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# CRIMINALS AND THEIR SCIENTISTS

The History of Criminology  
in International Perspective

Edited by  
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## *The French Revolution and the Origins of French Criminology*

MARC RENNEVILLE

Who will help me read the human heart through its envelopes?  
— Louis-Sébastien Mercier<sup>1</sup>

Does the history of French criminology still need to be written? Some recent works assume that it no longer does, but this certainly was not the case a short while ago.<sup>2</sup> Since World War II, criminology has taken a back seat to the issues surrounding criminal law. In fact, at times it has been unclear whether or not criminology had its own history at all. Michel Foucault's famous *Discipline and Punish* dedicated only a few lines to the subject.<sup>3</sup> Although important works on the history of penitentiary systems followed, Foucault's study did not give rise to new research on criminological science.<sup>4</sup> Most likely, this was because criminology was considered a by-product of the penitentiary system.

Without drawing on any particular theory, I seek to locate the origins of French criminology within the history of the state and the individual by focusing on the impact of the revolutionary period, which has been taken into account in histories of the penal system but has been curiously neglected in the history of criminological knowledge. For it is only by resituating the criminological question in this period that one can try to understand the genesis of the contradictory anthropologies of criminal law and the human sciences, involving the competing postulates of free will

1 Louis-Sébastien Mercier, *Le tableau de Paris (1782–1788)* (Paris, 1990), 310.

2 Christian Debuyst, Françoise Digneffe, Jean-Michel Labadie, and Alvaro P. Pires, *Histoire des savoirs sur le crime et la peine*, vol. 1: *Des savoirs diffus à la notion de criminel-né* (Brussels, 1995); Laurent Mucchielli, "Naissance de la criminologie," in Laurent Mucchielli, ed., *Histoire de la criminologie française* (Paris, 1995), 7–15.

3 Michel Foucault, *Surveiller et punir (naissance de la prison)* (Paris, 1975; reprint, 1993).

4 Michelle Perrot, ed., *L'impossible prison: recherches sur le système pénitentiaire au XIXe siècle* (Paris, 1980); Jacques-Guy Petit, ed., *La prison, le bagne et l'histoire* (Geneva, 1984).

and determinism. This heterogeneity of knowledge about criminality was frequently underscored by Foucault.<sup>5</sup> Far from reducing that contradiction to a professional conflict, Foucault considered these competing approaches to be strategically aligned and to constitute present-day "governmentality." I suggest here that this functional compatibility was an answer to the way the criminal question was posed in France at the turn from the eighteenth to the nineteenth century. Before turning to the political-scientific context at the end of the eighteenth century, a few historiographical comments are in order.

#### BETWEEN TWO CESARES: WHAT HISTORY FOR CRIMINOLOGY?

When one tries to define the origins of criminology in general, two questions arise: What should be understood by the term *criminology*? And: When did the birth of this science take place? If one defines criminology as a discourse that aims to undertake the scientific study of crime and criminals, the meaning of criminology is quite broad, because this science produced many schools, each of them claiming orthodoxy and genuine scientific validity.

If French criminology is understood as the study of criminal psychology, it can be said to begin with Bénédict-Augustin Morel (1809–73). If it is a sociology of deviance, its birth can be found in the works of Emile Durkheim (1858–1917). If it is the anthropological knowledge of the criminal, it arises in the works of Cesare Lombroso (1836–1909). If it consists of taking into account the offender's personality in sentencing, then it arises with the research on "psychic abnormalities," as formalized in Joseph Chaumié's circular of 1905.

All these chronologies are legitimate. But one can hardly see what could prevent revisionist schemes: Concerning criminal psychology, why Morel and not Prosper Lucas (1808–85)? If one defends the sociological approach, why not prefer André-Michel Guerry (1802–66) and his "moral statistics" over Emile Durkheim? And as far as anthropology is concerned, did not Franz-Joseph Gall (1758–1828) and Paul Broca (1824–80) anticipate the path later taken by Cesare Lombroso? Any dating based on a specific work lays itself open to a hagiographic reading that is reductive and lacks context.

It is possible to avoid these problems by adopting a strictly institutional approach, combining reception, academic teaching, and professionalization.

5 Michel Foucault, "L'évolution de la notion 'd'individu dangereux' dans la psychiatrie légale," *Déviance et société* 5, no. 4 (1978): 403–22.

The birth date of the national criminologies would then be more recent. In this way, David Garland can claim that English criminology did not exist before 1935.<sup>6</sup> But since the profession of the criminologist still has a precarious status at the end of the twentieth century, it makes more sense to think in terms of "schools" of approaches, trends, or methods, relatively independent from the institutions. Even if one thinks in terms of schools, Alvaro Pires has noted that the birth date of criminology remains an open question,<sup>7</sup> with three possible answers:

1. For some authors, criminology was born in the second half of eighteenth century, with Cesare Beccaria, although he had no clear "scientific" pretensions in his writings;<sup>8</sup>
2. For others, criminology did not originate with Beccaria's juridical treatise, but with the first statistical analyses of criminality by Guerry, Edouard Ducpétiaux, and Adolphe Quételet in the first third of the nineteenth century;<sup>9</sup>
3. For most authors, finally, criminology was born during the last third of the nineteenth century with the "triumvirate" of the Italian "positivist school" (Lombroso, Enrico Ferri, and Raffaele Garofalo), who dictated a shift in the object of study, from the crime to the criminal, and in the method, from juridical reasoning to scientific experiment.

