés*, Lyon, 1894, p. 405.

¹⁶ Lacassagne, Discours d'ouverture, p. 406.

¹⁷ Hence, the name given to the French school: the "social milieu" school. In the 19th century, this concept of milieu would be applied to two new fields. In biology, spearheaded by Geoffroy Saint-Hilaire, and in the moral sciences, by A. Comte and Taine, who had a very clear influence on A. Lacassagne.

the existence of a human community. We know that moral character is revealed by how feelings, intelligence and activity are expressed. For a long time now, everyday speech has indicated the predominance of one or the other of these ways of expressing by recognising men of spirit, character and heart.”¹⁸

3.1. Social milieu, the breeding ground for criminality

It has been said that society produces virtues and vices just as it produces sugar or sulphuric acid. Lacassagne believed that it is more accurate to say that society, like most living things, has its parasites and microbes, which are the criminals. Strongly influenced by the theories of Pasteur, this is a very medical approach that seeks to adapt these biological laws, which apply to human beings, to society – the social “body”:

“We know that some microbes cause putrefaction, while others have an indifferent relationship with the body until the day an accidental circumstance fosters an outbreak or causes them to become toxic. Similarly, the social milieu is a breeding ground for crime. The microbe is the criminal, an element that only matters the day it finds the broth that ferments it.”¹⁹

Thus, the social milieu or society, because of the inadequacies of its political organisation, the isolation and indifference it can generate and the increasing demands it makes, can lead people to turn to crime. It is the lack of attention paid to the most disadvantaged people, who are excluded from the benefits of education and are often marginalised by the mechanisms of the modern economy that makes them vulnerable to the demands placed on them by a hostile environment. Against the systematic exercise of anthropometry, it is important to give an example, develop moral education and curb the effects of an industrialism that sacrifices man to the march of progress. If the social milieu is everything, and if it is defective enough to encourage the development of vicious or criminal behaviours, reforms must be carried out precisely with respect to this environment and the ways in which it operates.

The following sentences – made to be said, repeated and remembered – use a few words to summarise what is most important about an issue. These aphorisms would be “the coat of arms” of the Lyon school. Through them, Lacassagne showed how crime harms progress and how it can damage a community, but also how it identifies a community’s shortcomings. These words had both an educational and a polemical function. Based on definition and precept, the aphorisms had to make an impact. In them, the dogmatic proposal and the practical proposal, science and ideology, are superimposed on top of each other. Six main aphorisms can be found in the theories of Lacassagne and the French school:²⁰

- The social milieu is the breeding ground for criminality; the microbe is the criminal, an element that only starts to matter the day it finds the broth that ferments it
- Any act that is detrimental to the existence of a community is a crime
- Any crime is an obstacle to progress
- The criminal with his anthropometric and other characteristics does not seem to be very important as all these characteristics can be found in “honest people”, too

¹⁸ Lacassagne, *Discours d’ouverture*, p. 406.

¹⁹ Lacassagne, *Discours d’ouverture*, p. 407.

²⁰ Lacassagne cites these aphorisms in one of his lessons. “Des transformations du droit pénal et les progrès de la médecine légale. 1810-1912” (AAC, 1913).

- We contrast social initiative with the fatalism that inevitably follows from the anthropometric theory
- Societies get the criminals they deserve: It is society itself that produces and develops the criminals

The simplicity of such formulas is deceptive, however. Their goal is to be sharp, polemical instruments to be used in a battle of ideas. These aphorisms all respect an ethic, a moral principle. Thus, “societies get the criminals they deserve” is a lesson for society, not for the criminal. Furthermore, without forgetting that the French school took a stand against Lombroso’s theories (not by denying the biological reality of the criminal phenomenon but by refusing its predominance or exclusivity and by introducing the “social” perspective), it evolved from this simple role of adversary by having a more detailed way of thinking that was not confined to a simple dilemma of doctrines but was open, complex and rich. The notion of the criminal man is the image of a social being whose history and movements, which made him what he is, have to be taken into account. “The criminal is not a savage; he is the modern man, the product of our age of industrialism and emancipation.”²¹ Man is not an abstract entity; he is characterised by his social dimension. Thus, Lacassagne made possible and led a movement that developed in parallel with Lombroso’s but, in an ideological sense, transformed the issues regarding crime’s relationship to society, as well as other factors of criminality.

The members of the Lyon school, as well as supporters, pupils and collaborators, promoted the thesis of the “social milieu”, which asserted itself without issue in the national scientific environment. From 1886 until 1914, Lacassagne did not have any real opponents in France. There were different, nuanced ways of thinking,²² but no thesis emerged that carried the same weight as that of the Lyon school. Controversies relating to doctrine played out on the margins (between Tarde and Durkheim, for example) and did not have any effect on the fate of the theory. In addition, thanks to this relative unanimity, the strength of the thinking, the dynamism of its spokesman and the flow of supporters, the establishment of the Lyon school, which officially spoke for France at international meetings, corresponds to and represents the birth of criminology in France.

However, other objections would soon be raised among legal experts who regarded Lombroso’s incursion into criminal law as too zealous and, therefore, incongruous.... This was a very “corporatist” offensive that followed the initial period of successful seduction or amused passivity.²³ An article by the French legal scholar Gabriel Tarde marked the beginning of a “charge”.

4. The period of protest, from one lawyer to another

²¹ Lacassagne, A., “Gabriel Tarde”, Inaugural speech at his monument, AAC, 1909, p. 898.

²² L. Manouvrier would add nuance to and insist on the ambivalence of the social milieu (and of education, in particular), which can “make a wolf unkind” or “turn a man with only a few predispositions into a criminal”. L. Manouvrier, Second International Congress of Criminal Anthropology, 1889, AAC, 1889, p. 561.

²³ A few articles on Lombroso had been published, but they dealt anecdotally with the issue: Maury, A., “Sur l’homme criminel”, *Journal des savants*, 1879; Espinas, A., “La méthode expérimentale en Italie”, *Revue philosophique*, 1879; Brissaud, J.-B., “Une nouvelle école de criminalistes”, *Revue générale de Droit*, 1880. (Gentzling, R., *G. Tarde criminologue*, PhD dissertation in law, S.D., p. 158).

