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A Critical Method for the Evaluation of Evidence: François Gorphe's (1889-1959) Contribution to a Science of Proof à la française

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Abstract: In his 1924 book *La critique du témoignage*, the French judge François Gorphe (1889-1959) advocated the need that evaluation of evidence be based on the best scientific knowledge available. Drawing upon an extensive knowledge of the experiments conducted by contemporary forensic psychologists, Gorphe urged judges to consider forensic psychology when interrogating witnesses and, ultimately, when evaluating evidence. Gorphe imposed himself as one of the main promoters of a science of proof in France. This paper examines Gorphe's contributions and the audience they received among forensic psychologists and criminologists in France and abroad. Despite their originality and anchoring in international scientific discussions, Gorphe's views have not encouraged the creation of an academic domain interested in evidential reasoning in French law faculties. The paper concludes with an examination of the reasons for the limited posterity of Gorphe's approach.

Keywords: History of evidence theory; Evidential reasoning; Science of proof; Forensic Psychology; Psychology of Testimony

« Dans une conception rationnelle de la justice, et notamment des preuves, la conviction qui emporte la décision doit être l'aboutissement logique d'un examen analytique des faits et d'une appréciation critique des éléments de preuve. Elle passe ainsi de l'état de simple croyance subjective à celui d'une véritable connaissance objective, communicable et contrôlable »¹

Introduction²

In 1928, at the height of his academic renown, the American specialist in the law of evidence and criminologist John Henry Wigmore (1863-1943) gave a laudatory account³ of a book recently published in France by the publisher Dalloz, entitled *La critique du témoignage* [The Critique of the Testimony]⁴. Wigmore praised it lavishly: « May we have such a book in English! ». The book, published in 1924 and quickly reissued for a second edition, was based on the thesis of a young French magistrate, François Gorphe (1889-1959). Wigmore's praise was not without ulterior motives, for Gorphe's book explicitly followed the path opened up by Wigmore himself⁵, who found a relay for his ideas in France, while reaffirming the anteriority of his own work: « And yet in France and the Continent generally the profession at large has not been appreciably in advance of the Anglican profession in realizing the possibilities of psychological and logical science as applied to judicial evidence. This is the first French treatise on the subject ». Indeed, Gorphe later returned the compliment to Wigmore, noting in relation to *The Principles of Judicial Proof* (1913), « There is no equivalent in Continental law »⁶.

François Gorphe was a pioneering author in France in the development of a science of proof. He affirmed the need for judges to draw on the knowledge developed in the field of psychology to reinforce the rigour of their investigations, suspects interrogation techniques and, eventually, evaluation of the evidence presented to them. As Gorphe put it, French legislation and case-law recognized that judges have « an absolute power of appreciation » of evidence: « Here is the judge left by the legislator to his own means, to the “flair” that he has or is supposed to have, we would say to his divination instinct. This is truly a heavy honour, indeed! »⁷. Therefore, the (incomplete but far-reaching) suppression of the legal proof system in France has broken « the old chains », but also

1 GORPHE, 1947: 18.

2 I am grateful to Catherine Fillon for her valuable help in identifying archives on François Gorphe and for her extensive knowledge on the history of the law faculties in France. Any mistake obviously remains all mine.

3 WIGMORE, 1928: 605.

4 GORPHE, 1924.

5 WIGMORE, 1913b (in his last published pieces Gorphe referred to the third edition published in 1937 under the title *The Science of Judicial Proof* [Wigmore, 1937]).

6 GORPHE, 1947: 21.

7 GORPHE, 1924: 11.

created the risk that the judges' reasoning be guided by « emotional intuition »⁸. In order to guide this work and to avoid errors of reasoning as much as possible, « it is indeed to science that one must deliberately resort »⁹.

Gorphe was born in Bordeaux (France) on 14 June 1889. He attended secondary school in Périgueux, his parents having settled in the Dordogne (commune of Douzillac), in the Southwestern part of France. After passing his baccalaureate at the age of 16 (1905), he studied law at the University of Bordeaux, from which he graduated in 1908. In the years preceding the First World War, he continued his legal training with a view to exercising a judicial profession (he graduated from the *Institut Pratique de Droit* of Bordeaux in 1913, then worked successively as a trainee lawyer and a trainee judge at the Court of Bordeaux from that date¹⁰), in parallel with a job at the *Banque de France*, obtaining a postgraduate degree [*diplôme d'études supérieures*] in philosophy and fulfilling his military obligations (Gorphe entered the army in 1910 and was placed on auxiliary service. From 1912 he was placed on standby duty until the general mobilisation decree of 1 August 1914)¹¹. Following his demobilisation in 1919, Gorphe was appointed deputy judge at the civil court of Libourne. His career¹² continued in various courts of first instance in western France: Marennnes (1922-1926), Bressuire (1926), and Poitiers (1926-1927). In 1927, he was appointed judge at the Lille court of first instance, where he practised until 1932, when he became a judge at the Poitiers Court of Appeal, then President of Chamber until his retirement on 10 June 1959.

During his career, Gorphe's worked mainly as an active sitting judge, but during the years 1920-1926 he was an investigating judge and, for a short period of time in 1926, prosecutor. During this period he also prepared his first doctoral thesis in political and economic sciences¹³. The dissertation, entitled *La critique du témoignage*, was defended at the University of Paris in 1924 and published shortly after by Dalloz¹⁴. In 1928, Gorphe defended a second thesis, in legal sciences, entitled *Le principe de bonne foi*

8 GORPHE, 1947: 17. Wigmore had made a very similar assumption earlier: « For centuries, lawyers and judges had evidenced and proved by the artificial numerical system; they had no training in any other, – no understanding of the living process of belief; in consequence, when “legal proof” was abolished, they were unready, and judicial trials have been carried on for a century past by uncomprehended, unguided, and therefore unsafe mental processes. Only in recent times, under the influences of modern science, are they beginning to develop a science of proof » (WIGMORE 1913a: 78).

9 GORPHE, 1924: 11.

10 Arch. Nat. 19800035/417/55805.

11 *Military service record* (regimental number: 1909/86).

12 *Annuaire rétrospectif de la magistrature, XIX^e-XX^e siècles*, V^o François Joseph Gorphe.