This last possibility is highly questionable. For as soon as Lombroso is elevated to the position of father of scientific criminology, he is usually criticized for methodological carelessness. Nevertheless, of the three choices, the last is the most preferable,<sup>10</sup> even if some difficulties appear, most of all in the definition of "pre-scientific" period, which, according to Pinatel, begins with Plato, Aristotle, Aeschylus, Euripides, and Sophocles.<sup>11</sup> It is certain that several objective factors converged around the middle of the 1880s. In 1885 the first international congress of criminal anthropology took place in Rome, Garofalo (1852–1934) published his *Criminologia*, France passed the law on the transportation of recidivists, and the following year Alexandre Lacassagne launched the *Archives d'anthropologie criminelle*.

6 David Garland, "The Criminal and His Science: A Critical Account of the Formation of Criminology at the End of the Nineteenth Century," *British Journal of Criminology* 25 (1985): 131.

7 Alvaro Pires, "La criminologie d'hier et d'aujourd'hui," in Debuyst et al., *Histoire des savoirs*, 1:35.

8 Edwin H. Sutherland, *Principles of Criminology* (Philadelphia, 1934); Henri Ellenberger, *Criminologie du passé et du présent* (Montreal, 1965); David A. Jones, *History of Criminology: A Philosophical Perspective* (London, 1986); George B. Vold and Thomas J. Bernard, *Theoretical Criminology* (New York, 1986).

9 Willem A. Bonger, *An Introduction to Criminology* (London, 1933); Alfred R. Lindesmith and Ya'akov Levin, "The Lombrosian Myth in Criminology," *American Journal of Sociology* 42, no. 5 (1937): 653–71.

10 Robert A. Nye, "Heredity or Milieu: The Foundations of Modern European Criminological Thought," *Isis* 67, no. 238 (1976): 335–55; Georges Picca, *La criminologie* (Paris, 1988); Raymond Gassin, *Criminologie* (Paris, 1990).

11 J. Pinatel, *Le phénomène criminel* (Paris, 1987), 45.

Although the richness and the durability of this journal would appear to be enough to mark the birth of criminology,<sup>12</sup> "criminology" at this time was not limited to "criminal anthropology." To dismiss this as a simple question of vocabulary would miss the fact that there was an animated and complex discussion that juxtaposed many theories, from Lombroso to Durkheim, on to Paul Topinard (1830–1911), Gabriel Tarde, or Lacassagne. Consequently, criminology cannot be considered as a "normal science," which Thomas Kuhn defined as having a minimal consensus on objects and methods.<sup>13</sup> Instead, the field of criminology was structured by several normal sciences coming from different traditions (psychiatry, anthropology, criminal law, hygienics, judicial statistics, and so forth).

When it proved difficult to find the origins of criminology in the last part of the nineteenth century, scholars changed direction and began to look at a genealogy of ideas. Without minimizing the importance of the last quarter of the nineteenth century, Christian Debuyst proposed a new agenda, namely, studying the "peripheral sciences" that were investigating the "delinquency phenomena" long before the term *criminology* became established.<sup>14</sup>

According to Laurent Mucchielli, French criminology began with eighteenth-century physicians. A continuity was established that operated on the level of ideas, witnessing various periods of consensus, open debate, and conflict for the next hundred years. At this level of analysis, it is possible to defend the idea that "the mentalities and penal practices, the big clichés of criminality" were established at the end of the Middle Ages.<sup>15</sup>

But the physicians never had a monopoly on scientific discourses about crime and the criminal. Thus Debuyst found the delinquency problem addressed in the "diffused knowledge" (*savoirs diffus*) and the "problematic positions" (*situations problèmes*) of the eighteenth century.<sup>16</sup> Although such studies pose the problem of continuity, they do allow a collective reconstruction of what Alvaro Pires calls "the field of criminology."<sup>17</sup> My problem here is not to establish when and according to which epistemological or institutional criteria criminology arose as a science, but when and within what context the "criminological question" became, according to Claude Lévi-Straus, a subject that was "good to think about" for both the "natural sciences" and the "human sciences."

12 Martine Kaluszynski, "Aux origines de la criminologie: l'anthropologie criminelle," *Frénésie* 2, no. 5 (1988): 17–30.

13 Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 3d ed. (Chicago, 1996).

14 Christian Debuyst, "Pour introduire une histoire de la criminologie: les problématiques de départ," *Déviance et société* 14, no. 4 (1990): 347–76.