Tarde used a long article in the *Revue philosophique* in June 1885 to introduce Lombroso's "criminal type" to the public. In it, Tarde not only criticised the idea that the criminal type had a particular anatomy and physiology but also addressed the relationship between madness and crime, as well as atavism, criminality in general, responsibility, punishment and the social causes of crime. This text revealed his scepticism of many of these points, and he fully used the opportunity to speak and think while still hoping for a great deal from this new research. Although moderate²⁴ in tone, it kicked off a "controversy" with Lombroso that took the form of a well-paced and always very courteous exchange of articles.²⁵

This episode is valuable to us as an indicator: Gabriel Tarde was not only a dense, complex character with an unusual personality and very personal opinions but also a magistrate and a legal expert. In this sense, he "exemplifies" the professional reaction to Lombroso's theories: the reaction from the legal community.

The legal world did not raise its voice immediately; it waited for the echo given to the Lombrosian theories, but as soon as it resonated loud enough, there were no opponents as fierce and as constant as them. The scientific nature of the theory of the born criminal, as well as its confirmation of the thesis of evolutionism, explains its rapid and subsequently controversial success and its support from the positivist and the medical world. It had more difficulty imposing itself in the courts and hardly managed to penetrate prison organisations. It should be noted that Lombroso was challenged by his peers!

In Italy, the legal scholar Luigi Lucchini was very outspoken;²⁶ for him, everything true in these doctrines was old or based on well-established knowledge, while everything that was new was false or based on erroneous reasoning. According to Lucchini, everything – in *The Criminal Man*, in *New Horizons of Criminal Law and Penal Procedure* (original title: *I Nuovi orizzonti*), in criminology tout court – was just idle fancy. Everything in it was wrong: the conclusions, the assumptions and, above all, the method. For Lucchini, only one school could challenge the competition: the legal school. Napoleone Colajanni would also speak out against critical positivism.

Jules Lacointa, who was the director of Criminal Matters and Pardons at the Ministry of Justice and wrote the introduction to the French translation of Lucchini's book, was equally pointed. In this respect, he allied himself with a magistrate: Camoin de Vence, who virulently spoke out about the flights of fancy peddled by Lombroso, the ardent propagator of this new anthropological doctrine, one of whose formidable aspects, for these legal scholars, was to succeed in wrecking the notion of responsibility.²⁷ In his eyes, Lombroso's system suppresses free will, despite free will being the only true basis for the right to punish. Criminal anthropology is mistaken in asserting that man is a plaything for various atavistic influences, anomalies and asymmetries that have by no means been proved with scientific certainty, neither in their very existence nor, especially, in their consequences. Moreover, denying free

²⁴ He was probably too moderate, since P. Topinard (in "L'anthropologie criminelle", *Revue d'anthropologie*, 1887, p. 658) and others considered Tarde to be a disciple of Lombroso's.

²⁵ Lombroso responded almost immediately to Tarde's critical presentation of 1 June 1885 with an article (in the same journal) dated 15 June and entitled "La fusion de la folie morale et du criminel-né, réponse à Mr. Tarde". Tarde answered this "response" on 5 July in the *Revue philosophique*, where he was pleased at having prompted Lombroso to respond "in the interest of science" (p. 181).

²⁶ Lucchini, L., *Le Droit pénal et les nouvelles théories*, Translated by Henri Prudhomme, Paris, 1892.

²⁷ Camoin de Vence, *Des erreurs et des dangers de l'anthropologie criminelle*, *Revue pénitentiaire. BSGP*, Paris, 1892.

will poses a major threat because it means that, in the longer term, repression would be eliminated.

It is for this reason that an advocate general, in the middle of the Anastay trial, exclaimed: “We will plead unconsciousness! The defence will invoke Lombroso’s authority. He is an ingenious man whose work is not without merit. But is he really a man of science?”²⁸

Initially, Saleilles and H. Joly rather rebelled against the anthropological method. For the former, “it is far better to run the risk of having thefts or other crimes committed, than to condemn any and every man on the basis of his features merely because nature has given him a jaw, a lip, or a skull that corresponds to one of Lombroso’s criminal types.”²⁹ According to Joly, “a whole new group wanted to take over the study of the criminal and reserve almost all of it for itself”:

“It has seemed that no research could be scientific unless anatomy and physiology played a major role in it. Those who have embraced these two sciences have, therefore, closely observed the hair, ears, eyes, noses, chins, mouths, teeth, thumbs, dermides and epidermides, skulls and brains of a considerable number of offenders. In Italy, in particular, this method has been advocated, practised and pushed to the extremes. The French school had conducted careful research here on more than one point and had made every effort to measure the results. With an ambition that everyone can contemplate today, in every sense, a case of restless development, Italy has produced a so-called criminal type from scratch in order to cover all types of criminals and has subsequently affirmed that this type was none other than the primitive Man reappearing among us through the unforeseen accidents of universal evolution.”³⁰

Joly, Guillot and Proal were recognised for their “combativeness” since Lombroso, in the preface to his second edition of *Criminal Anthropology and Its Recent Progress*, had praised them as “his three most formidable critics”. As for the legal community, the general view is summarised quite well by this statement from a French legal expert:

“Criminal anthropology is a mere sketch of one pillar of the anthropological edifice. Some of its parts are at most half-constructed; others are separated from each other by so many gaps that no one mind can yet draw the plan. The presumptuous omniscience of Lombroso, Ferri and Garofalo only seeks to destroy the foundations of old criminal law. As intoxicated innovators sincerely infatuated with new discoveries, these masters of a science that is still too young are pouring out a stream of more or less murky ideas. They do not know the depths of the criminal’s soul, nor his intimate movements, nor the degree to which it has plunged into evil... It is clear that agreement has not yet been reached between legal experts and anthropologists and that the ground on which agreement will be reached has yet to be found.”³¹

5. The defence of criminal law

Legal scholars were among the first to declare their scepticism and mistrust of Lombroso’s criminal anthropology, especially of the doctrines that attacked their criminal

²⁸ Chronique italienne du Dr. Bournet, AAC, 1892, p. 417.

²⁹ Saleilles, R., *The Individualization of Punishment*, Translated by Rachel Szold Jastrow, Boston, Little, Brown, and Company, 1911, p. 123.

³⁰ Joly, H., *Le crime*, Paris, Cerf, 1888, pp. 19–21; despite him being a philosophy professor, his convictions were more in line with those of the legal scholars.