13 In 1856, the doctorate in law was divided into two separate diplomas, one in political and economic sciences the other in legal science. Defending two theses was not uncommon in law faculties. Holding a doctorate was not compulsory for judges, yet it could boost their career. In contrast, those hoping to become academics would usually defend two theses. As he already worked as a judge, Gorphe had no obligation to even defend one thesis, not to mention defending two of them. At some point, he might have considered joining the university although no other indication of such a project has been found.

14 GORPHE, 1924.

[The Principle of Good Faith], also published by Dalloz in 1928¹⁵. If his second thesis earned Gorphe the fairly prestigious *Limandour Prize* from the *Académie des Sciences morales et politiques* (Legislation Section)¹⁶ on the proposal of Henri Capitant¹⁷, it was *La critique du témoignage* that established Gorphe's reputation. In 1927, Dalloz published a second edition of the book – this was unusual for a doctoral thesis – which resulted in the publication of reviews in scientific journals both in France and abroad. In this book, Gorphe defended the idea that although testimony is fallible, it is possible to develop a critical method of analysis that allows for a determination of its value. His analyses were nourished by a vast literature in forensic psychology, in French and other languages, and by the personal experience he had accumulated as an investigating judge in courts of first instance since 1920. According to Gorphe, the assessment of testimony cannot be handled solely as a matter of logic (internal coherence, concordance or contradiction between testimonies), but also of psychology, « especially affective psychology »¹⁸. The mental habits of judges play a central role in the evaluation of evidence. However, testimony may lead to truth as much as to error. Hence, testimonial criticism must classify and analyse errors: « Errors, like diseases, must, in our opinion, be carefully analysed and determined in their character, causes and symptoms; their nosology, etiology and semiology must be established »¹⁹. This endeavour led Gorphe to analyse the types of errors affecting testimony according to their object, the cognitive functions to which they relate (perception, memory, imagination, judgement, will), their form (errors stemming from substitution, modification, transposition, fusion or confusion, dissociation, entrenchment, addition, invention, errors of comprehension, errors in estimating quality or quantity), their causes (inventions, hallucinations, confabulations, misinterpretations, illusions). The identification of these errors by judges (Gorphe coined the term « testimonial diagnosis ») presupposes not only that they have good knowledge of the possible errors but also that they apply analytical methods to detect them. Gorphe thus presented a wide range of appropriate interrogation techniques and examination methods available to judges (mental examination, psychological tests, psycho-diagnostic apparatus, method of associating ideas, psychometric tests). The analysis of testimony also requires, Gorphe asserted, an analysis of the personality of the witness, since although the witness is an « instrument of proof (...) infinitely superior to those constructed by men, it does not have the security or precision of such an instrument »²⁰. It is therefore incumbent on judges to analyse the morality of witnesses, their intellectual capacities, affective dispositions (interest, passions) and psychological states (alterations and mental illnesses). Likewise, the material conditions in which a witness perceived the facts he or she is reporting must be carefully examined as they bear a decisive influence on sensory perception and recognition. As experimental psychology had demonstrated, witness identifications are « an essentially affective phenomenon, residing in an impression of the familiar, of the

15 GORPHE, 1928.

16 *Séances et travaux de l'Académie des sciences morales et politiques*, 1929, p. 387.

17 Capitant sat, together with Lévy-Ullmann and Julliot de la Morandière, in the thesis defence jury. The three of them had a certain academic prestige.

18 GORPHE, 1924: 40.

19 GORPHE, 1924: 54.

20 GORPHE, 1924: 120.

already known, before being expressed in a judgement of identity »²¹. Gorphe also examined memorization processes and warned that judges must evaluate how the erasure of memories affects the reliability of the testimony offered by a witness. Gorphe finally recommended practical techniques for hearing witnesses and evaluating the value of their statements based on the lessons of experimental psychology.

Throughout his career as a magistrate, Gorphe continued to promote the approach initiated in his 1924 work, regularly publishing articles and books until his death in 1959. In 1947, Gorphe published a book entitled *L'appréciation des preuves en justice: essai d'une méthode technique* [Assessing Evidence in Court: a technical method]²², in which he generalized the analysis carried out in 1924 on testimony by including all the evidence submitted to judges. In this book, which is the most complete of those published by Gorphe²³, he took up the essence of the demonstration he proposed in 1924; completing analyses relating to the logical investigation of evidence (here mostly based on Wigmore [WIGMORE, 1913]). Gorphe not only presented the psychological theories useful for the analysis of testimony, but he also analysed the scientific principles that must guide the evaluation of other evidence like written documents, confessions and statements, clues and presumptions. Shortly afterwards, in 1952, Gorphe published a last book entitled *Les Décisions de justice: Etude psychologique et judiciaire* [Judicial Decisions: A Psychological and Judicial Study]²⁴, which essentially combines his previous work on the evaluation of evidence with insights on the psychology of judges when performing the act of judging. Gorphe's analysis on the reasoning of judges focused mainly on the interpretation of the law and on legal qualification and proved to be less innovative. In this book, Gorphe mostly referred to the professional discipline that he claimed judges must adhere to (e.g. rising above individual preferences, the love of justice). Although Gorphe extended his analysis not only to the evaluation of evidence but also to judicial decision-making, his arguments on legal reasoning and the psychology of judges didn't attract as much interest as his work on evidence.

Gorphe's publications display a real continuity in his analysis. The author's primary originality lies in the fact that he has been able to overcome two limitations inherent in the literature on which it was based: beyond mere testimony, he generalized the evaluation to all types of evidence; beyond the mere appreciation of evidence²⁵, he investigated the contributions of forensic psychology to the analysis of all operations involved in the determination of facts, including the decision of judges. In spite of the

21 GORPHE, 1924: 312.

22 GORPHE, 1947.

23 For this book Gorphe was awarded the *Dupin Aîné prize* of the *Académie des Sciences morales et politiques*, together with Paul Roubier's *Théorie générale du droit* (*Revue des travaux de l'Académie des sciences morales et politiques et comptes rendus de ses séances*, 1947, p. 141 and p. 181).