15 Mucchielli, ed., *Histoire de la criminologie française*, 461.

16 Debuyst et al., *Histoire des savoirs*, 1:100–101.

17 Pires, "La criminologie d'hier et d'aujourd'hui," 43.

## THE END OF THE ANCIEN REGIME AND THE CRIMINAL QUESTION

If human society represses different acts by varying means, it cannot ignore the issue of crime. The "criminal question" was deeply modified in the West when moral theology lost its monopoly. As noted by Debuyst, it was in the eighteenth century that delinquent behavior and moral failing became distinguished.<sup>18</sup> Not that moral culpability disappeared all at once (it never completely disappeared), but it was no longer the dominant explanatory discourse on criminality. However, this break in the representation of the criminal/sinner was neither epistemological nor institutional but political because the foundation of theological representation was shaken in all fields. The same phenomenon was evident regarding the poverty question, which was closely related to the one of criminality: "Convinced of human perfectibility, the Enlightenment writers had the powerful desire to improve the quality of life and felt certain that the condition of the poor was in no way tied to their corruption or to human frailty. They no longer accepted the theory that poverty was a sin and preferred to consider it an effect of 'economic change.'"<sup>19</sup>

Giovanna Procaci noted that the second half of the eighteenth century witnessed a move from a conception of "poverty perceived as an individual destiny to one of poverty understood as a social phenomenon," and emphasized the subversive dimension of these new theories that considered poverty to be a "consequence of despotism."<sup>20</sup> This notion rejected the system of assistance based on charity, and physiocrats such as Anne Robert Jacques Turgot went so far as to theorize that poverty was a by-product of charity. These critics sought to discredit the church's ascendancy and to show that poverty was a social problem that the state had to take care of.

Parallel to the hardening of the repression regarding what Foucault described as the "illegalities of property" (*illégalismes de biens*), this period witnessed a change in the representation of criminality that was very similar to the changes in the conception of poverty.<sup>21</sup> While the philosophical and political agitation undermined the monarchy by openly criticizing its institutions and principles, and dechristianization was slowly progressing, French society vociferously debated the criminal question. The writings of Montesquieu, and even more those of Voltaire, Rousseau, Beccaria, Condorcet, and others, developed a line of thinking that one could call "judicial idealism." Judicial idealism held that criminality was caused not so

18 Debuyst, ed., *Histoire de la criminologie française*, 71.

19 A. Forrest, *La Révolution française et les pauvres* (Paris, 1986), 46.

20 G. Procacci, *Gouverner la misère: La question sociale en France (1789-1848)* (Paris, 1993), 14.

21 Foucault, *Surveiller et punir*, 99-106.

much by corrupted customs or the original sin but by badly organized secular institutions. It is significant that at that time there was no discourse connecting the urban working class and the "dangerous classes," even though in Paris at least, "four-fifths of the violent acts committed between 1765 and 1785 were attributable to journeymen or workers born outside the capital." That is to say, if Paris breathed "order and tranquility" those men who were soon to be labeled "savages" were already in the city.<sup>22</sup> To members of the working classes, poverty and criminality intermingled in reality, but in a remarkable sociopolitical configuration a large part of the elite considered that the danger did not come from the bottom but from the top.

The diagnosis of a natural corruption of the individual was transferred into the institutions. This remarkable moment was studied in detail by Hans-Jürgen Lüsebrink, in his analyses of the literature of the "famous trials," for which Louis-Dominique Cartouche (1693–1721) and Louis Mandrin (1724–55) were the key figures, and his analysis of the memoranda presented at the provincial academies.<sup>23</sup> Of course, literature about crime already existed in the seventeenth century in the *Tragical Stories of Our Times* (*Les histoires tragiques de notre temps*) by François de Rosset (1614), *The General History of Thieves* (*L'histoire générale des larrons*) by François de Calvès (1623), *The Spectacles of Horror* (*Les spectacles d'horreur*) by Jean-Pierre Camus (1630), and in ballads and tales, always useful for biographies of famous criminals. Two important changes took place: the amplification of those discursive circles that were initially confined to a popular public to all levels of society, and their new polemical usage. In the second half of the eighteenth century, the biographies of brigands published in the famous *bibliothèque bleue* often turned against the obsolete monarchy by criticizing its judicial power and by characterizing it as abusive and unfair. The narratives of trials or famous affairs revealed the arbitrary nature of the "lettres de cachet"; of procedural secrecy; and of the use of torture during interrogation.

The controversies in popular and literary representations of criminality can be found in the learned literature as well. Concerns about the criminal question and judicial reform are attested by the numerous examinations of these problems in theses by the learned societies and the academies. In 1777, for example, the Economic Society of Bern solicited proposals for

22 Arlette Farge and André Zysberg, "Les théâtres de la violence à Paris au XVIIIe siècle," *Annales E.S.C.*, no. 5 (1979): 1012.