³¹ L’école criminaliste italienne jugée par un jurisconsulte français, *Revue critique*, Chronique italienne, AAC, 1888, p. 164.

principles head-on and upended the foundations of criminal law rooted in responsibility and free will. They were not the only ones to oppose these notions of Lombroso, but they reacted against these biological doctrines in their capacity as legal scholars and formed a homogeneous group of professionals. They never wanted to allow the principles of law to be undermined by discoveries that they deemed perilous and that, in their opinion, all too often led either to sacrificing the individual and his right or to disarming society.

“But if the Lombrosians were allowed to apply their system”, wrote Camoin de Vence, “here is what the outcome would be: Imposing death or life sentences on habitual offenders, even those who commit minor offences; abolishing any proportional relationship between the offence and the punishment and replacing it with a relationship between the offender and the punishment, depending on the particular anthropological type; restoring accusatory proceedings; abolishing oral debate, adversarial process, the publication of judgments and the protection of the defence; and, finally, replacing judges educated in the science of law with experts in anthropological doctrines.”³²

The legal scholars continued to be suspicious of “new schools”, although their curiosity softened an unshakeable position. Positivism, through its two branches, sociology and anthropology, was accused of seeking to “invade the field of criminal law”. Thus, it was necessary to defend the true science of law against the dangerous encroachments of new doctrines but, as Camoin de Vence wrote, all claws were out: “As soon as they no longer had the appeal of novelty, these systems in which fantasy played too much of a part were put back where inventions that are no longer useful, the dregs of human work, go.”³³ Camoin de Vence agreed with Lacassagne when he rose up against Lombroso but only “recognised” his views and gave him legitimacy when the latter worked on criminal history.

All these elements may have contributed to “undermining” punishment and its foundations and producing this “punishment crisis”, whose advent can be seen in various texts. Thus, when Tarde talked about the punishment crisis, he was thinking of determinism as dogma and of narrow positivism. The fever spread to criminal law, which was challenged at its foundations; for Tarde, Lombroso’s criminal anthropology was only one of the factors weakening it. Tarde thought there were deeper causes at the root of this crisis: the universal anguish of conscience, the crisis of morality, the notion of duty. In any case, the legal community reacted; they felt both dispossessed and excluded from their territory.

It is within this perspective that the term criminal sociology appeared, if not more clearly then at least in a less vague and more precise way, as distinct from criminal anthropology. As Tarde put it in 1893:

“One would be quite right in saying that criminal sociology is to law what pathological physiology is to medicine. One could add that sociology in general is to law what physiology is to hygiene, understood in the broadest sense of the word as the art of healthy living, of which the art of healing is only one part.”³⁴

In fact, in France it was around a few personalities such as Camoin de Vence, Louis Proal, Raymond Saleilles, Tarde and Paul Dubuisson, (who was not a legal scholar but had

³² Camoin de Vence, *Des erreurs et des dangers de l’anthropologie criminelle*, *Revue pénitentiaire. BSGP*, Paris, 1892. p. 709

³³ Camoin de Vence, “Encore un mot sur la sociologie et l’anthropologie criminelle”, Paris, *Revue pénitentiaire. BSGP*, 1902, p. 300

³⁴ Tarde, G., “La sociologie criminelle et le droit pénal”, *Archives d’anthropologie criminelle*, 1893, p. 513.

some strong thoughts on responsibility) that the legal and criminal opposition would crystallise. We shall focus on the individual who would theorise his reflection the most extensively: Gabriel Tarde.

6. Gabriel Tarde, a strong and distinctive legal figure

As magistrate, head of the Statistics Office at the Ministry of Justice (1894–1900), professor at the Collège de France (1900) and member of the Academy of Moral and Political Sciences (1900), Gabriel Tarde was one of the main players in sociology and criminology at the end of the 19th century. Often forgotten only to be rediscovered, his written work is better known today for its sociology, its theory of imitation and its opposition to Émile Durkheim and Lombroso.

Besides being on the staff of the *Archives d'anthropologie criminelle* journal since its founding and heading its sociology section in 1893, Gabriel Tarde was also (after Lacassagne) one of its most prolific authors, and his articles appeared from 1887 until 1901,³⁵ but he was also its shooting star.

In 1893, Tarde became co-editor-in-chief of the *Archives d'anthropologie criminelle*. He was also called upon by René Worms to (and did) join the International Institute of Sociology. In 1894, Tarde was appointed to head the Statistics Office at the Ministry of Justice. From then on, he would be tasked with France's moral accounting and did the annual reports for the *Compte Général de l'Administration de la Justice Criminelle* (CGJAC), which had previously been Émile Yvernes's responsibility.³⁶ That same year, he took part in the first international congress of sociology, where he represented France as vice-president (along with Enrico Ferri, Albert Schaeffle and Jacques Novicow; Sir John Lubbock served as president). His reputation was already well-established at the time, as we can read in the *Journal des Débats Politiques et Littéraires*:

“[Mr Tarde is] one of the freest, most vigorous and most original minds at work today. [His work] deals with the transformations of law, as well as criminal legislation and crime issues. But don't think that Mr Tarde is merely a more or less learned, more or less astute legal scholar. He is – and for him, it is necessary to restore to a worn-out word all its true energy – he is a thinker.”³⁷

Tarde published nearly 15 books, around 30 articles in the *Archives de l'anthropologie criminelle* and an equal number in the *Revue philosophique* and about 10 papers in the *Revue internationale de sociologie*, not to mention his contributions to the *Revue politique*, the *Revue d'anthropologie*, the *Revue des Deux Mondes*, the *Revue pénitentiaire*, the *Revue scientifique*, the *Revue de métaphysique et de morale*, the *Revue de Paris*, the *Annales de l'Institut de sociologie* and the *Bulletin de l'Institut de Psychologie*.

³⁵ Some of these articles were published posthumously.

³⁶ From 1894 until 1900, Tarde did the annual reports for the CGJAC. “He was a remarkable statistician, despite the official cautiousness, administrative style and corrections that were in bad taste but imposed on him by some clumsy bosses”, according to F. Faure. “In this position, Tarde was not really in his place.” He excelled at interpreting statistics, discovering their hidden meaning and finding in them the decisive argument for an original theory, but he did not have any taste for assembling them (Discours de Sarlat, AAC, 1909).

³⁷ “Au jour le jour”, 2 February 1894, p. 1.

