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Martine Kaluszynski

The return of the dangerous man¹. Reflections on the idea of dangerousness and its uses

Abstract

In France, the re-emergence of the notion of dangerousness in the process of law making has rendered it necessary to elaborate on the objectives of political actors. (Act on the Retention of Safety and the Declaration of Criminal Irresponsibility Due to Mental Disorder, 25 February 2008., Act of August 10, 2007 Strengthening the Fight Against Recidivism in Adults and Minors)

The aim of this article is to analyse the social construction of this notion through the criminological discourse prevalent at the end of the XIXth century. The Third Republic was preoccupied with the question of recidivism, fearing degeneration and a declining birth rate, and was seduced by another notion emerging at this time: eugenism. Contemporary law making has reactivated a historical heritage based on extreme measures that have derived from these concepts. Based on a socio-historical approach, this article attempts to understand the mechanisms of governance in a republican society, as well as the influence of these mechanisms in the production of legal, political, moral and societal norms.

In France, the reality surrounding the different penal laws² leads us to question the principles and the orientations chosen or improvised by the political power in the elaboration of its criminal policy.

Keeping a person in jail after he has served his sentence is a systemic aggravation of sentences in case of recidivism which recognizes (we are intentionally concise) the law on the maintenance of security adopted by the Parliament on February 7th, which was published on Tuesday, June 10, 2007 in the *Journal Officiel*, after having been partially censored by the constitutional council³.

This law proposes a retention of security, a measure that allows the exceptional retention in a closed socio-medical-judicial centre of people sentenced to a minimum 15 year prison term for certain crimes and who are deemed at the end of sentence to present a very high probability of recidivating and pose a particular danger based on serious personality problems.

The law regarding security detention is to be applied by a regional jurisdiction, made up of three judges, based on the proposals of a multidisciplinary committee, containing, notably, two psychiatric experts. The condemned person is to be assisted by a lawyer chosen or appointed during an adversarial debate. If there has been a security retention placement, the decision can be contested before a national commission composed of three advisors from the French Supreme Court.

« The principle of non-retroactivity of the more severe penal laws does not apply here : detention is a security measure. It is not a sentence. It is pronounced by judges. But it is not based on the guilt of the person. Detention does not punish a fault. It aims at preventing recidivism. It is based on the dangerousness of some condemned people in relation to serious acts. It is a preventive measure which abides by constitutional requirements. It requires that, for the same degree of dangerousness, two offenders are treated in an identical fashion. The date of their conviction does not justify a different measure. If they both meet the conditions, we should be capable of

placing both in detention⁴ ». This law is part of the legislative and medical arsenal implemented to counter recidivism⁵ and here more specifically the recidivism of sexual offenders⁶.

The character of dangerousness thus reappears in the penal orientations of political power in a determined fashion⁷.

We find here the elements, ideas and the temptations that history had already seen or dangerously flirted with. There are other words, other actors, another context, marked nevertheless, by many echoes.

From a socio-historic perspective, we would like to propose in this paper, elements that are part of an analysis of the mechanisms for managing order in a republican society and its manifestations through the production of legal, political, moral and social norms. We will thus return to the question of recidivism, the struggle against recidivism under the 3rd Republic, « a creative obsession in the 19th century »⁸, and to the idea of dangerousness as it appeared, in its effective, expected, envisaged uses.

Justifying/defending the intellectual enterprise named *Discipline and Punish* and specifying the 18th century, Michel Foucault wrote : *it is the theoretical and practical search for such mechanisms, it is the will ceaselessly organizing equivalent mechanisms that constitutes the object of the analysis. Studying the way in which we wanted to rationalize power, the way we conceived (in the 18th century), a new « economy » of the relations of power, to demonstrate the important role held by the idea of the machine, of looking, of surveillance, of transparency, etc. which is neither to say that power is a machine nor that such an idea was born automatically* »⁹.

We will depend on a socio-historic interpretation, not to go searching in the history of episodes, of moments that would easily provide a demonstration, which would in a sense grant a legitimacy to a topic anchored in the contemporary. It will be a question of reintroducing a multiplicity of experiences, the diversity of historical laboratories available, to question, to perceive, to seize or sketch the forms assumed by the state apparatus based on the period or geographical area. Historicization allows for the enlargement of frames of reference for an analysis that is too often confined to a single precise context and which, in order to present plans felt to be innovative solutions, obscures the available and relevant historical laboratories, in order to reflect today on the meaning of political projects or processes. The idea of processes is particularly fruitful in such a socio-historical perspective¹⁰.

It is not pointless to return to this past, this republican history, which because of its concern for efficiency and legitimacy in its maintenance of order, was strongly based on scientific knowledge, expert knowledge needed to support its political decisions¹¹.

We will attach ourselves precisely to the context, the problematic situation¹² with a line of sight upon the existence of opportunities, projects, problems, of conflicts as conditions that are favorable to the appearance of this expert knowledge that is criminology. This knowledge would open a field of study, with its rivalries and its competitions, to shape interests where scientific, professional, and political logic melded indissolubly. Crime would become a scientific object but also a political one¹³. This is by virtue of an idea that had become an important principle of action : prevention-which the character of dangerousness would reveal in speeches but also be confronted by the legislators through the law of 1885 dealing with the banishment of recidivists. This character of dangerousness was very close, in this late 19th century context, haunted by degeneration and a low birthrate¹⁴, and by another equally emergent idea : eugenics. We will stop there to scrutinize the mechanisms, in order to understand the spirit and examine this reactivated heritage.