23 Hans-Jürgen Lüsebrink, "Les représentations sociales de la criminalité en France au XVIIIe siècle," Ph.D. diss., Ecole des Hautes Etudes en Sciences Sociales, Paris, 1983.



"a complete and detailed project of criminal legislation" that would take into account (1) the principle of proportionality, (2) the nature of the evidence to be retained, and (3) how to reconcile an efficient judicial investigation with "the greatest possible guarantees for liberty and humanity." Voltaire and Jean-Paul Marat sent their own contributions. In 1780 the Academy of Chalons-sur-Marne called for a reflection "about the means to decrease the severity of the penal laws in France, without going against the public severity." Joseph Elzéar Dominique de Bernardi and Jacques-Pierre Brissot de Warville also submitted their reports.

The winds of philanthropy could be felt in most of these memoranda.<sup>24</sup> A reduction in punishment was advocated most often, and the authors considered the harshness of the laws a violation of citizens' rights that partially explained the increase of criminality. Beware those who failed to comply with the recommendations of the academies. At the Chalons-sur-Marne examination of 1780, for example, an author distinguished himself by asserting that excessive lenience by judges was at the origin of criminal behavior. The Academy's judgment was harsh: "He begins by saying that the penal laws are not severe in France. . . . It would be no use to go further in the analysis of this memo, which is very badly written and does not fulfill, in any way, the views of the Academy."

An analysis of fifty memoranda written between 1774 and 1788 by Lüsebrink showed that although half of the memoranda stated that the primary origin of all crimes lay in human nature itself, in the "vices" and "disastrous passions" of the human being, a multitude of social factors was cited to explain the evolution of and the increase in criminality. Human nature was cited as the cause of offenses twenty-seven times, but "social abuses" were cited thirty-eight times, and "juridical abuses," forty-three times.<sup>25</sup>

Of course, the Christian influence remained strong, and when the "human nature" of the offenders was cited as a cause, it was still referred to as sin and fault, and not as illness in the strict sense. The rare presence of medical terms should not be considered here as evidence of a criminological discourse because their use was generally metaphorical. This pathological register was mostly a polemical broadside against the judicial institution. In this way it was, for Brissot de Warville, the excessive frequency of punishment that was "a symptom of illness" for a government because "the man is not born an enemy of society." He did not hesitate to denounce the

24 Catherine Duprat, *Le temps des philanthropes: La philanthropie parisienne des Lumières à la monarchie de Juillet*, 2 vols. (Paris, 1993), 1:15-18.

25 Lüsebrink, "Les représentations sociales," 213.

criminality of the upper classes: "Attacks against the security and the liberty of the citizens are one of the greatest crimes, and in this category must be included not only assassination and theft committed by individuals of the people but also those committed by men in high places and the magistrates, whose influence acts on a larger field and with more force, destroying the ideas of justice and task in the mind of the subjects, and replacing them with the right of the strongest, a right that is equally dangerous for those who apply it and those who are subject to it."<sup>26</sup>

Most of these works undermined the bases of the political legitimacy of the state. In his *Plan of Criminal Legislation*, which was subsequently destroyed, Marat wondered whether there was "no government in the world that can be considered legitimate" and whether obeying the laws was not a matter of calculation rather than duty.<sup>27</sup> It was recalled recently that Beccaria's famous *Dei delitti e delle pene* was not only a treatise on rights but also a pamphlet on equality. Hence, the penal question was a pretext to treat "the reform of society and state in a more general manner."<sup>28</sup> Moreover, there is a passage of a work where Beccaria identified himself as a brigand. In these surprising lines, seldom cited, the author devoted himself to what criminologists today would call cost-benefit analysis, but the reasoning of his imaginary offender was miles apart from the one that certain criminologists attribute to Beccaria. Let us recall this passage: "What are [as the offender would say] those laws that we must respect and that make so many differences between the rich and me? He refused me a penny when I asked him and, as an excuse, exhorts me to work, which he could not do himself. And those laws, who made them? Rich and powerful people who never deigned to visit our dark cottages of poverty."<sup>29</sup>

Because the poor benefited little by respecting the laws and the costs for doing so are high, the reformer continued, it was necessary to break "those ties that are disastrous for most men and that benefit only a small number of idle tyrants," to attack "the injustice at its root" and return to "the natural state of independence." Beccaria ended with an imaginary monologue of the

26 Jacques-Pierre Brissot de Warville, *Les moyens d'adoucir la rigueur des lois pénales en France, sans nuire à sûreté publique, ou Discours couronnés par l'Académie de Châlons-sur-Marne en 1780* (Châlons-sur-Marne, 1781), 23-4.

27 Pierre Lascoumes, Pierrette Poncela, and P. Lenoël, *Au nom de l'ordre (une histoire politique du code pénal)* (Paris, 1989), 29-30.

28 Mario Sbriccoli, "Beccaria ou l'avènement de l'ordre: Le philosophe, les juristes et l'émergence de la question pénale," in Michel Porret, ed., *Beccaria et la culture juridique des Lumières* (Geneva, 1997), 178.