In his book *Penal Philosophy* (published as *La Philosophie pénale* in 1890), in which he recast a theory of responsibility, as well as the many articles he wrote, Gabriel Tarde opposed Cesare Lombroso's and the Italian school's determinist theories alluding to crime as being rooted in biology. For Tarde, these theories inevitably implied that biologically abnormal individuals were free from responsibility and put mad and criminal individuals on the same level. Tarde would situate the causes of crimes elsewhere: in the criminals' social and psychological background. According to Tarde, crimes relate to a particular time and country. For example, killing a cow in India can be considered a crime of the highest order, whereas it will not be much condemned in the rest of the world. Thus, no one is born a criminal because the very definition of crime varies depending on prevailing opinions and legislation. By contrast, there are many social and psychological causes that explain where the criminal originates. The latter is often influenced by economic hardship and the beliefs of his environment that do not correspond to society's role models. Consequently, Tarde considered crime and its repression as moral and social rather than legal issues.

6.1. The views of G. Tarde

Tarde's theories ascribe an important role to psychosocial factors and especially to imitation. For him, criminal science must be not only a criminology but also a social morality.

Tarde first put Lombroso's type theory on trial, along with Marro's theory of the plurality of types. However, he did not deny that "there actually exist a certain number of true criminals",³⁸ but despite everything, their crime was a factor of the environment. Just as there are no external signs by which to recognise criminality, the marks of unwavering honesty are equally elusive.

Mentioned only in passing, theories or definitions of crime have varied considerably. It is not an easy task to come up with a definition applicable to all acts that have been regarded as criminal over the centuries. Many actions now deemed criminal were once lawful (and vice versa). Since criminal anthropology has existed as a discipline, scholars have tried to solve this question. Each of them has looked at crime from a different angle and often rejected the definitions of their predecessors or proposed a very personal one. Without looking to compile an anthology, we will discuss the definitions proposed by different individuals one at a time.

While Lombroso discusses the criminal in all of his books, he shies away from defining crime and leaves it to others to tackle this problem. Garofalo examined this notion and defined it as a natural offence³⁹ in which the implication of moral indignation must be retained, which constitutes progress regarding the notion of incrimination. Ferri, for his part, defined this notion by considering what makes the criminal – that is, from a sociological and anthropological point of view, his **antisociality**. For Colojanni, crime is an action that is determined by individual and anti-social motivations that disrupt living conditions and are an affront to the average morality of a people at a particular moment in time.⁴⁰ Garofalo was the

³⁸ Tarde, G., *Penal Philosophy*, Translated by Rapelje Howell, Boston, Little, Brown, and Company, 1912, p. 223.

³⁹ Garofalo defines a natural offence as follows: "The element of immorality is essential for a harmful act to be considered criminal in the eyes of the public. It is an insult to all feelings of pity and probity."

⁴⁰ The notion of an average morality is vague; moreover, it is not the anti-social nature of what motivated the act that characterises the crime, because in most cases the motivation for the crime, the goal, has

one who gave this issue the most thought. In France, Durkheim also tried to define crime.⁴¹ The *Archives* did not publish many articles on this topic,⁴² but French authors did consider the matter.

For Tarde, the idea of a crime essentially implies that a right or a duty has been violated. Tarde starts with the following observation: Crime is a social disorder that is, always and everywhere, characterised by an emotion that it induces. According to him, the criterion of violating by the will of an individual can be used, along with one other important element: moral outrage. Outrage is a social force that creates dissent between an individual and his group. It creates a consensus shared by all of society about certain things that are considered to be fundamental. Tarde arrives at the following definition:

“Crime is the violation of a right, that is, of a will that is considered superior (divine, royal, collective) and against which a rebellious and hostile will has risen up; this violation is conceived as one that presents, to varying degrees, the dual character of being both a social danger and a social stain – a social danger to be prevented or a social stain to be rubbed out. As a social danger, crime is censured by utilitarianism; as a social stain by conformism. It is all the more alarming because it expresses a deeper moral disparity that has made the perpetrator resistant to morally imitating his environment.”⁴³

Tarde proved his idea of the criminal to be more complex than it seemed. He used arguments to reject the atavistic theory and, with no less glee, Lombroso’s attempted assimilation between offenders and epileptics:

“Man becomes a criminal: Regardless of whether he was born with hereditary predispositions and regardless of whether he was perverted by a corrupting influence in his childhood, he veers into the bad side, all the while keeping the conditions of identity and social similarity that give him responsibility.”⁴⁴

But Tarde also writes in *La Criminalité Comparée*:

“It is certain that the beautiful classic head, with its straight brow and nose, its small ear set close to the temples, affords a perfect contrast to the head of the criminal, the ugliness of which is its most pronounced characteristic. Out of 275 photographs of criminals, I found but one attractive face, and this of a woman; the majority of the others were repulsive, and monstrous faces were not lacking.”⁴⁵

Although Tarde rejected the conclusions of the Italian school, it is very likely that there were some elements in its way of thinking that he did not consider to be radically

nothing anti-social about it. The criminal is trying to satisfy ordinary and normal needs: hunger, pleasure, jealousy, love, ambition, revenge... These are the means used to achieve goals that are anti-social and involve the conscious and voluntary violation of an important right that others have.

⁴¹ Durkheim, E., *Les règles de la méthode sociologique*, Paris, Flammarion, 2010.

⁴² The subject was discussed on two occasions at the International Congress of Criminal Anthropology: In Brussels in 1892, with an intervention by Onanoff and Blocq on the natural definition of crime from a psychophysical point of view (*Actes du Congrès de Bruxelles*, p. 303), and in Amsterdam in 1901, with a report by Pierpers on the notion of crime from an evolutionary point of view, in which it emerges that social crime is the social lesion produced by the selfish state of the human psyche in which altruistic evolution has not yet sufficiently advanced to tame its selfish tendencies as much as a certain social state requires (AAC, 1901, p. 603).

⁴³ Tarde, G., “Qu’est-ce que le crime ?” *Revue philosophique*, 1898, p. 350.

⁴⁴ Corre, A., “Bibliographie : La philosophie pénale”, AAC, 1891, p. 100.