1. An historical context

In the 1880s, in a time of economic and industrial upheaval, crime and criminality were well endowed as reflections of the uncertainties and fears of a society on the move. The feeling of economic and social “insecurity” could only be moving towards this visible pole. The Third Republic promoted values of order, stability, work and had the will to mobilize everything to have them respected. In an epoch that was inclined towards science and humanity, new methods and techniques emerged quasi-simultaneously, among them, criminology¹⁵. « ...*criminal anthropology and the repetitive discourse of criminology, find one of their precise functions here : by solemnly inscribing offences in the field of objects susceptible of scientific knowledge, they provide the mechanisms of legal punishment with a justifiable hold not only on offences, but on individuals ; not only on what they do, but also on what they are, will be, may be. The additional factor of the offender’s soul, which the legal system has laid hold of, is only apparently explanatory and limitative, and is in fact expansionist. During the 150 or 200 years that Europe has been setting up its new penal systems, the judges have gradually, by means of a process that goes back very far indeed, taken to judging something other than crimes, namely, the ‘soul’ of the criminal. (...)Another truth has penetrated the truth that was required by the legal machinery ; a truth which, entangled with the first, has turned the assertion of guilt into a strange scientifico-juridical complex* »¹⁶. The criminological discourse would construct an apparatus that was an appropriate accompaniment to the political decision, expert knowledge, it would be at the foundation of many legislative or institutional measures.

2. The emergence of the “criminal man”

The emergence of the « criminal man »¹⁷ would make a contribution that was determinative in the elaboration of a scientific knowledge of crime. It is to Cesare Lombroso that we owe the first works on this question, with the theory of the born criminal and the idea that criminals are actually individuals who have remained behind evolution, who have not reached the stage of full humanity. Lombroso at first proposed that the criminal is a savage lost in our civilization, then likened the criminal to a moral madman and declared that criminals must be suffering from epilepsy. From this perspective, criminals were seen as having developed into a separate race, with precise structural indicators, biological or psychological, which would establish an instinctive and indelible marker. Eugenism would be part of this perspective. From among these theories, without a doubt the most revolutionary, was this shift of focus from the crime to the criminal, the illuminating of the concrete and dynamic personality of the criminal...the emergence of the criminal man, in a process where he once existed little or not at all. The French school based around Alexandre Lacassagne asserted itself by not denying the biological reality of the criminal phenomenon, but in rejecting predominance or exclusivity, and in introducing the « social » perspective. It does not accept « *this fatalism or original flaw and believes that it is society that creates and prepares criminals* »¹⁸. The vision of the criminal man is that of a social being whose history and formative experiences should be taken into account. Lacassagne facilitated and managed a movement that developed in parallel with that of Lombroso and which ideologically transformed the questions about the relationship of crime to society and to factors of criminality.

To better understand the reality of this criminal man, he will be broken apart, dissected, divided up. Studies based on the nature, the sex or the age of the criminal will develop in abundance, to

the extent that aside from the criminal act itself, the fact that it is the work of a madman, a woman or a child will directly determine the sentence and the conception it is based on.

3. A structuring principle of action: prevention

To understand, detect, prevent, reduce crime, respond to reactions of insecurity, to review the factors that are the source of criminality and tied to its development, seem to be among the main objectives which French criminologists aim for. To substitute prophylaxis for penalty—that is the grand idea of the criminological academy. Of all these elements, two are dominant : the interest focused on the child¹⁹ and the emergence of the idea of prevention. A very widely held idea was that the small child thief would grow into a much larger criminal, and that the struggle against crime would have to begin at the youngest possible age, the time when the growing child would be the most easily influenced, thus susceptible to negative and positive influences. In the 19th century, there was an increase in every type of discourse having to do with the child, especially the impoverished child. This reflected both the belief that the destitute or abandoned child had a criminal potential and would be transformed into a serious criminal, and the hope that childhood would be a favorable time for intervention, offering the possibility of an effective fight against any deviance.

We dread the idea of the maturing of a young criminal who risks becoming an all the more redoubtable one because his misdeeds began at an earlier age. Such a discourse developed in spite of the scientific basis it tried to adopt. The idea of childhood at risk would besiege charitable societies and represented the concretization of a discourse that demanded post-educational action. Today, the debates about the precociousness of young criminals do not direct attention to the age of the offender. It is the nature and seriousness of the offence that is given priority in order to determine the punishment to be imposed. The 19th century created an education-related logic in a broad sense, if we consider the correctional or prison colonies which in 1927 had become by choice of the prison administration, « closed correctional facilities», through the very early establishment of charitable societies. The law of February 2, 1945, promulgated after Liberation Day, emphasizing the educational potential of the young delinquent and creating in its stride, the 1st of September, 1945, the direction of closed corrections, seemed to convey a definite answer to the question that went very far back in history : is the young delinquent more of a child deserving punishment or a child victim of society, one to protect, to educate ? The actual penal policy seemed to favor the first option.