29 Cesare Beccaria, *Des délits et des peines* (1764; reprint, Paris, 1991), 80.

legitimate offender and by conjuring the ghosts of Mandrin and Cartouche: "At the head of a small troop I will correct the errors of fortune and see the tyrants turn pale and tremble in front of the ones whom their insolent arrogance treated worse than their horses and dogs."<sup>30</sup>

#### THE PENAL CODES AND PENAL KNOWLEDGE IN REVOLUTION

Hence, what appears in France at the end of the eighteenth century is the emergence of new discourses on a criminality that not only is understood in its religious dimensions but also as a social and political phenomenon. This emergence expressed itself in the popular literature, as well as in penal policies that were proposed to prevent the crimes. Enemies and public servants of the absolutist monarchy attacked the great proliferation of royal laws. In spite of the failure of a last-ditch attempt at reform in 1788, the will to modify the penal law had been supported by the Enlightenment philosophers, who applied themselves mostly to the question of the legitimacy of the right to punish, and the magistrates, who were anxious to rationalize their practice.

These concerns were clearly visible in the penal field through the publication of numerous annotated collections of royal ordinances. The common point made by all the educated men who argued about the criminal question just before the Revolution was the possibility of building a new social order in order to restore the social fabric and to change men.<sup>31</sup> These hopes were often expressed as a "judicial idealism," translated into a shared hope for the capability of the laws – as long as those were just – to reform customs and to regenerate society. Denis Diderot summarized this spirit perfectly in his *Supplément au voyage de Bougainville*: "If the laws are good, the customs are good, if the laws are bad, the customs are bad."<sup>32</sup> Besides, it was not by accident that the figure most frequently called for in a revolution was precisely the legislator, who has the "power to institute, and is capable of carrying out the mutation from savage world to civilized world."<sup>33</sup>

In the minds of some people these laws would even aim at correcting the inequalities of nature: "The social state does not establish an unjust inequality of the rights near the natural inequality of the mean. . . . On the

<sup>30</sup> Ibid., 131–2.

<sup>31</sup> Mona Ozouf, *L'homme régénéré: Essais sur la Révolution française* (Paris, 1989).

<sup>32</sup> Denis Diderot, *Supplément au voyage de Bougainville* (1772; reprint, Paris, 1993), 178.

<sup>33</sup> Ozouf, *L'homme régénéré*, 462.

contrary, it protects the equality of the rights against the natural but harmful influence of the inequality of means," as Abbé Sieyès wrote in 1793.<sup>34</sup>

Observing the priorities in the complaints coming out of the *cahiers généraux*, the Constituent Assembly was very active on matters concerning the reform of judicial institutions. On June 12 and 13, 1791, Etienne Michel Le Pelletier de Saint-Fargeau (1760–93), in the name of the committees for criminal legislation and the constitution, presented to the Assembly a penal code that, according to Jacques-Guy Petit, was a "synthesis of Enlightenment thought." Le Pelletier based the new system of punishments on the principles of "humane" punishments, "proportionate" to the crime, "fixed and determined," "durable" and "public" and essentially based on a deprivation of freedom at three different levels: jail, detention, and prison.

Le Pelletier placed his hopes in the reform of the criminal through confinement and forced labor, which made the 1791 law a real "code of utopia."<sup>35</sup> His whole proposal was permeated by the juridical idealism that belonged to the reformist philosophy, and it pointed once again to institutions as the source of criminality: "Despotism prevails everywhere. It has been noticed that crime is on the increase; this is not surprising since the individual is degraded; and it could be said that freedom, similar to those strong and vigorous plants, soon purifies any evil in the fortunate ground from which they spring."<sup>36</sup>

Le Pelletier's report was not accepted to the letter. Although Maximilien Robespierre, Jérôme Petion, and Adrien Duport joined him in defending the abolition of capital punishment, this punishment remained in the repressive arsenal. This retention was more than just symbolic, but very revealing in that it sanctioned an exclusive interpretation of the social contract. From this date, in effect, the person of the "delinquent-citizen," as defined by Beccaria, was no longer considered to be inviolable. The positive right of the state was asserted at the expense of the natural rights of the individual. This was based on a new vision of the offender: There are some cases when society applies capital punishment when the offender is not quite a man.

The Legislative Assembly, which met for the first time on October 1, 1791, did not challenge the work of the Constituent Assembly, and adopted the final text of the code on October 6. The great novelty of this first French penal code – which represented a break as much radical as ephemeral

34 Emmanuel Joseph Sieyès, "Des intérêts de la liberté dans l'état social et dans le système représentatif," *Journal d'instruction sociale (par les citoyens Condorcet, Sieyès et Duhamel)* 2 (June 8, 1793): 33–48.

35 Jacques-Guy Petit, *Histoire des galères, bagnes et prisons (XIIIe–XXe siècles): Introduction à l'histoire pénale de la France* (Toulouse, 1991), 46–8.