⁴⁵ Tarde, G., *La Criminalité Comparée*, Paris, Cujas, 1972, p. 16.

untrue. In this regard, his attitude reflected a subtle balance between scientific and moral judgment. His conception of the criminal remained shrouded in ambiguity, which reflected his questioning:

“Despite the indisputable anatomical and physiological (but not sociological) similarities with the pre-historic or the present-day savage, the born criminal is not a savage, nor is he a madman. He is a monster, and like many monsters, he has some characteristics of regressing to the past of the race or the species; however, he combines them in a different way, and we should be wary of judging our ancestors based on this sample. This does not mean that I dispute the notion that characteristics specific to the born offender could, indirectly and over many generations, make a sudden appearance... what I dispute is that it explains the criminality of the born offender.”⁴⁶

In fact, Lacassagne’s and Tarde’s position captures a difficult feeling they have about the criminal; they cannot define him clearly. Thus, while divergences with the Italian school are highlighted at times, the method and the craniological and anthropological research are not really contested,⁴⁷ and they are at the root of numerous articles published in the *AAC* between 1886 and 1914. In his *Penal Philosophy*, Tarde wrote:

“In order to judge of [the] inherent power [of a powerful action], we must first of all observe its manifestations among idiots. In them the imitative inclination is no stronger than in ourselves, but it acts without encountering the obstacle which is met with in our ideas, our moral habits, and our wishes. [...] All the important acts of social life are carried out under the domination of example.”⁴⁸

Tarde applies these conceptions to the influence of the most important social factors on crime: education, labour, industry, poverty, wealth and, more broadly, to modifications in the notion of crime produced by changes in civilisation. Thus, for him, “criminality without any doubt, like every other branch of social activity, implies physiological and even physical conditions, but [...] like industry especially, it is to be accounted for better than in any other way, by the general laws of imitation, in its local color as in its special force at each period of time, in its geographical distribution as in its historical transformations, in the varying proportion of its various motives or the unstable hierarchy of its varying degrees as in the succession of its changing methods.”⁴⁹

7. An important issue: the criminal’s responsibility

“Criminal madness” raises the concrete issue of an individual’s responsibility for his crime. Are criminals crazy?⁵⁰ Is free will an illusion, one of those ancient metaphysical conceptions that modern science must work to rid humanity of?

“There can be no crime, or delict, where the accused was in a state of madness at the time of the action; or when he has been constrained by a force which he had not the power to resist.”⁵¹

⁴⁶ Tarde, G., “Le type criminel”, *Revue philosophique*, 1885, p. 6.

⁴⁷ One example is the work of C. Perrier, *Les criminels. Étude concernant 859 condamnés*, Lyon, Storck, 1900.

⁴⁸ Tarde, G., *Penal Philosophy*, Translated by Rapelje Howell, Boston, Little, Brown, and Company, 1912, p. 322.

⁴⁹ Tarde, *Penal Philosophy*, p. 416.

⁵⁰ See Baudin, L., “Folie et criminalité. Les criminels sont-ils des fous ?” *Examen critique des nouvelles doctrines de Lombroso et de l’école italienne dite d’anthropologie criminelle*, Besançon, 1888.

⁵¹ The Penal Code of France of 1810, Article 64.

If the criminal is mad, madness excludes crime. The criminal madman is cleared of all charges, which is most often followed by administrative detention. The expert's conclusion is important. By revealing the criminal man's personality as a means to understand the phenomenon of crime, Lombroso would completely change the situation of man in the face of an offence. Until then, the focus of public authorities, judges and public opinion in general had mainly been on the crime and the social damage that was caused. The criminal himself was considered abhorrent simply because he had been able to commit such an outrageous act. Those who drafted the Penal Code had a very objective view of repression. Ferri taught that the offender should be made "the protagonist of criminal justice" so as to more rationally exclude him. From then on, it was no longer the act alone that was judged but the author, and the question arose: Are criminals really responsible for their actions, and does society have the right to punish them?

7.1. The negation of free will

For some, the issue of the responsibility of criminals or delinquents could not be addressed since, according to them, delinquency is itself the result of madness.

Legal scholars and doctors countered such "exuberant" theories,⁵² but Tarde's and Dubuisson's thinking was more nuanced, and there appears to have been agreement on the notion of mitigated responsibility.

7.2. The reactions of Tarde and Dubuisson

For most of these writers, a vicious or criminal act alone was not proof of insanity and could not exempt the one who committed it from responsibility. Without being totally hostile to the Italian school, the French were opposed to this negation of free will,⁵³ as Garraud expresses it:

"The negation of moral freedom is as excessive as the negation of the influences that solicit man's voluntary acts without fatally determining them. The idea of absolute free will falls outside the fact-based truth, just like the idea of a fatal determinism."⁵⁴

Two writers were particularly passionate about this issue: G. Tarde and P. Dubuisson, who were in charge of the sociology section of the AAC. Tarde linked this problem of

⁵² Dr. L. Baudin, who applauded the positive data explorations collected by the Italians, protested a hasty and systematic generalisation and affirmed that it was neither possible nor permissible to consider a criminal as crazy, that for that reason alone he was a criminal (L. Baudin, *Folie et criminalité : les criminels sont-ils des fous ?* Besançon, 1888).

⁵³ See Saleilles in *The Individualization of Punishment*, p. 181, where he writes, "The conception of punishment implies responsibility. One must believe in responsibility in order that a measure taken against an offender shall be a punishment. But the application of punishment is no longer a matter of responsibility but of individualization. It is the crime that is punished; but it is the consideration of the individual that determines the kind of treatment appropriate to his case. Responsibility as the basis of punishment, and individualization as the criterion of its application: such is the formula of modern penal law. The era of responsibility is completed; that of individualization is beginning"; Pailhas, B., "Existence du libre arbitre", AAC, 1897; Hamon, A., "La responsabilité", AAC, 1897; A. Bérard, "La responsabilité morale et la loi pénale", AAC, 1892.

⁵⁴ Garraud, R., "La sociologie criminelle et le droit pénal", AAC, 1886, p. 11.

responsibility to the moral crisis that he believed was sweeping through society at the end of the 19th century, a crisis that influenced all facets of society and, thus, also criminal law. Tarde was not a fervent defender of free will and considered it more an issue of causality than freedom. It seemed to him that the gradual disappearance of the belief in free will did not pose a danger in and of itself – at least, no more so than the spread of deterministic theory.