Facilitating this ideal of protection, we will witness the emergence of a different element within legal and medical thought, even if not new, still innovative : prevention. To warn, to predict, requires a knowledge, one based on arguments that are solid, scientific, rational, which alone will justify intervention and preventive action. It is thus criminology, a young knowledge, still at the stage of a theoretical stammerer, but made up of experts or some considered as such, which would form the basis for the preventive approach. The analyses essentially recall, through the eventuality of crime, what is necessary for a sane society, one that is solid, ordered. Henceforth, in the name of a possible risk or a danger, preventive action, based on a legitimate scientific discourse, would have the power of implementation, would be more accepted, more acceptable than a repressive intervention. Today, the principle of precaution, and the debates surrounding its usage²⁰, have in some ways replaced or substituted for the idea of prevention, or more precisely, enriched and expanded it.

One element is determinative both in the discourse and the choices which would be made visible through the legislation : the character of dangerousness. This idea is completely implicit in the

writings and the measures, whether it is about the child, (delinquent or not), the criminal, the foreigner.

Dangerousness, the operational character of the knowledge and the penal policies

Closely connected to the idea of prevention, the notions of danger, dangerous state, dangerousness emerge : a commonplace concept for psychiatry in the 19th century, but new for criminology, where it would impose itself, brought by Garofolo, with Italian positivism under the name of « temibility »²¹. Little by little, there would be an enlargement of the object to be « investigated » and the personality, the milieu, then the situation, would be seen as dangerous. We would no longer focus on the individual himself, with the objective of treating him, correcting him, punishing him, but would seek to act upon the factors able to oppose him, to corrupt him. It would be enough to show a character that reflects or approaches these factors seen as criminogenic, for him to become a suspect.

This manufacturing of risk factors would serve as a reference and lead to new modalities of intervention²². Dangerousness had two levels. It referred to people who lived the situation and to the dominant group that experienced it as a threat to its own interests. This was a paradoxical idea because it involved both the assertion of a subject's specific character, and a simple probability, a random datum, because the proof of the danger could not be confirmed until the crime had effectively been committed. Dangerousness was thus characterized by a significant arbitrariness, a doubtful scientificity, but would remain a legitimizing instrument. The desired objective was to anticipate, to prevent the emergence of an undesirable event. All of the ideas and methods shared this objective : from a simple surveillance to the most direct intervention.

5. In the name of prevention : exclusion

Republican governmental practice in the penal domain mimics practice in the political domain, a compromise among different logics. The stakes raised by the examination of the penal laws exceed the legal level and reveal the foundations of a young Republic in the making.

The advent of the Third Republic marked for the first time the durable and constitutional implementation of values derived from the Revolution. The republican opportunists in power were committed to the safeguarding of law and order. The phenomenon that disturbed them more than any other was the rise in recidivism and petty crime, the multiplication of the number of « habitual offenders » who seemed to lapse inexorably into vice and corruption. These recidivists, whether thieves, fraud artists or simple vagabonds, were, for this republican society, a real danger.

Recidivism led to the questioning of all aspects of penal justice (legislation, the prison system, the police...)²³ and of social arrangements (poverty, vagabondage...). The Third Republic inherited a phenomenon and an echo from the past. The echo posed the question in terms of the reform of the penal system and strongly questioned prison as well as the apparatus that accompanied it. For many, the problem of recidivism, originally limited to just the tribunal, had become a social issue in its own right. There was a real fear of the thief, the criminal, but more still, of the person who combined these crimes and repeated them : the recidivist. Furthermore, a character of incorrigibility and incurability was seen in the vagabond²⁴.

Recidivism was condemned as the largest sore point of the prison system, the ultimate proof of its inability to fulfill three functions assigned to the penal justice system : to correct the guilty,

repair social disorder, and set an example. On May 27, 1885, the republicans would adopt a law condemning multirecidivists to transportation for life to Guyana or New Caledonia, in such a way that even when freed, the ex-convict could not return to « contaminate » the national body politic. The punishment was not proportional anymore because it was applied not just to the simple offence, but also to the intention of its perpetrator²⁶.

This measure introduced the idea of temibility into legal thinking. We judge the individual, not based on what he has done, but rather on the basis of what he is and what he has been found to be capable of doing and, if his condition is dangerous, he is condemned to transportation as a measure of social protection. As early as 1878, Charles Lucas²⁷ had severely criticized transportation. The idea of incorrigibility and its legal consequences were put forward. The Italian criminologists (led by C. Lombroso), and the French ones (with A. Lacassagne and G. Tarde) had a lively debate regarding these issues, but the reports presented²⁸ during the congresses did not resolve matters. J. Leveille, professor in the faculty of law in Paris, asserted that in his mind, there were offenders who could not be corrected by punishment, which could be seen in the frequency of relapses within a limited period. For him, incorrigibility marked the habitual criminal against whom society had to protect itself by punishing not the most recent act but the behavior in its entirety. The bill which would be examined was a revision into a single text of different bills introduced early in 1882²⁹. It nevertheless retained the name of the one asked by Gambetta in November of 1881 to prepare a bill relating to transportation³⁰ :

Waldeck-Rousseau³¹. The latter promoted the necessity of a law against recidivists and not one in their favor. It was very firm on the principle that recidivists were perverse, requiring special measures, exceptional ones like transportation, measures approved by public opinion³². In parallel with the idea of a criminal determinism, the conception of a criterion of incorrigibility removed any idea of sanction, correction, reintegration. This viewpoint would be debated and strongly contested by, among others, Clemenceau³³.