36 Lascoumes, Poncela, and Lenoël, *Au nom de l'ordre*, 353.

because the 1810 code modified its terms – was the fixed nature of the punishments.

The reformers considered the penal code to be the best instrument for fighting the arbitrariness of judges, by putting into practice Beccaria's syllogism: "the major must be the general law, the minor the act in relation with the law, the conclusion will be the acquittal or the sentence."<sup>37</sup> The old system of legal proofs was abolished: The judge would no longer accumulate "complete," "light," "half-complete" evidence, and "distant clues" in order to come to his decision. As a sign of the reformers' Anglophilia, a jury was to render its verdict on the most serious crimes. The power of the judge in these cases was limited to ratifying the decision of the jurors by applying the punishments prescribed by law. The judges did not have any latitude to modify the punishment with what was later called "extenuating circumstances" and what the judges of the ancien régime had called "diminished responsibility."

In spite of the refusal to abolish capital punishment, the French penal code was influenced by the voluntarism of politics and philosophy that guided the party of the most learned reformers. The culpability of offense against religious morality disappeared. The shared belief in the perfectibility of the individual was perceptible, as much in the retention of old, dissuasive punishments (iron collar, public exposition, loss of civil rights) as in the new measures taken to rehabilitate the criminal through work.

If the regeneration of society was effected by enforcing just laws, then it was accompanied by the true education of the citizens. For this purpose Le Pelletier de Saint-Fargeau had written a plan for public education, which he considered a necessary complement to the promulgation of the penal code. Considering that "the human species" had been "degraded by the vice of the old social system," Le Pelletier was "convinced of the necessity to cause an entire regeneration."<sup>38</sup>

Conscious of this necessity and urgency, the doctors also worked at the end of the century on this regeneration through an increased knowledge of man. As far back as 1790, Pierre Jean Georges Cabanis dreamed of prisons that would be "true infirmaries of crime." This was not a simple rhetorical analogy but a true identity link because the doctor-philosopher did mention the county of Oxford, where the prisoners were put in jail and reformed by

<sup>37</sup> Beccaria, *Des délits et des peines*, 67.

<sup>38</sup> Michel Le Pelletier de Saint-Fargeau, "Plan d'éducation nationale présenté aux Jacobins par Félix Le Pelletier, lu à la Convention le 13 juillet 1793 par Robespierre au nom du comité d'instruction publique," in *Oeuvres* (Brussels, 1826), 267–330.

work; thus, "the curative method was discovered, by means of which the crime can be treated as another form of madness."<sup>39</sup>

In 1804 the famous report titled "Relations Between the Physics and the Morals of Man" established the basis for a general science of man, for an "anthropology" that would try to ascertain the factors influencing man's intellect.<sup>40</sup> Yet, this new science could be achieved only by keeping the philosophical work of the Enlightenment at arm's length. Whereas in *De l'esprit* (1758) and *De l'homme* (1772) Claude Adrien Helvétius (1715–71) defended a "psychology" that was based only on physical sensibility and the search for individual physical pleasures, and whereas the perfectibility of man through education seemed unlimited, Cabanis estimated that the way these sensations were received varied depending on the individual's sex, primitive organization, nature, age, health, climate, physical traits, and eating habits. The study of these variations was as useful for the doctor as for the moralist and the legislator because these factors could influence the subject's decision-making capability. Any confusion of the sensations, the impressions, or the instinctive determinations necessarily limited the free will.

While the physiological ideology built a research program that contradicted the certainties of the anthropology that had guided the first codifications, the spirit of the laws evolved in the direction of a rejection of judicial idealism. After Thermidor, it was time for a stabilization of society and its institutions.<sup>41</sup> During the discussion of the civil code in 1804, Portalis openly accepted social inequality as legitimate, justified by the nature and the birth of individuals: "It is not to the right of property that inequality amongst men must be attributed. Men are not born equal in size, force, industry, or talents. Chance and events also create differences between them. Those primary inequalities, which are the very work of nature, necessarily entail those that are observed in society."<sup>42</sup>

The reversal of the debates that took place before the Terror was clear: The priority no longer was to invent a new society but to preserve it. It was necessary to re-establish it and maintain social order. The civil code was followed by the code of civil procedure (1806), the commercial code (1807), the code of criminal procedure (1808), and, finally, the new *code penale* (1810). The preliminary measures and the primary book were presented

39 Pierre-Jean-Georges Cabanis, *Observations sur les hôpitaux* (Paris, 1790), 6.

40 Pierre-Jean-Georges Cabanis, *Des rapports du physique et du moral de l'homme* (Paris, 1980), 554.

41 Bronislaw Baczko, *Comment sortir de la Terreur: Thermidor et la Révolution* (Paris, 1989); Martin S. Staum, *Minerva's Message: Stabilizing the French Revolution* (Montreal, 1996).