24 GORPHE, 1951.

25 Twining emphasized the « narrowness of focus » of Bentham, and Wigmore after him, who concentrated on « formal determinations of liability and guilt in respect of questions of fact by judges or juries in trial » and mostly left aside the determination of facts « at other phases of legal process (such as negotiation and sentencing) or other arenas (such as arbitration and administrative tribunals) » (TWINING, 1985: 176). Although Gorphe did not deliver such an all-encompassing vision, he sought to highlight the contributions of forensic psychology at all stages of the trial.

limits and inadequacies that can be found in Gorphe's proposals, his project remains highly topical and open to potential development. Gorphe himself very quickly became clearly aware of the ambition and scope of his project – a project whose publication would take him a lifetime. Indeed, most of his analyses had been in fact developed, if not published, before World War II: his 1947 book was written before the war²⁶ and a good part of the examination published in his 1952 book had been published separately in the early 1930s²⁷.

Gorphe's analysis reflects the way in which developments of positivism in the social sciences in the late 19th century pervaded legal scholarship. In a 1950 newspaper article, the then-famous specialist of international criminal law and French judge at the Nuremberg trials, Henri Donnedieu de Vabres²⁸ referred to Gorphe as opening a new scientific era in the analysis of evidence:

In the history of repression, a scientific phase follows the metaphysical phase and the legal phase. The Paris congress [second international congress of criminology, 1950] has only broadened a development that the recent works of Mr. Gorphe, president of chamber at the Poitiers Court of Appeal, have highlighted with regard to the theory of evidence. This movement, born of free scientific research, creates guarantees against arbitrariness. It is itself a generator of freedom²⁹.

The wording alludes to the law of three stages of Auguste Comte³⁰, but it also takes up the ideas developed by the Italian sociologist Enrico Ferri (1856-1929), who had a notable influence on criminologists at the beginning of the 20th century and heralded the time of proof in justice based on science³¹. Gorphe himself, moreover, inscribed his work in continuity with the then-influential historical method defended by Langlois and Seignobos³² and the efforts they made to give historiography a scientific foundation. Gorphe saw the work of jurists on testimony as a variation of the approach undertaken by historians³³: « historians, who have preceded jurists in the criticism of testimony, have established a triple critique of documents which is based on three main modes of alteration of the truth: the critique of interpretation, the critique of sincerity and the critique of exactitude »³⁴.

26 GORPHE, 1947: fn 1, p. 13.

27 Some articles are simply repeated in *Les décisions de justice* (1952) (GORPHE, 1931b, 1931c), others are substantially rewritten while remaining very similar in content (GORPHE, 1931a, 1931d, 1935a). An initial footnote in these articles indicates that they are part of a book « in preparation » or « to be published ». Twenty years passed before the announced book eventually appeared.

28 HALPERIN, 2007.

29 *Le Monde*, 27 Sept. 1950.

30 COMTE, 1830.

31 FERRI, 1884, translated in French in 1905. Ferri identified five stages in the evolution of evidence systems: ethnic, religious, legal, sentimental and scientific (FERRI, 1905: 507).

32 LANGLOIS, SEIGNOBOS, 1898.

33 This idea had already been supported by the psychologist and physiologist Jean Larguier des Bancelles in a text Gorphe had read and cited (GORPHE, 1924: 14), with an inaccurate reference. Larguier des Bancelles's mention of Langlois and Seignobos appears in LARGUIER DES BANCELLES, 1905.

34 GORPHE, 1924: 57. The same idea is advocated again in GORPHE 1947b: 146, with further reference to BERNHEIM, 1903 and DE SMEDT, 1883 : « Historians were the first to feel the need for [a scientific analysis of the testimony]: it is true that nothing is less certain than historical accounts, based on disappeared, unverifiable testimonies and [testimonies] not dictated by a pure concern for truth ».

Singular magistrate, Gorphe is one of the few in France who actively participated in the intellectual ferment of the years 1900-1930 in the development of a science of proof. He displayed a vast knowledge of experimental psychology, both from European and American sources, as the numerous references he quoted attest to (more than 600 in *La critique du témoignage*), not only in French but also in German, Italian, and English. In his numerous writings, on which he worked in addition to his activity as a judge, Gorphe advocated that the experimental knowledge of forensic psychology can improve forensic techniques and must be taken into account by judges when evaluating evidence (section 1). In Gorphe's view, « such a method has a general scope and is applicable in any judicial field ». Nevertheless, he admitted, « its importance is much greater in criminal matters »³⁵. Therefore, Gorphe devoted much of his efforts to interesting criminologists and criminal law specialists, particularly the post-World War II promoters of the « social defence », in contributions to forensic psychology (section 2). In so doing, Gorphe not only highlighted the contributions of forensic psychology for evidence; he also advocated changes in judicial training and a widespread diffusion of psychology-based techniques in courts, and even beyond. Hence, Gorphe posited his contribution at an equal distance from a theoretical contribution to the evaluation of evidence and a repertoire of professional technique, with all the awkwardness associated with this interstitiality (section 3).

1. Bridging forensic psychology and the analysis of evidence

At the turn of the 20th century, social psychology developed as a specific branch of psychology. Under the title of forensic psychology, part of this research was devoted to the study of psychological phenomena in the context of trials. The psychology of testimony was one of the main objects of analysis. In several European countries, physicians and psychologists set up experimental protocols in order to assess the reliability of testimony. In 1902, the German psychologist William Stern (1871-1938) published a study on the psychology of testimony³⁶, followed by a book³⁷ and shortly after by the creation of an ephemeral review (1903-1906) devoted to the same topic: *Beiträge zur Psychologie der Aussage*. In 1906, he founded the Institute for Applied Psychology in Berlin together with the psychologist Otto Lipmann. The institute hosted research on the psychology of testimony and suggestibility³⁸. Stern's 1902 and 1903 results soon gained interest outside Germany. In France, his experiments echoed Alfred Binet's (1857-1911) interest in the risk that investigators and judges unduly direct the answers of witnesses with leading questions; a risk Binet had already pointed out in 1900 in his noted book on suggestibility³⁹. Incidentally, he also expressed interest in creating a « practical science of testimony »⁴⁰. It does not come as a surprise, therefore, that the experiments carried out in Berlin aroused the interest of Binet, who drew the

35 GORPHE, 1947: 23.

36 STERN, 1902a.

37 STERN, 1902b.

38 LIPMANN, 1908; STERN, 1910.

39 BINET, 1900.

40 BINET, 1900: fn 1, 285.

attention of the French-speaking community to this work⁴¹. In 1904, Binet published in *L'Année psychologique* – the journal he founded in 1894⁴² – a paper where he highlighted the need for a « science of the testimony »⁴³. This call was shortly followed by the publication of two other contributions in *L'Année psychologique* offering detailed accounts of the experiments carried out in Switzerland by the psychologist and physician Édouard Claparède (1873-1940), in his own name⁴⁴ or in his laboratory in Geneva by Marie Borst⁴⁵. The same year, the psychologist and physiologist from the University of Lausanne Jean Larguier des Bancelles published a voluminous summary⁴⁶ of the work carried out in this field, with particular emphasis on the decisive contributions of Stern⁴⁷. This research paved the way for further investigation on memory and on the capacity of individuals to describe a scene or an image according to their personal characteristics, particularly when the witnesses are children⁴⁸. The reliability of ordinary testimony was strongly questioned, hence the need to analyse in detail the psychological mechanisms hampering perception, recognition and memory.