The legislator did not wish to punish only the penal relapse, but rather the incorrigibility, the irreducibility, or even the « criterion of perversity »³⁴.

In spite of the vehement opposition of several deputies, among others, Clemenceau, on February 13, 1885, 198 out of 218 senators voted to adopt the law, with only 20 voting against. The law of 1885 as well as the national debate that preceded its adoption were at the very heart of the structure that would lead to the creation of a modern welfare state. It marked a decisive progress in this process that would see the republican democracy integrating social, solidarist, preventive and repressive dimensions which have, with certain inflections, been retained to this day.

It thus remains to be understood why such legislation, which completely overturned conceptions which had to that point been dominant, was passed in France at that moment, in what conditions and under what pressures. In France, since the middle of the 19th century, the formation of the penal question as a societal problem led to the questioning of the stakes that characterized it, and the strategies of the actors that participated in its assertion. This social question seemed to be a construct in which factual data such as the industrialization dynamic, urbanization and proletarianization combined closely with social representations, mobilized and articulated around projects that were strategic, specific and identifiable. At the same time, a law was adopted relating to preventive means for combatting recidivism ; whether it was seeking to complement the other or just embody logics connected to the principles of republican action, this law of August 14, 1885 did not aim at exclusion but rather parole, patronage and rehabilitation. This law on the attenuation of punishments was added to the legislative arsenal against recidivists and the logic of this last law tempered the severity of transportation. Far from excluding each other,

the guiding ideas of these two bills are associated and reveal each other³⁵. Thus we observe two legislative conceptions that are distinct but free of mutual contradiction. Nevertheless, they proceed from two different principles (exile and reintegration) but in the end pursue the same objective : to eradicate recidivism. The law of May 27 was an emergency law, that of August 14 a law of foresight.

Recidivism, or rather the fear of recidivism, revealed in an exemplary and extreme fashion the conceptions that are both opposed and complementary but which initiated penal policies. Not all penal reforms are built in this way but were inspired by these double logics which were not necessarily to be seen as a paradox of the republic, but as one of its traits, one of its specificities³⁶. We have the image of the great republican laws enacted in the 1880s, and in the same period the law of May 27, 1885 (attenuated by the law of August 14) would be chosen. The security aspect of the law, its very great severity, its obligatory character, bring it into the list of the great repressive laws that France has known. The law of May 27, 1885 united practically all of the republicans around it and allowed the left to regroup around the government. It was not only the fruit of some republicans to the disadvantage of the electorate, it was embedded in a logic of thought that developed little by little over the course of the century. It was a republican law in which the terms « prevention », « public security », « social preservation » returned constantly in the comments of speakers of the left as of the right. In a sense, we have here a *eugenic* law, having as a goal the prevention of the multiplication of undesirables as well as their exclusion and elimination from the metropolitan ground.

To block all the possible eruptions of danger was an idea of the end of the 19th century, and the implication of this was the sterilization of criminals, something suggested by the eugenic temptation³⁷.

6. The eugenic temptation?

Eugenism had its origins in the thought of English mathematician Francis Galton, who in his 1869 foundation work, *Hereditary Genius*, posed the idea of the heredity of political power in British society³⁸. He deduced the existence of a biological superiority in the ruling classes, a superiority that was transmitted from generation to generation. As a result, in 1883 he decided to found eugenism, which etymologically, was the « science of noble births » and whose purpose was to allow for the improvement of the English race by a study of the laws of heredity³⁹. We assist then at the birth of a curious hybrid, the association of a coherent ideological doctrine with the beginnings of a science of heredity. The theories of Galton quickly took flight, emigrating to the United States of America where they inspired many imitators⁴⁰. It would take until the end of the second world war to see the influence of these theories flowing back. What was this new science actually proposing ? To improve the physical, mental and social qualities of the generations to come, to combat the degeneration of the white races by massive means, to eliminate undesirables, parasites living off the elites and to dedicate and channel funds for the benefit of selected couples and their offspring⁴¹. The eugenism of Galton and his developments around the world played a major role in the construction of genetic knowledge. In the early 20th century, the United States experienced a veritable popular craze for eugenism, from the academic world to the popular classes. The Americans were the first to translate eugenic theories into public policies, voting for a law that restricted immigration in 1924 and implemented eugenic sterilizations from the 1920s. The United States thus seemed to have cultivated a privileged relationship with eugenism, a dangerous liaison born with the century. It was from this

perspective that it would become possible to envisage the sterilization and castration of criminals.