42 *Naissance du code civil: La raison du législateur* (Paris, 1989), 274–5.

to the State Council (Conseil d'Etat) on October 4, 1808, discussed, and then adopted on October 3, 1809. On the same day the project was sent to the civil and criminal legislative commission of the legislative corps, which remarked on it. The council adopted this section in January 1810. The same procedure was followed for each section of the code. It was definitively adopted (240 votes to 16) by the legislative corps without public debate and promulgated on February 23, 1810.

With this, the Consulate ended the work of codification with which the Revolution had begun. This is understandable because Portalis thought that penal laws were "less a special sort of law than the sanction of all other laws." However, if penal laws did not have any other aim than supporting the principles that other laws had invoked, one must wonder why the Consulate undertook to draft a new penal code twenty years after Merlin de Douai's first reform. The only survey of the motives for the 1810 code can be found in the presentation of the preliminary explanation and rationale for the reform (*exposé des motifs*) made by Jean-Baptiste Target (1723-1810) in 1801 before the State Council: "Vices are the roots of crimes. Should it be possible to eradicate them, then the law would no longer have to punish. Though for a genius, passionate for the love of good, the improvement of the human race is no chimerical thought, it is a very slow process, to be carried out by wisdom, perseverance, and time. Every day, however, society must be maintained and quick remedies must be found for present calamities: such is the aim of criminal laws and the penal code."<sup>43</sup> A complete change is reaffirmed: Safety becomes more important than the reform of customs. The final code no longer sought to improve individuals or to protect them, but to maintain society.

Indeed, for Target, "real wisdom respects humanity" but should not sacrifice "public safety." The principle of the complete rehabilitation of the offenders was questioned, and on this point Target disagreed with the spirit of the lawmakers in the Constituent Assembly: "An idea of perfectibility, rarely applicable to all men generally, even more rarely to souls that have been altered in crime, and nearly chimerical for those who were soiled by horrible crimes or for whom deep corruption appeared in the repetition of offenses, had embellished in their eyes the principle adopted by our first lawmakers."<sup>44</sup>

<sup>43</sup> Jean-Baptiste Target, "Observations sur le projet de code criminel," in Jean Guillaume Loaré de Roissy, ed., *La législation civile, commerciale et criminelle de la France ou Commentaire et complément des codes français, 1827-1832*, 31 vols. (Paris, 1801), 29:7.

<sup>44</sup> *Ibid.*, 16.

The penal code of 1810 marked the final break with the reformist thought of the Enlightenment and the initial move toward the realistic management typical of the nineteenth century. Moreover, the presentation of the code project constantly rode roughshod over the idea of citizenship and the principle of the uniformity of punishment. Indeed, Target remarked that society was made up of classes, some helped by "enlightenment," supported by education, and others degraded by destitution. Although he thought that the distribution of punishments unfortunately could not be carried out according to the "characters" and "tendencies" of individuals, he asserted that the code should take into account the status of the individual as much as the nature of their crime because "the lawmaker's reason" would no longer accept being "fed an abstraction." Thus, customs should be considered.

This development was not so much one of transformation but one of accommodation, control, and pacification. The state would from now on pay full attention to the real society: "The societies to which laws are given should be considered as they are and not as they should be."<sup>45</sup> The nineteenth-century penal code, the code of the criminologists, sealed a durable compromise between monarchical law and revolutionary law. On the one hand, the code of 1810 preserved certain principles of the revolutionary law, including the principles of the legality of punishments (Article 4), equality before the law, and finally that of the division of offenses into three categories: contraventions, offenses, and crimes. On the other hand, the code abandoned the principle of fixed punishments that had been so close to the reformers' hearts by introducing the principle of mitigating circumstances. Even if these were at first limited to contraventions, one of the nineteenth-century trends consisted precisely in extending this modulation to the two other offense categories. The short period of judicial idealism was thus closed, and for a long time.

#### CONCLUSION: ONE CRIMINAL QUESTION, SEVERAL ANSWERS

At the end of the eighteenth century, France was marked by a period of political and legal transformation that completely changed the problem of how to manage deviancy. The society that evolved after the great Revolution had a new way of perceiving the social bonds and the legal character of the right to punish.

In this new context, the criminal question left to the nineteenth century involved an equation between two unknown quantities, both linked to

<sup>45</sup> *Ibid.*, 9.



the relation between individual and society. The first unknown looks like a statement: Crime is persistent. Many reformers thought that economic progress and an increase in the standard of living would make crime increasingly rare – or that it would disappear altogether. A few revolutionaries (Barère, Lanthenas, and so forth) sincerely thought that they would be able to cure society of crime and destitution. These speeches did not deceive the listeners for very long when they were confronted with the daily exercise of power.