Forensic psychology received mixed interest from legal scholars. Bentham analysed the « psychological causes of the falsity or truth of the testimony »⁴⁹ but he grounded his views in universal experience much more than in science⁵⁰. The Austrian criminologist Hans Gross (1847-1915) is often praised for his early interest in experimental psychology as a necessary toolkit for investigating judges (his major contributions appeared in the last decade of the 19th century⁵¹). In the United-States, the route opened up by Gross was followed by Wigmore, who even dedicated *The Principles of Judicial Proof* to the memory of Gross, « who did more than any other man in modern times to encourage the application of science to judicial proof »⁵². Gross and Wigmore shared much in common. Both began their careers as legal practitioners (the former an investigating judge and the latter a lawyer) before embracing academic careers, at the University of Gratz (Austria) and Northwestern University (United States), respectively. Both devoted a significant part of their professional activity to the development of

41 Binet also took the opportunity to reaffirm his pioneering role in this field of research. His 1900 call for a science of testimony had not, he lamented, received the response it deserved: « One is never a prophet in one's own country, it is understood. This part of my book on suggestibility had no echo in France. (...) It was in Germany that the seed germinated » (BINET, 1904: 130). Over these precedence disputes, see WOLFFRAM, 2018.

42 NICOLAS, SEGUI, LEFRAND, 2000.

43 BINET, 1904.

44 CLAPARÈDE, 1905a, 1905b.

45 BORST, 1904. On the laboratory of psychology in Geneva and Claparède's turn to experimental psychology, see RATCLIFF, RUCHAT, 2006: 40.

46 LARGUIER DES BANCELS, 1905.

47 Larguier des Bancelles had already published in *L'Année psychologique* a laudatory review of Stern's 1902 article on the psychology of testimony (LARGUIER DES BANCELS, 1902).

48 The Belgian psychologist and pedagogue Julien Varendonck published several studies on the reliability of children's testimony: e.g. VARENDONCK, 1914.

49 BENTHAM, 1823: 44; BENTHAM, 1827:150.

50 BENTHAM, 1827: 110.

51 GROSS, 1906 (1893); GROSS, 1911 (1898).

52 WIGMORE, 1913b. Wigmore also paid explicit homage to Bentham. The proximities between Wigmore and Bentham have been analysed in depth by William Twining (TWINING, 1985).

criminology⁵³ and investigated the impact of psychology on witnesses and judges. According to Gross, psycho-criminology was a branch of criminology (« criminal phenomenology »)⁵⁴, with two main sub-fields: the knowledge of crimes and their investigation and subjective criminal psychology. Gross developed the latter subject in greater length in his 1898 *Kriminal Psychologie*, later translated into English at Wigmore's instigation⁵⁵.

By contrast, in France, forensic psychology received very limited attention in legal scholarship. With rare exceptions⁵⁶, this research was also ignored by legal practitioners. The publication of Gorphe's thesis in 1924 broke with this situation. Gorphe explicitly placed his book in the tradition of these authors:

But if testimony is as old as the world, the science of testimony is as young as our 20th century and it is not yet finished being born. It is true that some jurists have previously had some general ideas drawn from judicial practice, but that is all (...). It was then that Hans Gross published his famous *Practical Manual of Judicial Investigation*, a chapter of which is devoted to testimonies and contains the most valuable advice for investigating judges. Shortly afterwards, under the impulse of Binet in France, Gross and Stern in Germany, with the help of the recent progress of experimental psychology and clinical psycho-pathology, the first elements of the science of testimony were formed⁵⁷.

In his book, he extensively cited psychologists, whom he believed offered valuable resources for the improvement of the work of judges and investigators. This science of testimony has, he praised,

begun by destroying the « superstition » of the authority of testimony and demonstrating beyond doubt that error in testimony is the rule (in proportions to be determined), not the exception, and that the fidelity of testimony depends not only on the qualities of the witness, but on many factors relating to their mentality, the subject matter of their testimony and the conditions of their testimony⁵⁸.

Gorphe therefore advocated the development of psychological expertise in court, alongside the mental examinations already carried out by specialists in psychiatric disorders. Indeed, like many French psychologists in his time, notably Piéron, he believed that the results of pathological psychology shed light on the psychology of ordinary individuals. From then on, psychological expertise had to « follow the development of experimental psychology »⁵⁹ and required the training of specialized experts. Gorphe described in detail the results of the most important experiments in the field of word association (« associative psychodiagnosis », the claim that experimentally

53 In 1898, Gross founded a scientific journal on criminology: *Archiv für Kriminal-Anthropologie und Kriminalistik*. Wigmore participated in the creation of the *Journal of Criminal Law & Criminology* in 1910 and chaired the *American Institute of Criminal Law and Criminology* (1909-1910).

54 GROSS, 1906: xxv.

55 GROSS, 1911.

56 In 1906, the inspector general of administrative services of the Ministry of the interior, Camille Granier, published a « Critique of oral evidence », which drew heavily on forensic psychology studies: GRANIER, 1906.