The question of responsibility relates to the philosophical search for causes. It is a question of examining what men have always wanted to express in terms of calling their fellow human beings responsible. According to Tarde, a person had historically always been held responsible for an act when he and not some other person was believed to be the person who deliberately and consciously committed the act. It is a problem of simple causality and identity – not freedom – that was resolved by this judgment. For society to function properly, there must be moral responsibility. With the notion of free will weakened, Tarde tried to restore the balance. To deny responsibility is to deny the moral idea. For his part, he based responsibility on two conditions: personal identity and social similarity.⁵⁵ Thus, guilt implies not only an act that goes against the utility or the general will of the co-associates, which is the fault envisaged by its material side, but also, essentially, personal identity and social identity. It is by combining these two very positive notions that Tarde gave a complete explanation of both demerit and moral merit.⁵⁶

Personal identity can be understood as the permanence of the person: personality considered in terms of its duration. Its foundation is memory and habit. The cause behind an individual's actions lies in the individual himself. Everyone has a notion of, a feeling about their own identity. Personal identity comes and goes and is subject to alternating increases and decreases, periodic fluctuations. Can we, therefore, compare individual identity to free will? It seems that there is not a difference in nature but perhaps a simple difference in degree. Thus, responsibility would depend on individual identity and social similarity,⁵⁷ both of which are enough to give it a solid foundation. The issue of irresponsibility, studied by Tarde, serves as a counterpoint to his theory of responsibility. Tarde notes, first of all, that the scope of irresponsibility has expanded considerably and that this expansion is due in large part to the development of contemporary criminal science. Limited to cases of very dramatic madness, this field has grown because of the increasing diversity of cases. Tarde found that total irresponsibility among criminals is a rare phenomenon. Even among the insane, one should not invoke the notion of absolute but rather “practically absolute” irresponsibility.

The morbid causes that produce a more or less profound transformation of the individual release him from responsibility insofar as they affect his individual identity and social identity. The problem of human freedom is also raised. Where is the freedom of man? “Freedom of the will consists in the idea of being free”, says Saleilles, “it is man's consciousness of his own freedom. To have the consciousness of being a free agent is all that is necessary to realize one's freedom.”⁵⁸ Tarde relies on this idea of freedom when talking

⁵⁵ See Tarde, G., “La responsabilité morale” (International Congress of Criminal Anthropology), Paris, 1889, AAC, p. 353.

⁵⁶ Tarde, G., “La responsabilité morale” (International Congress, AC), Paris, 1889, AAC, p. 359.

⁵⁷ Social similarity: An essential condition for the awakening of a sense of moral and penal responsibility is that the agent and the victim be more or less social compatriots and that they have a sufficient number of similarities in terms of social origin. Being socially similar includes performing the same acts, having the same type of judgment and a set of precise ideas, judgments and prejudices similar to those held by most other members of society.

⁵⁸ Saleilles, *The Individualization of Punishment*, p. 67.

about responsibility as it relates to the criminal act. The judge will have to consider not whether the accused was free but whether he acted in accordance with his own nature or was under the influence of external forces. The logical consequences of the principle of freedom have never been taken to their extremes:

“From all time a being has been adjudged to be responsible for an act when it was thought that he and no one else was the author, the willing and conscious author, be it understood, of this very act. The problem solved by means of this judgment is one dealing with causality and identity and not with freedom.”⁵⁹

Responsibility, in both the moral and the metaphysical sense, is made up of generalities. The issue of responsibility was in the remit of P. Dubuisson, who produced numerous essays for the *Archives*⁶⁰ and spread his knowledge at the Paris Faculty of Law, where he taught an open course on mental illness from the point of view of responsibility and capacity. In fact, Dubuisson rejected the dogma of a moral responsibility, whose objective existence would imply the reality of a very hypothetical meaning. He also rejected the notion of physiological responsibility, which can only be assessed by knowing the intimate functioning of brain neurons... Neither of these responsibilities could be of interest to a magistrate tasked with defending the social order. In the past, in the eyes of criminal law, there were no madmen – there were only guilty people. Today, with modern theories, there are some tendencies to see only madmen and no longer any guilty people; some see any being who has committed a harmful act as irresponsible and not a criminal.

With Tarde, Dubuisson and Alexandre Bérard, the French school attempted to moderate these conceptions and remained very sceptical of the theory of irresponsibility. Everyone has “a model” to present, everyone tries not to be systematic and to apply the same eagerness to judging things and beings... They all tried, all three of them, to take the individual into consideration in the judgment and not necessarily to pity him. In fact, they asked for “a middle ground”, in the words of Bérard:

“But such is humanity that it can never keep itself in a middle ground: A century ago, madmen were punished, as if they were aware of their actions; today, throwing themselves into the opposite extreme, there are those who want to see a madman and a lunatic in every criminal and any crime to escape punishment; for them, it is the act of an irresponsible being.”⁶¹

So beyond the controversies and the resistance, how were the Italian theories received in France? The opposition was focused on theory and totally respectful. It was a declaratory rejection but, in fact, really a mixed rejection because (despite the disputes)⁶² there was widespread acceptance, and the influence of the Italian school would be fragmented, diluted, scattered but nonetheless present in the legislative chambers and the European legal systems that it would integrate. Thus, it would mix and hybridise the inscribed dogmas, and one of the

⁵⁹ Tarde, G., *Penal Philosophy*, Translated by Rapelje Howell, Boston, Little, Brown, and Company, 1912, p. 84.

⁶⁰ Dubuisson, P., “De l’évolution des opinions en matière de responsabilité”, AAC, 1887; “Théories de la responsabilité”, AAC, 1888; “Du principe délimitateur de la criminalité et de l’aliénation mentale”, AAC, 1892; “Essai sur la folie au point de vue médico-légal”, AAC, 1904.

⁶¹ Bérard, A., “La responsabilité morale et la loi pénale”, AAC, 1892, p. 173.

⁶² See Kaluszynski, M., “Identités professionnelles, identités politiques : médecins et juristes face au crime en France à la fin du XIX^{ème} siècle”, in Blanckaert C. and Mucchielli L. (eds.), *Histoire de la criminologie française*, Paris, L’Harmattan, Histoire des Sciences Humaines collection, 1995, pp. 215–235.

most beautiful illustrations can be found in the idea of dangerousness found in France at the heart of the law of 27 May 1885 on the relegation of recidivists.