Disillusionment came quickly because the problem had to be dealt with, but, in the longer term, these dreams of a government cure were lost because industrialization did not turn out to be the appropriate remedy. Afterward, not only did the persistence of crime have to be explained but also the unexpected relationship between the progress of civilization and the progress of crime. Because it no longer could be said that crime was related to political despotism, other causes were sought. One theory occurred to all specialists, such as doctors, lawyers, moralists, psychologists, theologians, and sociologists: The more a society perfects itself, the more the individual's morality declines. This diagnosis was repeated in the nineteenth century by Morel and Durkheim, among others, but it can still be found in the writings of some criminologists today, with all related commonplaces: Criminality of young people is more severe, a return to "good values" is necessary, and the prison and judicial systems are in crisis.

The second unknown factor in the equation is the individual's right to resist. The formula of the philosophers of the Enlightenment Century was clear from a theoretical point of view: "the consensus of all persons against the arbitrariness of one person." However, if we look at it more closely, judicial idealism found a solution that was incompatible with the exercise of power. The social bond was tied to the fiction of a "social contract," freely consented to by all, which assumed that everybody had good reason to adhere to it. Robert Castel noted that six categories of individuals were going to pose problems for this new idea of sociability throughout the nineteenth century: criminals, vagrants, beggars, children, lunatics, and proletarians. For Castel, however, only the lunatics clearly showed the limit of contractual legalism because only those individuals necessitated neutralization "by other means than the ones of a juridico-policy apparatus."<sup>46</sup> Thus, "the repression of the lunatic will have to lie on a medical ground, whereas the repression of the criminal immediately has a juridical ground."<sup>47</sup>

<sup>46</sup> Robert Castel, *L'ordre psychiatrique (l'âge d'or de l'aliénisme)* (Paris, 1976), 56.

<sup>47</sup> *Ibid.*, 41.

Was the criminal personality so different from the lunatic's? A priori, it was. A lunatic cannot use his reason. He is insane, cannot take advantage of his freedom and, as a result, cannot understand the social contract: If he breaks it, it is because he does not know it, not because he questions it. Therefore, the offense of a lunatic is not a direct political threat to the power of the establishment. The criminal is the opposite because the imputability of his crime lies in his ability to use his reason and his freedom of will. His actions remain to be understood: Why does the offender choose to transgress the law? Why does a minority refuse the rules of the game? Foucault clearly showed how these questions brought out the contradictions of a repressive machine that theoretically assumed individual freedom of will but whose judicial procedure never ceased looking for the reasons that pushed the individual into committing an offense. On the one hand, the juridical discourse insisted on the freedom of will; on the other, morals claimed a causal relationship. Crime could be understood only in analogy with economic exchange: It would not be "free." In this juridico-moral conflict the offender's freedom quickly became quite chimerical, and justice was entirely unprepared to confront horrible crimes for which no explanation could be found.

If lunacy and criminality were mutually exclusive in the juridical register, they never stopped being systematically combined in the normative register of erudite speeches. Let us consider this question of overlapping in action from another point of view: If we agree with Durkheim that crime is an attempt against the "strong states of collective consciousness" or, to update the expression, to the values of the dominant group, we can see how subversive an offense can be. To commit an offense while being conscious of one's acts is no longer only risking a punishment because you gave in to temptation, as it was according to the system of ancient right; it also is a refusal of the order and the symbolic values of a society that derives its legitimacy from the individuals who compose it. How can a being in possession of intellectual faculties make himself an outlaw and act against his own and everybody else's interest from his own free will?

The reformers of the "century of Enlightenment" answered this question depending on their political situation. Under the ancien régime the social contract was not kept by the government. And if the criminal – this is Beccaria's example – transgressed the law, it was because he has good reason to do so, pushed by hunger and destitution, disheartened by the inequity of laws and corruption of powerful people. But such an argument could not be endorsed by postrevolutionary politicians. If social cohesion was to be preserved, the contractual system demanded that something other than old Christian liberty to do evil be invited, because the moral statistics were

showing a spread of evil and criminal offenders were exposing the failure of the carceral system through their recidivism. This second gap was filled with a soft determinism, apolitical and guaranteed by scientific objectivity. The doctors – legists, phrenologists, hygienists – were the first ones to try and cure the new society; soon they were assisted by many specialists in the human sciences, which led to new institutions.<sup>48</sup> Crime paid in those times, and everyone claimed to have discovered the solution to the criminal question. We have not solved it yet.

Far from being a time of confusion, the Revolution has turned out to be a key period for the emergence of French criminology. It was at that time that new judicial and medical representations of the criminal appeared. With the benefit of hindsight, one can see that the opposition between free will and determinism was a polemical artifact that never curbed the repressive machinery. In actual practice, compromise prevailed, both in the theories about criminology and in the judicial system.<sup>49</sup> Research in the French sphere validates recent analyses on the social construction of theories and on the failure of the same when practically applied. In fact, the transformations that occurred in the course of the nineteenth century were already present in Target's report, that is, the decline of the reformers' hopeful expectations and, as early as the middle of the century, the criticism – which was not specific to France – of places of confinement such as prisons and lunatic asylums.

48 Marc Renneville, *La médecine de crime (1785–1885)* (Lille, 1997).

49 See the chapter by Peter Becker in this volume.