57 GORPHE, 1924: 12.

58 GORPHE, 1924: 16.

59 GORPHE, 1947: 79.

provoking the association of ideas could reveal the thoughts hidden by a suspect) carried out in his time, following the pioneering work of the German psychologist W. M. Wundt and further developed by Wertheimer and Klein [1904] in Germany and by Yerkes and Berry in the United States [1909]. The use of the method of word association in trials found in Hugo Münsterberg a fervent promoter⁶⁰, and gave rise to lively exchanges with Wigmore, who undertook to demonstrate the limits of this method⁶¹. Gorphe agreed with Wigmore that the promises of the associative method should not be exaggerated, but nevertheless noted the benefits that judges could derive from it: [this method] « is nonetheless superior to empirical means of superficial observation and practical intuition, and deserves to be included among the modes of investigation of psychological expertise »⁶², provided that it is practiced by trained professionals and is supplemented by other evidence. Gorphe also devoted attention to psychological evidence through observation of symptoms (the observation and interpretation of the symptoms of the feelings manifested by the suspect and witness) promoted by the German psychologist C. Leonhardt⁶³ as well as to the then-developing « psychometric tests ». Gorphe was particularly interested in the idea that physiological reactions could enable the detection of a lie. He gave a detailed account of the experiments led by the Italian psychologists V. Benussi and C. Musatti on « the respiratory symptoms of sincerity and lying »⁶⁴ and of their later development by Martson and Larson to develop what would become the polygraph. The lie detector « complementing quite well », Gorphe asserted, verbal association methods⁶⁵.

Although he necessarily occupied a marginal place in the field, not being a psychologist by profession, Gorphe earned recognition among psychologists as well. In 1924, Henri Piéron (1881-1964) reviewed *La critique du témoignage* in *L'Année psychologique*. Piéron succeeded Binet at the head of the Laboratory of Psychology at the Sorbonne and of *L'Année psychologique* in 1912 and gained wide fame as a psychologist. In his review of Gorphe, he emphasized the « considerable documentation » gathered by the author and « the conscientious and clear presentation of the main studies relating to the science of testimony »⁶⁶. The professional relationship between Piéron and Gorphe continued throughout their careers. At the end of his life, Gorphe wrote a voluminous contribution to the treatise of applied psychology edited by Piéron⁶⁷. In this chapter, Gorphe gave a comprehensive overview of the contributions of forensic psychology to the evaluation of evidence. This was to be his last published text. Shortly before, Gorphe had urged younger psychologists to consider orienting their

60 The psychologist Hugo Münsterberg worked in Germany in Leipzig, where he had been a pupil of Wundt, and in the United States, at Harvard. In 1908, he strongly advocated the use of word association methods in courts [MÜNSTERBERG, 1908].

61 WIGMORE, 1909.

62 GORPHE, 1947: 97.

63 GORPHE, 1947: 99.

64 GORPHE, 1947: 115.

65 GORPHE, 1947, 128

66 PIÉRON, 1925.

67 GORPHE, 1959. In a short tribute published on the occasion of Gorphe's death in 1959, Piéron recalled his « fundamental work » on the critique of testimony, his book devoted to judicial decisions (1952) and « the large chapter devoted to psychology in justice » in the volume VII of the *Treatise on Applied Psychology* (PIÉRON, 1959).

career to the service of justice. Deploring the fact that psychologists had not yet been given the role they deserved in the courts and criticizing their « subordinate role » to physicians, Gorphe exhorted psychologists to affirm the usefulness of their knowledge for trials: « Can psychologists accept this disappointing situation? Aren't they better? »⁶⁸.

Gorphe's views on forensic psychology were expressed in consideration of French criminal procedure where the witnesses are examined by the judges, hence his focus on the utility of forensic psychology for judges. As Gorphe put it, judges should not be interested in clinical studies only when witnesses suffer from a mental illness. They must also consider « that part of applied psychology that is now called *forensic psychology* »⁶⁹ which is concerned with the psychology of normal individuals and they should modify their professional techniques accordingly. Crucially, Gorphe pointed to identifications of an individual by a witness (even in good faith) as the source of innumerable miscarriages of justice: « even more than by any other kind of testimony, a serious judgement on the value of a recognition can only be made after a critical examination is made, not at random, but according to a scientific method of psychological analysis that needs to be developed »⁷⁰. In order to reduce the risk of errors, it was therefore necessary that the written minutes of the testimony – the sole document on which judges base their evaluation of the testimony when it is not presented orally in court – describe precisely the conditions under which the testimony was given, whether the witnesses was hesitant, embarrassed, angry, etc. Judges must also pay attention, Gorphe argued, to the conditions under which witnesses were confronted with the person they supposedly recognized in order to avoid any suggestive questions or practices that could interfere with true identification⁷¹: « It is therefore not useless that, following the example of notorious foreign judges, we should take advantage of the new results of forensic psychology to try to establish an interrogation technique (...) and a reporting technique (...) [on] scientific basis »⁷².

Given Gorphe's attention to criminal procedure and given the functions he had occupied in the early years of his career as an investigating judge, it was logically among legal scholars specialising in criminal procedure and in criminology that he particularly sought to find an audience.

2. Interesting the specialists of criminal law and criminology in forensic psychology

The history of criminology as a scholarly enterprise taking crime and the criminal as its object has been widely undertaken⁷³. The development of criminology spread

68 GORPHE, 1957c.

69 GORPHE, 1924: 14.

70 GORPHE, 1929a: 293. Because of the limitations of identifications, Gorphe also criticised the full faith given by the law to certain identifications: GORPHE, 1933.

71 GORPHE, 1929b. This text was also published in English the following year: GORPHE, 1930.

72 GORPHE, 1929b: 175.

73 MUCCHIELI, 1994; DEBUYST *et al.*, 1995; KALUSZYNSKI, 2002.

throughout the 19th century in Europe, under various forms, and led to the creation of two journals almost simultaneously: in Italy, the *Archivio di psichiatria, antropologia criminale e scienze penali* [Archives of Psychiatry, Criminal Anthropology and Criminal Sciences] (1880-1917) on the initiative of Cesare Lombroso and, in France, the *Archives de l'anthropologie criminelle et des sciences pénales* [Archives of Criminal Anthropology and Criminal Sciences] (1886-1914) founded in Lyon by the physician Alexandre Lacassagne. Neither of these two journals continued after the First World War. After the conflict, the French school of criminology associated with the name of Lacassagne⁷⁴ partly detached from forensic medicine and turned towards investigation techniques. In 1910, Lacassagne's former student and assistant, Edmond Locard, created a laboratory for police science in Lyon. In 1920, he published *L'enquête criminelle et les méthodes scientifiques* [Criminal Investigation and Scientific methods]⁷⁵, in which he called for the transformation of criminal investigation through scientific methods: « scientific methods tend to penetrate the entire criminal trial: whether it is a question of responsibility, observations, clues or the assessment of testimony, everywhere technical considerations are needed as necessary progress »⁷⁶.