Human sterilization, in other words, the intentional suppression of the power to reproduce, is the eugenic measure par excellence. On the scientific level, the question is intimately connected to the notion of heredity. Scientific knowledge regarding the transmission of characteristics is the only one that can delimit the range of action for sterilization and the justification for its application, to « abnormals », dangerous criminals. This intervention would arouse different reactions. The United States of America was seduced, and was the most innovative⁴². In the 1900s, we see several enthusiastic articles⁴³ about sterilization. « *Every one knows that to obtain beautiful, well raised animals, the breeders start with selection, the search for perfect producers, without vice or defect, whereas they reject, they sacrifice the defective individual* »⁴⁴.

Director of the prison anthropology service in Brussels, author of many criminological studies, Dr. Vervaeck was profoundly committed to the sterilization of criminals⁴⁵. His arguments contain an impressive condensation of all the eugenic ideas of the time. The observation that the « multiplication » of abnormal degenerates and idiots in society is to the detriment of « healthy, strong and well balanced social units » begins the article.

« It is necessary to go beyond a simple scientific propaganda, beyond a dry preventive education, a repression which focuses with equal firmness on the crime of moral contamination by the book and the image and public assaults against mores. We must reach to the source of these degeneracies that threaten modern societies, facilitating more widely the unions between strong and intelligent subjects while avoiding too much concern for the protection of the weak and the abnormal. ». For Vervaeck, the State « has the moral right to pursue the physical and mental improvement of the race, and this is both in the general interest and in the interest of individuals. On the other hand, the State has the right to avoid the burdens and dangers for society that are represented by the abnormal, the stupid, the dangerous of any kind that we can, except in rare cases, subsume in the group of mental defectives »⁴⁶. The State has the complete right to impose upon doctors and others with responsibility declarations relating to « dangerous » cases. That would not encroach upon individual freedom, it would be a normal obligation. Faced with « the criminal », the State has the right to punish.

Finally, « *if all the means of education and prevention had to remain powerless to prevent some abnormal and diseased people from remaining a serious danger to society and for their descendants, it would be necessary to not hesitate in eliminating them for an unlimited term of social life, but on condition that their segregation is humane, scientific, disconnected from any penal preoccupation, inspired above all by a desire to care for them, to improve them, and the the goal to be returned to freedom, if possible* » ⁴⁷. This was expressed in 1926 by Dr.

Vervaeck, who was close to Binet-Sanglé who had proposed « *the creation of an institute of euthanasia where mental defectives, exhausted by life would be anesthetized to death with the help of protoxide of azote or laughing gas* »⁴⁸.

France, in spite of the writings of Gobineau⁴⁹ or Vacher de Lapouge⁵⁰, « resisted » these practices. No legislation or any application of this practice, ever saw the light of day in France. But we know that the scientific or university milieus were not « hostile » to these ideas⁵¹. The French movement, in general, remained discreet, prudent and attentive at the end of the 19th century, when eugenism had penetrated and fascinated the learned world. What were the criteria (biological, social, scientific...) that qualified subjects for the application of eugenic measures ? What tests, what experiments, what observations would allow one to assert that a mental deficiency had reached a point where it had become a social nuisance ? The eugenicists themselves

were worried because sterilization could prevent the births of superior men : geniuses, savants, whom the accidents of hereditary transmission could cause to emerge through the reproductions of mental defectives or sick people. We find here the argument of Cesare Lombroso to the effect that genius and madness⁵² can have a common origin. Sterilization of criminals as a social defense thus posed many questions⁵³.

7. Eugenism, ideology of normality

Eugenism at the beginning of the 19th century was obsessed with the idea of degeneration. Engrafted onto philosophies of decadence, the idea of a generalized moral decay, a symptom of a pathological degradation of modern society persuaded progressively more minds. If eugenism spoke to us ceaselessly of progress, of the improvement of the human race, it was not through any affiliation with the historical optimism of a Condorcet, but rather by a voluntarist reaction, through the desire to summon a historical condemnation of biological decay. Thus, for the eugenists, this degeneration was first of all the consequence of the mixing of the races but also of the social classes. Indeed, for the eugenists, the weak in spirit, that is to say, the whole collection of poor people, social deviants, alcoholics, prostitutes, slum dwellers and recent immigrants, rot the social body through their galloping fertility and the heredity of their social deviances. The existence of races, made up of biologically distinct human categories, was, at that time, obvious. The eugenists were largely inspired by then fashionable racial typologies in their enterprise of differentiating between desirables and undesirables. However, the clearly anti-racist positions taken by anglo-saxon eugenists committed to the left, pushed certain authors, such as Pierre-André Taguieff, to declare that racism was not an essential element of eugenism⁵⁴. Eugenism, unburdened of this terrible suspicion, would become morally safe and thus acceptable. We can thus affiliate this current of thought with the theories of the European school of anthroposociology which, through anthropomorphic studies, sought to demonstrate that the superior and inferior layers of the European populations were related to different ethnic types⁵⁵. We can well see here that eugenism was at its source nourished by a normative project of society that rejected all otherness. The principle drive of this project was the racism that was intrinsic to eugenism and which established a model, a norm that condemned any deviant person, whether physically, morally or socially, to be designated as inferior. This inferiority derived from their abnormality, from their humanity presented as truncated, partial. The figure of the abnormal person in the 19th century traced its roots to the medieval figure of the monster.