8. A recidivist at the centre of the republican penal structure or the continuing debate between science and law

In the 19th century, the role that recidivism played for politicians and on public opinion was comparable to that of modern violence⁶³. It led them to question all aspects of criminal justice (legislation, the prison system, the police etc.) and social issues (poverty, vagrancy etc.). Important notions, ones that are still relevant today, would emerge here and contribute to the development of a criminal policy – and, more broadly, a policing policy – as the framework of a republican ideology. These were the major challenges around repression through a toughened and reinforced policy, illustrated by the law of 27 May 1885, of prevention characterised by the law of 14 August 1885, which emphasised patronage, rehabilitation and “reduced sentences”. The notions of danger, a dangerous state and dangerousness emerged, all of which are closely linked to the notion of prevention: A banal concept in psychiatry in the 19th century but a novel idea in criminology, where it would subsequently assert itself, it was brought by Garofalo along with Italian positivism under the term of “temibilità”. For these laws to be effective, there could be no question about identifying such an individual.

Little by little, the target of the “investigation” would expand, with the personality, the environment and then the situation considered as dangerous. The individual himself would no longer be the one who is treated, corrected and punished, but action would be taken regarding the factors likely to upset and pervert him. It would be enough to display the features that belong to or are close to these factors viewed as criminogenic in order to become a suspicious individual. From the end of the 19th century, it was with the idea of anticipating all possible patterns of danger that the sterilisation of criminals was suggested and that the temptation of eugenics started to assert itself. Notwithstanding the observations of Gobineau or Vacher de Lapouge, France “resisted” these practices... No such legislation has ever been enacted in France, nor was this practice ever applied. But we know that the scientific and academic communities were not entirely “hostile” to these views.⁶⁴ At the end of the 19th century, while eugenics was spreading through and fascinated the learned world, France remained discreet, cautious and attentive. Even the eugenicists themselves were concerned that sterilisation could prevent the birth of superior men: geniuses and scholars who could emerge, by chance, via hereditary transmission among the descendants of degenerates or sick individuals. Here we find Cesare Lombroso’s argument that genius and madness⁶⁵ can have a common origin. Therefore, sterilising criminals as a social defence raises many questions.⁶⁶

⁶³ Schnapper, B., “La récidive, une obsession créatrice au XIX^{ème} siècle”, in *Voies nouvelles en histoire du Droit. La justice, la famille, la répression pénale (XVI^{ème}-XX^{ème} siècles)*, PUF (Publications de la Faculté de droit de Poitiers), 1991, pp. 331-351.

⁶⁴ The French Society of Eugenics was created after the first international eugenic congress held in London from 24 to 30 July 1912. It published a journal entitled “Eugénique” in January 1913. Among the personalities were Richet, Professor Landozy, Binet-Sangle and Papillault. A French committee was represented and present at the Congress, whose objective was “to obstruct the causes of decline that appear to threaten the human race when it attains a certain degree of civilisation”. Dr. Manouvrier was the vice-president, and among the members of the committee were Legrain, Papillault and Lacassagne. *AAC*, 1912, pp. 878–879

⁶⁵ See the excellent work by Renneville, M., *Crime et Folie, deux siècles 'enquêtes médicales et judiciaires*, Paris, Fayard, 2003.

⁶⁶ As Isaac Drapkine writes, “the sterilisation of criminals is a principle of defending society. Let us say

8.1. In the name of prevention: exclusion. The law of 27 May 1885 on relegation

Republican government practice was to the criminal field what it was to the political field: a compromise between different rationales. The issues raised by the review of criminal laws went beyond the judicial level and revealed the jurisdiction of a young republic at work.

Recidivists, whether they were thieves, crooks or mere vagrants, posed a real threat to this republican society. For many, the problem of recidivism, which was initially limited to the judicial arena, was becoming a full-fledged social issue. There was a palpable fear of the thief, the criminal, but even more so of the one who notches up all these crimes and then repeats them: the recidivist, or repeat offender. The one who was targeted in this way was the beggar, the vagrant, the multi-recidivist par excellence. This “rebel against all kinds of work”, as Waldeck-Rousseau described him, was a danger that threatened this society for which order and work were well-established values. In addition, vagrants were recognised as being incorrigible and incurable.⁶⁷

Recidivism was condemned as the greatest scourge of the prison system, the ultimate proof of the latter’s inability to fulfil the three functions assigned to the criminal justice system: correct the guilty, repair social disorder and set an example. On 27 May 1885, the republicans passed a law condemning multi-recidivists to life imprisonment in French Guiana or New Caledonia so that, even if they were released, the former convicts would not be able to return and “contaminate” the national social fabric on the mainland. The punishment was no longer proportional since it took into account not only the offence itself but also the intention of the one who committed it.⁶⁸

This measure introduced the concept of “*temibilité*” into law, according to which the individual is judged not for what he has done but for what he is and what he is capable of doing. If his condition was considered dangerous, he was sentenced to relegation as a means of enacting social protection.

The notion of incorrigibility was proposed, along with its legal implications. Italian (led by C. Lombroso) and French criminologists (with A. Lacassagne and G. Tarde) had lively discussions about these orientations, but the reports presented⁶⁹ at congresses did not

no straightaway (...) Sterilisation plays no role in the application of punishment and, applied to aggravate punishment, it would be a medieval tool, useless and irrational. We cannot define criminality as a biological conception; the criminal is not a being whose descendants we have to fear. Otherwise, we would be neglecting the influence of the milieu, which is just as important” (Drapkine, I., *La stérilisation des criminels, défense sociale*, PhD dissertation in medicine, 1935).

⁶⁷ See Wagnart, J.-F., “La pénalisation du vagabondage et la répression de la pauvreté errante à la fin du XIXe siècle” in *Cahiers d'Histoire*, 1996, no. 64, pp. 77–90, and, more generally, J.-F. Wagnart, *Le vagabond dans la société française (1871-1914)*, PhD dissertation in history presented in May 1997, Paris I, 3 volumes ; the same author, “Les migrations des pauvres en France à la fin du XIXe siècle : le vagabondage ou la solitude des voyages incertains”, *Genèses* 30, 1998, pp. 30–52.

⁶⁸ Philibert, D., *La relégation des récidivistes. La loi du 27 mai 1885. Une loi républicaine d'exception*, s.d. Renard D. and Pollet G., third-year thesis IEP Grenoble, September 1993.