Criminology was hence a field where Gorphe's views could find their way and ultimately attract the interest of legal scholarship. Very quickly, Gorphe endeavoured to publish articles defending his ideas in the main criminology and criminal law journals. As his materials and sources of inspiration were far from being only based in France, Gorphe published extensively abroad. In the United States, it is the relationship Gorphe established with Wigmore following the latter's review of *La critique du témoignage* that gave him access to *The American Journal of Police Science*⁷⁷ (the journal of the *American Institute of Criminal Law and Criminology* founded by Wigmore at Northwestern University). Wigmore himself translated into English three pieces by Gorphe and had them published in the *Journal of Criminal Law and Criminology* (also founded by Wigmore)⁷⁸. Gorphe published in European criminal law and criminology journals as well, especially in the main European countries where forensic psychology had developed: Belgium (*Revue de droit pénal et de criminologie*⁷⁹), Switzerland (*Revue de criminologie et de police technique*⁸⁰), Italy (*Giustizia Penale*⁸¹), with the notable exception of Germany.

In France, Gorphe sought to find an audience for his ideas among jurists interested in comparative law (Gorphe was a full member of the French Society for Comparative Legislation and acted as a rapporteur at some of its congresses⁸²). At first, Gorphe directed his contributions to criminologists involved in the French tradition of criminology of Lacassagne and Locard. As early as 1929, Gorphe published his first

74 KALUSZYNSKI, 2005.

75 LOCARD, 1920.

76 LOCARD, 1920: 25.

77 GORPHE, 1930.

78 GORPHE, 1936a, 1936b, 1936c.

79 GORPHE, 1931b, 1934, 1946.

80 GORPHE, 1950a; GORPHE, 1951a.

81 GORPHE, 1938a.

82 See GORPHE, 1952a.

paper in *Études criminologiques*⁸³, a journal edited by the Institute of Criminology of the University of Paris (1925-1930). He also soon published in the *Revue internationale de criminalistique*⁸⁴ founded by Locard in 1929 and in the *Revue pénitentiaire et de droit pénal*⁸⁵ published by the *Société générale des prisons*⁸⁶. However, after the early 1930s, Gorphe published mainly in journals aimed at legal scholars interested in international criminal law. The contact he established with Henri Donnedieu de Vabres was instrumental in the dissemination of his ideas in this milieu. Gorphe published in the *Revue internationale de droit pénal*⁸⁷ founded in 1924, with the participation of Donnedieu de Vabres. He also had access to the *Revue de science criminelle et de droit pénal comparé*⁸⁸, to whose creation Donnedieu de Vabres had contributed in 1926. Donnedieu de Vabres also agreed to write the prefaces to Gorphe's books published in 1947 and 1952. In these prefaces, Donnedieu de Vabres referred to his experience as a French judge at the Nuremberg Tribunal and underlined the practical interest of Gorphe's research. If the general tone is laudatory (« the book of M. Gorphe is in its genre a “Discourse on Method”, a treatise on the art of thinking well, and, by thinking well, of judging well »⁸⁹), a few hints point to some reservations due to the fact that the book is « full of anecdotes » and might lack systematic conclusions.

After World War II, Gorphe's conversations with criminal law specialists in France found a renewed flourishing in the new social defence movement developed in the wake of Marc Ancel⁹⁰. The new social defence movement resonated with much of Gorphe's ideas on the individualization of punishment and the rehabilitation of offenders based on the analysis of their personality. The fact that social defence was attaching great importance to criminology also contributed to the diffusion of Gorphe's thesis, as he had already gained a foothold in criminology circles. Even before the war, the humanist views on criminal law Gorphe had defended were fully in line with those of the new social defence, particularly on the legality of offences⁹¹ or the psychological care of prisoners⁹². From the early 1950s on, Gorphe explicitly referred to these « new criminological conceptions that led to a focus in repression much less on the objective criminal fact than on the personality of the agent »⁹³. The « scientific humanism »⁹⁴ that characterizes the new social defence was thus nicely suited to Gorphe's views.

The social defence promoters strongly advocated for the individualisation of the criminal sentence. Gorphe supported this view, insisting on the need for judges to rely on psychological studies in order to have « a thorough knowledge of the accused and [to

83 GORPHE, 1929a.

84 GORPHE, 1929b.

85 GORPHE, 1933.

86 KALUSZYNSKI, 1997.

87 GORPHE, 1932a, 1935b, 1935c, 1937a.

88 GORPHE, 1938b, 1937b, 1938c, 1947a, 1957a.

89 GORPHE, 1947: 12 (foreword).

90 ANCEL, 1954.

91 GORPHE, 1937a.

92 GORPHE, 1938b.

93 GORPHE, 1952b: 1.

94 SIZAIRE, 2017. For a subjective account of social defence within the field of criminology, see RADZINOWICZ, 1999.

decide] on the appropriate treatment to be applied to him »⁹⁵. The repressive individualisation promoted in social defence prompted Gorphe to advocate for the creation of a « real personality file » for each accused person, this being « the only way out of arbitrariness, especially with psychotechnical tests, which allow safe comparisons »⁹⁶. In 1952, Gorphe contributed to the first international criminology course. In his contribution, he insisted on the need that interrogation methods be adapted to the person being interrogated and suggested that instruments such as psychomorphology (linking body shape and character) and graphology were appropriate⁹⁷. In 1953, Gorphe took part in the *Journées de défense sociale* [social defence conference] organised in Poitiers, his city of residence. His contribution appeared in the first volume published by the newly founded *Centre d'études de défense sociale* [Center for the Study of Social Defence] within the *Institut de droit comparé de Paris*, led by Ancel⁹⁸. This paper did not develop any new ideas compared to Gorphe's previous publications but it allowed him to disseminate them to an audience more favourable to his views than any other before. However, this new opportunity arrived late in Gorphe's life. Most of the texts he published in the 1950s, up to his death in 1959, were essentially reprints and syntheses of his contributions of the 1920s and 1930s. The only innovations he put forward at that time were practical recommendations regarding the activity of judges, quite distant from the concerns of the social defence.