« *The abnormal will long remain something like a pale monster* »⁵⁶. This abnormal is thus an unfinished human being, a mix of humanity and inhumanity. We thus use a full strategy of differentiation in order to mark the biological inferiority of all those who deviate from the norm. Thus justifying an inequality in rights between individuals, the eugenists asked for a monopoly of power that could assure the continuance of a social norm defined according to their own image. And there resides one of the essential faults of eugenism : its faith in the existence of a model for human perfection. Once the deviance is identified, it becomes necessary to correct it. This identification could not avoid continuation because, as analyzed by Canguihem, normality is not a passive concept⁵⁷.

The second phase, therefore, is that of correction. But this normalization, because of the irreducibility of the biological heritage to any environmental influence, was for the eugenists, doomed to failure. Being unable to practice this return to normality, it was necessary to prevent the transmission and propagation of these deleterious traits. It is therefore possible to envisage eugenism as the continuation of the long disciplinary enterprise of power that allowed for the

imposition of a social norm no longer by physical coercion but by an apprenticeship at the youngest age and a progressive interiorization of this norm. Thanks to this subtle mechanism of social control the individual becomes « *something that we fabricate* »⁵⁸. Eugenism attempts to invert the order of creation, seeking to model human nature in order to discipline thought. But this forgets that eugenism is also the product of humans. Deterministic conceptions, based on the theories of heredity and admitting the existence of a kind of hereditary transmission of a dangerous state, would thus justify themselves. During the intense legislative activity of the 1880s, two tendencies seemed important : the first, connected to the development of the protection of childhood with the implementation of a protective legislation corresponding to an ideology of protection appropriate to this period ⁵⁹; the second connected to the will to efficiency, with different principles which had not only the objective of correcting but also of punishing, eradicating. The major objective of eugenism was the eradication of all social deviance. For the eugenists, this purification of society was to occur through the reproduction of desirables (positive eugenism) and the disappearance of undesirables (negative eugenism). « *Eugenic action is an intervention : it can only be realized by the appeal to the authority of a State planner, only capable of controlling the mechanisms of reproduction* »⁶⁰.

8. Legislating on dangerousness: the State, the law, recidivism and the citizen

Transportation had to terrify recidivists. And yet, its onerous execution, and the perverse effects of the judge's obligation to impose it, were direct causes of its failure. The elimination of recidivists was seen as insurance against a social disaster, the different protagonists disagreeing only on the method to use. The debate concerning transportation was the occasion for republicans to call for a coming together of social classes around the figure of the recidivist. Here the political ideology and penal justice were joined. Transportation was thus embedded in a double alternative : prevention and exclusion on the one hand, correction and repression on the other.

The assertion of the new republican political order was based in large part on the conception of a system of legal regulation that sought to safeguard the liberal principles of the regime as well as the social peace. This conception of law as a barrier against « barbarism » seemed to induce the Republic to translate the danger it confronted in legal terms, not only to punish that which it considered a crime but also to symbolically regulate a group. This use of the law seemed to take on some interesting meanings. Indeed, aside from the need to normalize a group, we can wonder in what way can the law represent in such circumstances, a powerful symbolic tool for a regime whose foundations remained fragile. The law, the very base of the republican political link, appeared to be the only alternative to the deficiencies of the social pact damaged by different problems that had come to light earlier.

The involvement of the politic apparatus, particularly by means of the conception of the law, thus appeared as the translation of major social stakes and of struggles for power or influence⁶¹.

In any case, the final choice that the law makes between different projects is never neutral and ends in a compromise solution which materializes the force and power of different actors, that is to say their capacity to make themselves heard, to influence and to institutionalize their interests on the political scene but also to render them representative and legitimate.

Beyond a potential or real efficiency, we can from that point wonder today about the emergence of different bills, such as the biometric identity card, the will to screen for behavioral disorders in

childhood, the DNA tests which verify the kinship of candidates for immigration in the context of family reunification, or the wearing of an electronic bracelet which allows one to avoid committing a crime through a continuing surveillance.

In the 19th century, as today, it is in relation to the body, and its different elements, its measure, its marks, its sex, its nature, its soul, that fear and also fascination crystalize. We try to decode it, we try to bend it, we try to master it. Eugenism was presented as a total and absolute guarantee for the mastery of the individual, from his birth to his death and, by that, of the continuation of the « brave new world ». There was the will to render the spirits docile by influencing the bodies, what Foucault called « *political anatomy* » and which would have evolved with the complicity of biology into a « *political genetics* »⁶². Is a eugenist temptation still there ? Will we fall from a justice of freedom towards a justice of security ?