⁶⁹ At the International Prison Congress in St. Petersburg in 1890, 11 reports were presented, five in support of the idea that there are incorrigible offenders and that criminal law should take special measures against them. They argued that the notion has undeniable social utility but failed to define a simple criterion by which to qualify incorrigibility, p. 343.

settle the issue.⁷⁰ J. Lévêillé, a professor at the Paris Faculty of Law, asserted that there are criminals who cannot be corrected through punishment, which is evident from the frequency of relapses within a limited time. For him, incorrigibility is the habitual offender from whom society must protect itself by punishing not his most recent act but his conduct as a whole. For these offenders, there has to be severe sentences, confinement and transportation.⁷¹ The bill that emerged consolidated various other bills that had been introduced at the beginning of 1882 into a single text.⁷² However, it was named after the man whom Gambetta commissioned in November 1881 to prepare a bill on transportation:⁷³ Waldeck-Rousseau.⁷⁴ The latter argued there was a need for legislation against (and not in favour of) recidivists. He was very firm on the principle of recidivists' perversity, implying special, exceptional measures such as relegation, which enjoyed public approval.⁷⁵

In parallel with the idea of criminal determinism, the notion of there being a criterion for incorrigibility eliminates any idea of sanction, amendment or reintegration. This approach would be debated for a long time and strongly contested – among others, by Clémenceau.⁷⁶ This legislator⁷⁷ did not wish to punish only a relapse into criminality but rather incorrigibility, the irreducibility and even the “criterion of perversity”.⁷⁸

Despite vehement opposition from some MPs, including Clémenceau,⁷⁹ on 13 February 1885, 198 senators out of 218 voters adopted the law in full, with only 20 voting against. The law of 27 May 1885 united practically all republicans around it and allowed the left to regroup around the government. It was not the product of some republicans lacking an electorate but part of a way of thinking that would gradually develop over the century. It was a republican law in which the terms “prevention”, “public safety” and “social preservation” were constantly used by speakers from both the left and the right.

The 1885 law and the national debate that preceded its passage are at the very heart of the structure that would produce the modern welfare state. It marked a decisive step forward in this process, which saw the republican democracy integrate a social dimension of solidarity, prevention and repression that it still retains to this day, albeit with a few changes. The law of 27 May 1885 was representative of the opportunist republic. In a way, we have here a “eugenicist” law that could have initiated a series of security laws; at the same time, however, a law was passed that has the opposite rationale: a preventive law aimed not at

⁷⁰ Schnapper, B., “La récidive, une obsession créatrice au XIX^{ème} siècle”, already cited.

⁷¹ *Ibid.*

⁷² Gambetta's cabinet was succeeded by that of de Freycinet on 26 January 1882, which, in turn, was replaced by the Duclerc government on 7 August 1882. Gerville-Réache who would synthesise and present the bill it to the House on 17 March 1883. There was the text by the Gambetta government, along with Jullien's private bill (Dec. 1881), a private bill introduced by Gaston Thompson, a radical Gambettist deputy, as well as Armand Fallières and Pierre Devès's private bill tabled on 11 November 1882.

⁷³ The word “relegation”, as opposed to deportation, would only appear in the debates later on. It was suggested by J. Reinach, *Les récidivistes*, 1882, p. 145.

⁷⁴ Member of the Republican Union, barrister, son of a renowned legal scholar and an elected deputy of Ille-et-Vilaine, he was chosen by Gambetta to lead the Ministry of the Interior in 1881.

⁷⁵ *Annales Chambre des Députés*, 1883, p. 119.

⁷⁶ Clémenceau, G., *Annales Chambre Députés*, 1883, pp. 147–151.

⁷⁷ Farcy, J.-C., *L'histoire de la justice française de la révolution française à nos jours*, Puf, Paris, 2001, 494p; the same author, *Deux siècles d'histoire de la justice en France. Notes bibliographiques*, CNRS, Paris, 1998, CD-ROM

⁷⁸ Cf. Teisseire, E., *La transportation pénale et la relégation*, Paris, 1893, p. 269.

⁷⁹ Georges Benjamin Clémenceau (1841–1929), doctor, journalist, multiple political office holder, convinced Dreyfusard, radical republican, very active on the left.

punishing the offender but at improving him, not at eliminating him by moving him elsewhere but at criminally treating him by means of prison. The law of 27 May 1885 was an emergency law passed in response to a social problem.

In legal and medical thinking, a different and innovative (though not new) element would emerge to facilitate this ideal of protection: prevention. In the future, it would be possible to respond to a potential threat or danger by taking preventive action based on a legitimising scientific discourse, which will be more acceptable and better accepted than acts of repression. The matter of there being a risk is wholly implicit in the literature and measures, whether around children (offenders or not), criminals or foreigners. One element is decisive in both the discourse and the choices that will be made and is visible throughout the legislation: dangerousness.

9. Concluding remarks

In France, there was resistance to the Italian school and significant controversy between different disciplines. Although they were interested in the contributions of emerging criminology, legal scholars were hesitant, as Gabriel Tarde showed. At the same time, they engaged in a very fruitful discussion in the face of a positivist agenda that was more complex than it had seemed. It is true that one of Lombroso's most formidable legacies is the consideration of criminals as a truly distinct race with specific structural, biological or psychological stigmata that leave an instinctive and indelible mark. Eugenics shared this perspective. Of these theories, the most revolutionary was undoubtedly this shift in emphasis from crime to the criminal and the consideration of the offender's dynamic, concrete personality in a process that, for the most part, had lacked such specificity. Undoubtedly because of the alliances he forged, as well as the reactions he generated, Lombroso was also at the root of a "multidisciplinary" scientific approach to the criminal phenomenon. Outrageous and modern, Lombroso explored all directions, as shown by the criminal thinking that he and his colleagues developed.

Beyond its specific impact, Lombroso's criminal anthropology made its influence over biological determinism felt, above all by supporting its fundamental thesis on the role of individuals and their milieu. Because of the innovative and disruptive nature of these theories, the Italian school did not leave the scientific world unaffected. It provoked multiple and varied reactions. It was behind the creation of movements that, in this field, sought to affirm their own convictions in contrast to those of the Lombrosian school.

Despite the disputes and reticence that were on display, important criteria of positivist thinking would be central to legislative measures. For this reason, opposition was not so obvious. The influence of the positivist movement spread through various Western countries' legal systems. The creation of a hybrid(ised) criminal culture – imbued with new ideas that were re-appropriated and reinvested according to national cultures – illustrated the "revolutionary" (in the etymological sense of the term) force of the Italian positivist school, which, although contested, was essential to modern criminal law.

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