3. Training society to give testimony, training judges to evaluate witnesses

Beginning with the defence of his thesis in 1924, Gorphe tried to reconcile a reflection that the analysis of evidence be grounded on the best scientific knowledge available with the design of practical recommendations directed to judges in order to reinforce their professional skills. In his terms, referring to the « technical method » he was offering to judges, « this method, like justice, must strike a balance between the modern scientific spirit and the practical concerns of the courts »⁹⁹.

The first practical lesson Gorphe drew from forensic psychology was that testimony is fragile but still « educable ». The psychologists Borst¹⁰⁰ and Claparède¹⁰¹ had experimentally demonstrated that individuals, both adults and children, trained in testifying, significantly improve the accuracy and precision of their statements. Gorphe echoed this idea in March 1929 at the International Congress of Applied Psychology held in Paris. His contribution was published in the journal *La psychologie et la vie* under the title « L'éducabilité du témoignage »¹⁰². In this paper, he argued that

95 GORPHE, 1950a: 84.

96 GORPHE, 1951b: 168.

97 GORPHE, 1952c.

98 GORPHE, 1954.

99 GORPHE, 1947: 472.

100 BORST, 1904.

101 CLAPARÈDE, 1905a, 1905b.

102 GORPHE, 1929c.

« learning to provide testimony includes a whole series of tasks »¹⁰³ (to observe, to fix one's attention, to remember, to reproduce faithfully). Therefore, proper training for these tasks must be provided, not only to children in schools, but also to « every person ». Hence Gorphe strongly advocated that everyone should learn « the elementary notions of the art of acting as a witness and, if need be, to practise it without waiting to be called to justice and to risk the worst errors to the detriment of others »¹⁰⁴.

This proposal, which Gorphe pointed out as constituting a true « psycho-pedagogical program », easily found its place in *La psychologie et la vie: Revue de psychologie appliquée*. Indeed, this journal was edited from 1927 onwards by the commercial company Pelman Institute, which was committed to spreading in France the Pelman method of mental training and personal development¹⁰⁵. The Pelman method had been developed in the United Kingdom in the late 19th century by Christopher Louis Pelman and popularised by William Joseph Ennever as a method of training physical and mental capacities dedicated to the reinforcement of self-confidence and success. In the 1920s and 1930s, the method had been quite popular in France. The distance course « Twelve lessons of Pelmanism » received a widespread audience and the publication of *La psychologie et la vie* (1927-1939), under the supervision of the philosopher and psychologist Paul Masson-Oursel, offered a platform for the diffusion of these ideas. Gorphe's view on the educability of the testimony echoed the confidence of Pelmanism in training methods and self-improvement. Just as the Pelman method – which Gorphe did not mention in his paper – offered to develop personal capacities through mental training, testifying in courts should be based on an ordered method: this program, Gorphe argued, « is realizable only with the contact of the facts and with the help of a practical method »¹⁰⁶. This eventually demands a moral education of the citizen, which must be based first and foremost on self-knowledge: « It is thus important to know oneself: critical control of oneself and moral conscience »¹⁰⁷.

Beside his interest in the education of the general public to the art of testifying, Gorphe devoted much attention to the education of judges. As early as the 1930s, Gorphe insisted on the need to train judges in « ancillary forensic sciences » (criminology, penitentiary science, forensic psychology, forensic psychiatry, evidence technology) and suggested that these topics should be included in the curriculum of the professional examination for admission to the judiciary¹⁰⁸. But, in his view, the training of judges also required special moral qualities based on a good « knowledge of men » and « a psychological penetration that is not provided by the abstract science of law or the practice of civil affairs »¹⁰⁹. This contention led Gorphe to strongly oppose the

103 GORPHE, 1929c: 55.

104 GORPHE, 1929c: 56.

105 LE SONN, 2017.

106 GORPHE, 1929c: 55.

107 GORPHE, 1929c: 55.

108 GORPHE, 1932b: 241; GORPHE, 1957c: 167.

109 GORPHE, 1932b: 243.

intervention of popular juries¹¹⁰, these « improvised judges »¹¹¹ administering an « arbitrary and fanciful »¹¹² justice, who lacked both experience and moral qualities. Nevertheless, Gorphe's views on the qualities of judges can be considered as pertaining much more to professional identity building than a really thorough work based on experimental psychology. In 1951, when the occasion was given to him to express his views in the *Académie des sciences morales et politiques*, Gorphe referred only to very broad notions of the moral qualities that the judges should possess more than anyone else: « qualities of intelligence and method, and qualities of will and firmness »¹¹³.

If Gorphe advocated the need for a method in the education of witnesses and judges, he did not himself trace its contours. Here again, he turned to psychologists. Gorphe's interest in the training of personal capacities, in the general public and in judges, turned him into a firm promoter of the psychotechnical methods that had been recently designed in the field of vocational orientation. His above-mentioned acquaintance with Piéron, as well as the interest he had developed in Claparède's work in the 1920s, had enhanced Gorphe's familiarity with these methods. Both authors had, indeed, an interest in education and promoted new methods taking into account the individuality and capacities of each child¹¹⁴. Both promoted, as well, the contributions of psychological research to professional orientation¹¹⁵. Gorphe collaborated with the *Société psychotechnique de Paris* [Psychotechnical Society of Paris] which was directed by Guy de Beaumont, a great promoter of psychotechnical tests in recruitment. In 1929, Gorphe was also a member of the *Institut général psychologique*¹¹⁶, a rather eclectic group where mediums interested in telepathy would meet with academic psychologists striving to give a scientific base to their discipline like Piéron¹¹⁷. Gorphe took up these ideas and suggested that psychotechnical tests should be used not only as an important tool for professional orientation but also as a way to assess personalities in courts (whether the accused persons or the witnesses). It would be advisable, he suggested, to « constitute in schools an anthropological record for each pupil or student: this would serve, not only for justice eventually, but also and above all for the subject himself for his professional and general orientation in life »¹¹⁸. The same holds for judges, Gorphe

110 GORPHE, 1934; GORPHE, 1935b; GORPHE, 1952d: 111. Gorphe also objected to witnesses being questioned by people who had not been specially trained to criticize testimony, such as journalists or insurance agents (GORPHE 1924, 393).