Whereas the men of the 19th century had scientific innocence, the stammering of the discoverers, the men of the 21st century will not be able to claim ignorance, the misunderstanding of the perverse effects of measures which discriminate and anchor in law things which can be diverted from their original purpose⁶³. Legislative measures, regulations, bills that are implemented, in statistics or in debates these last months in France, in the context of the struggle against recidivists, or the struggle against clandestine immigrants reveal the ambivalence⁶⁴ of a power confronted by the eminently political issue of security and so resuscitates a memory in some way buried by an institution. They reactivate the stammerings, the experiments, the orientations familiar to the Third Republic, and we don't know whether these things were witnesses to its inventiveness or...its impotence !

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Notes

- [1](#) I would like to thank the evaluators of this paper for the pertinent remarks- the critical and theoretical comments were especially stimulating.
- [2](#) The law relative to the retention of security and the declaration of penal irresponsibility because of mental problems of February 25, 2008.
- [3](#) Chantraine , Berard, 2008
- [4](#) Speech of Rachida Dati, keeper of the Seals, Minister of Justice-Senate, January 30, 2008.
- [5](#) See the law of August 10, reinforcing the struggle against the recidivism of majors and minors, Law No. 2007-1198 published in the Journal Officiel No. 185 of August 11, 2007, also called the law regarding recidivism or the Dati law.
- [6](#) See the law of June 17, 1998 which laid the foundations for the accompaniment of sexual criminals by introducing the socio-judicial follow-up. Applicable only to sexual criminals, this follow-up facilitates subjecting the convicted to an order for care (psychotherapy and, if necessary, medical treatment) or to measures of surveillance after the execution of the prison sentence, a period possibly amounting to 30 years.
- [7](#) See the Garraud Report, 2006.
- [8](#) To borrow the excellent phrasing of Bernard Schnapper, 1983.
- [9](#) Foucault, 1980, 37.
- [10](#) Kaluszynski, Wahnich, 1998, 17-33.
- [11](#) Foucault 1975 , Translated by Sheridan, 1977, 27. “.. there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations”.
- [12](#) Chevalier, 1996, 33-51.
- [13](#) Kaluszynski, 2002.
- [14](#) Nye, 1984.
- [15](#) Mucchielli, 1994 ; Debuyst, Digneffe, Labadie Pires, 1995.
- [16](#) Foucault 1975, Translated by Sheridan, 1977, 18-19.
- [17](#) C.Lombroso, *L'homme criminel*, Paris, Alcan, 1887, 2 vol. In 8°
- [18](#) Lacassagne, 1894, 406.
- [19](#) Pierre, Chauvière, Lenoël, 1996.
- [20](#) See Vanneuville, Gandreau, 2006.
- [21](#) The concept of “temibility”, already contained in Garofolo’s article published in the October 1878 issue of *Giornale napoletano di filosofia e lettere* under the title “Studi recenti sulla penalità”, was specified by him in a study which appeared in Naples in 1880 : *Di un criterio positivo della penalità* and developed in his work Garofolo, 1891. According to Garofolo, the term “temibility” refers to the constant and active perversity of the criminal and the amount of evil that we can fear in terms of its criminal capacity, from where the parallel terms periculosity, redoubtability, dangerousness, dangerous state came. Garofolo would enlarge this concept in order to give a more constructive sense.
- [22](#) The prosecutor-general of Lyon, William Loubat, strongly approved of this notion for individuals “whose presence in society constitutes a permanent threat for their peers: recidivists, the incorrigible, vagabonds and professional beggars, stateless people, procurers and anti-social elements of all kinds”, letter to the director of *Temps* regarding the half-mad, 1913, 940.
- [23](#) See Farcy, 2001 ; 1998.

- [24](#) See Wagniar, 1996, 77-90 and more generally, Wagniar, 1997, 1998, 30-52..
- [25](#) Additional punishment of reclusion or of time spent outside the metropolis inflicted upon recidivists.
- [26](#) Philibert, 1993.
- [27](#) Lucas, 1878.
- [28](#) At the international prison conference held in St. Petersburg in 1890, reports were presented, 5 favorable to the idea that there are incorrigible criminals and that penal law should impose special measures in their regard. They asserted that the idea of an indisputable social utility, without managing for all that to find a simple criterion which would allow them to describe the idea of incorrigibility, 343.
- [29](#) Following the changes of the minister (the Duclerc cabinet had succeeded that of Gambetta then of Freycinet on August 7th 1882). It was Gerville-Réache who effected the synthesis and returned it to the Chamber on March 17 1883. He had the text of minister Gambetta, and the private bill of Jullien (December 1881), a private bill offered by Gaston Thompson, a radical Gambettist deputy, and the private bill of Armand Fallières and Pierre Deves introduced November 11, 1882.
- [30](#) The term transportation only appeared later in the debates, it was suggested by J. Reinach, 1882, 145.
- [31](#) Pierre (Marie, René, Ernest) Waldeck Rousseau (1846-1904) lawyer, Minister of the Interior, Council President, Member of the list of the union of republicans, Waldeck-Rousseau sat in the National Assembly on the benches of the left, approving the orientations of the Opportunists. Gambetta confided to the Ministry of the Interior, 1881.
- [32](#) Annals of the Chamber of Députés, 1883, 119.
- [33](#) Clemenceau, Annals of the Chamber of Deputies, 1883, 151-147. Georges Benjamin Clemenceau (1841-1929), physician, journalist, carried out many political functions, committed dreyfusard , radical republican, very committed to the left.
- [34](#) Cf. Teisseire, 1893, 269.
- [35](#) So, in the law of May 27, 1885, there is a removal of the punishment by the high-police and the abrogation of the law of July 9, 1852 concerning the ban on stays in the department of the Seine and the municipalities of the town of Lyon (article 6).
- [36](#) Kaluszynski, 1999.
- [37](#) Voir Mucchielli, 2000.
- [38](#) The first article of F. Galton appeared in the literary review *Macmillan's Magazine*, Galton, 1865, drawn from Billig, 1981, 166.
- [39](#) The term “eugenism” was coined in 1883 by Galton in his *Inquiries into human faculty and its development*.
- [40](#) But in the rest of Europe as well, in France, Switzerland, Poland, Italy, Northern Europe and in Germany where the term was “racial hygiene”. Then, eugenism left the frontiers of the West and took hold in in Japan and Latin America in the 1920s. About Latin America, see the excellent work of Stephan, 1991.
- [41](#) A new science but with echoes from the past, since Socrates recommended frequent sexual relations among the elites and rare relations among inferior subjects (Plato's Republic). Aristotle wanted to forbid all reproduction after the age of 50 and to let the malformed die. The Spartans followed those same practices as did the Romans by virtue of their *twelve tablets*. See Carol, 1995.
- [42](#) Even before the era of eugenism, see can find several examples of sterilizations prescribed by the authorities: in 1865, in the state of Texas, they sterilized criminals. These sporadic and then illegal measures were “punitive and exemplary”. In 1907, the state of Indiana was the first which passed a law aimed at the heredity of the criminal. This law, promulgating sterilization for incorrigible criminals would be adopted in turn by Louisiana (which applied it as well to “idiots and imbeciles), with Virginia, Idaho and Utah applying it to morons, epileptics and the insane), See J. Sutter, *Eugenism*, 1950.
- [43](#) D. Servier (senior professeur at l'École du Val-de-Grâce, 1901, D. Naecke (response to Dr. Servier), 1901. Dr. Robert, R. Rentoul (Liverpool), 1910. De Hais, W. Maier (physician at the psychiatric clinic at l'université Zürich-Bughölzh), 1911.
- [44](#) Servier, 1901 133.
- [45](#) Dr. Vervaeck, 1926.
- [46](#) Vervaeck, 1926, 24-25.
- [47](#) Vervaeck, 1926, 40-50.
- [48](#) Dr. Binet-Sangle, 1918, 142.
- [49](#) Joseph Arthur Gobineau (1816-1882) diplomat, French author, author of *Essay on the Inequality of Human Races* (1853-1855), theoretician of racial thought.
- [50](#) Georges Vacher de Lapouge, French anthropo-sociologist, militant socialist, theoretician of French eugenism.
- [51](#) The French Eugenics Society would expand after the first internationaleugenics congress held in London in 1912. A journal “Eugenic”, the organ of this society, would be published in January 1913. We find there, Riche, Professor Landozy, Binet-Sangle, Papillault...At the first international eugenics conference organized in London from July 24-30, 1912, whose objective

was “to create obstacles to the causes of decline which seem to threaten the human race when when it attains a certain degree of civilization”, a Frech committee was represented and present. We find there Doctor Manouvrier, vice-president, and as members of the committee, Legrain, Papillault and Lacassagne, *AAC* 1912, 878-879.

[52](#) See the superb work of Renneville, 2003.

[53](#) As Isaac Drapkin wrote in 1935, *the sterilization of criminals is a principle of defence of society. Let us say at once-no (...) Sterilization plays no role in the application of punishment, and applied to aggravate punishment, it would be a medieval method, useless, irrational. We cannot define criminality as a biological conception, the criminal. a being whose descent we have to fear. It is neglecting the important influence of the environment.*

[54](#) Taguieff, 1991, 61..

[55](#) For example, Georges Vacher de la Pougé, writing in 1909 that the poor classes are not the product “of purely arbitrary circumstances but of the inferiority of the social capacities of the ethnic elements which compose them”. Vacher de Lapouge (G), *Race et milieu social. Essais d'anthroposociologie*, Librairie des sciences politiques et sociales, 1909, p. 254, cited in *Autrement*, série science et société, “Des sciences contre l’homme, volume 1 : Classer, hiérarchiser, exclure”, n.8, Mars 1993,

[56](#) Foucault, 1999, 53.

[57](#) Canguilhem, 1966, 193.

[58](#) Foucault, 1975, 136.

[59](#) See, Ewald, 1985.

[60](#) Taguieff, 1994, 81..

[61](#) See Commaille, 1996.

[62](#) Foucault, 1997.

[63](#) Noiriel, 1999.

[64](#) See the very fine article by Rogers Brubaker, 1993, 3-26. *He writes: The rhetoric of inclusion is one thing, the policy of inclusion is another. They are not unconnected. (...). The rhetoric of inclusion is not abstract. It is based on a particular form of national consciousness, on the sense of the grandeur of France, on the assimilatory capabilities of the institutions and territory of France....., 24.*

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