111 GORPHE, 1951b: 165.

112 GORPHE, 1951b: 169.

113 GORPHE, 1951b: 166.

114 Claparède strongly criticised the uniformity of pedagogical methods and their lack of consideration of the tastes, creativity and personality of the pupils (RUCHAT, 2015). He supported the pedagogical experiences that took place under the label of the *éducation nouvelle* and promoted their development, notably by training the educators in the school for learning sciences (*Ecole libre des sciences de l'éducation. Institut Jean-Jacques Rousseau*) he founded in 1912 in Geneva (HOFSTETTER, SCHNEUWLY, 2006). Piéron embraced these ideas as well. He contributed to the institutionalisation of the *éducation nouvelle* by sitting on the board of the *Groupe français d'éducation nouvelle* created in 1929, thereby enhancing the scientific credentials of this institution (SAVOYE, 2007: 240).

115 HUTEAU, 2014; HUTEAU, 2018; MARTIN, 2014: 112.

116 MURCHISON, 1929: 379.

117 PLAS, 2012: 98 ; MARMIN, 2001: 157.

118 GORPHE, 1950a: 88.

claimed. Psychotechnical examinations developed by specialists of professional orientation can help verify that aspiring judges bear the moral qualities needed to perform a balanced and effective evaluation of the evidence. Indeed, if Gorphe had underlined the limitations of these methods at an early stage of their development¹¹⁹, his caution was all gone in the 1950s: « Psychotechnical science is now in a position to discern aptitudes of all kinds »¹²⁰; it is « one of the most useful applications of experimental psychology, used for professional orientation, diagnosis of aptitudes, selection of candidates in various branches of activity »¹²¹. Psychotechnical examinations should thus be included in professional examinations to determine the aptitudes of judges: this would avoid « the deplorable spectacle of a magistrate failing to judge properly »¹²².

Conclusion

Despite the originality of Gorphe's work and although he was closely connected to various professional fields, including law, psychology and criminology, his impact on legal scholarship in France has been limited. Apart from Donnedieu de Vabres – who wrote the preface to his last two books – Gorphe received very limited attention within French universities. After Gorphe's death in 1959, shortly after he retired, the path he had opened up was not followed by others. Forensic psychology and criminology kept developing after World War II, but this happened in isolation from law schools and without any connection to academic lawyers. The post-war period did not see the emergence of figures that would be willing to work – like Gross, Wigmore or Gorphe did – at the interface of the theory of evidence, criminology and psychology. The opportunity to lay the foundations of a legal scholarship interested in the evaluation of evidence and evidential reasoning was missed.

This lack of academic interest in Gorphe's work has several explanations. The very practical nature of his work is one of them. Indeed, Gorphe was concerned with the actual practice in the courts and assumed an orientation towards the professional skills of judges. Just like Gross¹²³ and Wigmore¹²⁴, Gorphe did not hesitate to go into very mundane details (e.g. the recommendation that judges draw the layout of the premises or that witnesses draw the person they have seen before proceeding with confirmations of identity)¹²⁵. Moreover, the psychological theories and experiments on which Gorphe relied may now seem dated and even obsolete. The faith he placed in psychotechnical tests, psychomorphology or methods of mental development inspired by Pelmanism have been partly discredited over the years. Moreover, some of his recommendations may seem unrealistic, such as filing an anthropological record for each student in the schools aimed at providing information about his or her personality. Finally, Gorphe's

119 GORPHE, 1924: 114.

120 GORPHE, 1950a: 90.

121 GORPHE, 1951b: 171.

122 GORPHE, 1950a: 90.

123 GROSS, 1906: 143.

124 WIGMORE, 1913a: 755.

125 GORPHE, 1929b: 167.

appeal to the personal qualities of the judges gives a moralizing stance to his last pieces that strongly contrast with his claim to base the evaluation of evidence on science.

Gorphe's failure to secure a lasting influence in the universities is also due to institutional reasons. Gorphe had always worked as a judge, moreover in provincial jurisdictions. Apart from a few occasional lectures, he never held a university position. In France, law professors have maintained a distant relationship with judges, by whom they have sought information on the practice of courts but rarely theoretical inspiration. Similarly, the efforts Gorphe made throughout his career to get criminologists interested into the contributions of forensic psychology suffered from the development of criminology outside law faculties in France¹²⁶ and from the weakening of the « social defence » doctrine in 1980s France¹²⁷. Furthermore, Gorphe's interest in the psychological foundation of the evaluation of evidence was far from resonant with legal scholarship. Indeed, French academics inherited from the Napoleonic reconstruction of the universities in the early 19th century a legal culture centred on dogmatic analysis¹²⁸. Now, as Gorphe himself pointed out at the outset of *La critique du témoignage*, French law does not impose on judges what form evidential reasoning should take. The free proof system that mainly prevails since the French Revolution – as the intimate conviction in criminal trials epitomizes –, leaves judges free to assess the evidence, without the law imposing the means by which their conviction must be formed or the degree to which they must be convinced to consider a fact proven¹²⁹. In such a context, Gorphe ultimately invited jurists to turn their attention to the evaluation of evidence, a domain where French law remains silent. Consequently, such an invitation had little chances of finding any echo among academics essentially interested in dogmatic analysis of the law. While Anglo-American scholarship gave far more attention to Wigmore than to Gorphe, it is only in Spanish-speaking countries where Gorphe received continued interest from legal doctrine. Gorphe's books have all been translated into Spanish¹³⁰, and still receive attention today¹³¹. This situation does not reflect a dismissal of dogmatic analysis in Spanish-speaking scholarship. As in Spain and some Latin American countries the rules of procedure explicitly require judges to comply with *sana crítica*, the evaluation of evidence became a possible subject of analysis for jurists interested in the dogmatic approach. Gorphe was fully aware that the rule of *sana crítica* offered a possible reconciliation of his views with dogmatic doctrinal analysis. When he depicted this provision of the Spanish Code of Civil Procedure of 1881, he noticed with a hint of envy that this « wise prescription (...) is in line with the ideas set out [in his 1924 book] »¹³².

126 COLSON, 2013.

127 SIZAIRE, 2017.

128 JAMIN, JESTAZ, 2004; AUDREN, HALPERIN, 2013.

129 TARUFFO, 2003.

130 GORPHE, 1949; GORPHE, 1950b; GORPHE, 1955.

131 e.g. ABEL LLUCH, 2015.

132 GORPHE, 1924: 32.

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