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The Italian *Scuola Positiva* in Brazil between the nineteenth and twentieth centuries: the problematic issue of “influence”*

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Abstract

Brazilian historiography has often discussed the “influence” of the *scuola positiva* in Brazil between the end of the nineteenth century and the first decades of the twentieth century. More recently, there have been researches that have tried to avoid the unidirectional tendency and the lack of precision of the concept of influence. In the light of a critique of the concept of influence, this work intends to raise some new historiographical possibilities through analysis of some of the pioneers of *scuola positiva* in Brazil and of the Brazilian appropriation of the scheme “*scuola classica*” versus “*scuola positiva*”. Given that the Brazilian legal tradition of the nineteenth century was different from that which the Italian positivists found when elaborating the *scuola classica* concept, this space of memory was occupied in Brazil by other elements, an interpretation that can only be elaborated by withdrawing from the concept of influence.

Keywords

Brazilian legal history, *scuola positiva*, influence, Brazilian positivist thought, 1890 Brazilian penal code

Summary: 1. Introduction. 2. Everything started in 1884: Recife versus São Paulo. 3. How and why is there *scuola positiva* in Brazil? 3.1 Paper-based circulation. 3.2 Authoritarianism? 3.3 *Scuola positiva* and the Brazilian legal tradition. 4. Concluding remarks. Bibliographical References

1. Introduction

“When I was taking notes for a quick lecture about ‘Tobias Barreto as the first critic of Lombroso in Brazil’, the names of the first and main supporters or sympathizers of the so-called New Penal School or Positive Penal School came to my mind, by association of ideas. The name that immediately occurred to me was that of João Vieira de Araújo. In fact, he was, before everyone else, the best informed of the criminological theories of Lombroso, Ferri and Garofalo in Brazil and introduced them, in 1889, in his ‘*Comentário filosófico-científico do Código Criminal*’. For this very reason, when in April 1891, the publication of the journal ‘*La Scuola Positiva nella Giurisprudenza Civile e Penale e nella Vita Sociale*’ was being prepared, Giulio Fioretti sent him an honourable invitation to collaborate”¹.

* This article is a translation with some additions, modifications and bibliographical updating of the chapter “*A escola positiva italiana no Brasil entre o final do século XIX e início do século XX: a problemática questão da ‘influência’*” published in Meccarelli, M., Palchetti, P., *Derecho en movimiento. Personas, derechos y derecho en la dinámica global*, Madrid, 2015, pp. 203-230. This new version was carried out within the framework of the following research projects: *L’influence de la révolte positiviste sur le droit pénal au tournant des XIXe et XXe siècles: un état de la discussion en Europe et en Amérique latine* (Groupe Européen de Recherche sur les Normativités); *História do direito penal brasileiro em perspectiva comparada entre os séculos XIX e XX* (FAPEMIG, edital demanda universal 1/2017); and *Las influencias extranjeras en la Codificación penal española: su concreto alcance en la Parte Especial*

The fragment above was written by the famous jurist acting during the first half of the twentieth century in Rio de Janeiro, Evaristo de Moraes. He was a lawyer who, in his work and in his - legal and political - activism, always made his adherence to the *scuola positiva* very clear². Tobias Barretto and João Vieira de Araújo: the two names mentioned by Evaristo de Moraes could not be missed in an analysis of the Italian *scuola positiva* in Brazil³. The first, in fact, is to be excluded; and the second, effectively, is a pioneer. João Vieira indeed will be an important character of the history we are going to recount in the lines below, even if it will not be possible, here, to deepen the problematic “reception” of positivist ideas specifically in the writings of João Vieira de Araújo⁴, because we will focus on the main features of the *scuola positiva*'s history in Brazil during the last years of the nineteenth century and the beginning of the twentieth.

Thanks to the existence of a good number of works by jurists and historians - from Evaristo de Moraes's almost memorial notes in the 1930s to some very recent researches - on the presence of the “*scuola*” in the Brazilian context⁵, it is not difficult

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¹ “Quando tomávamos notas para rápida palestra acêrca de ‘Tobias Barreto como primeiro crítico de Lombroso, no Brasil’, vieram-nos à mente, por associação de idéas, nomes dos primeiros e principais e adeptos ou simpatisantes que, entre nós, grangeára a chamada Nova Escola Penal ou Escola Penal Positiva. O nome que, desde logo, nos ocorreu foi o de João Vieira de Araújo. De fato, fôra ele quem, antes de todos, se mostrára mais bem informado das teorias criminológicas de Lombroso, Ferri e Garofalo e as inculcára, em 1889, no seu ‘Comentário filosófico-científico do Código Criminal’. Por isto mesmo, quando em abril de 1891, se preparava a publicação da revista ‘La Scuola Positiva nella Giurisprudenza Civile e Penale e nella Vita Sociale’, foi-lhe dirigido, por Giulio Fioretti, honroso convite para colaborar” (Moraes, E. de., “Primeiros adeptos e simpatisantes, no Brasil, da chamada Escola penal positiva”, *Revista Forense*, setembro de 1939, pp. 147-148).

² For a biography of Evaristo de Moraes, see Mendonça, J., *Evaristo de Moraes, tribuno da República*, Campinas, 2007.

³ Both are considered representatives of the so-called “Recife School”, which is the expression used to qualify the scientific trend that emerged in one of the two law schools of the Empire - Recife - between 1860 and 1870 (cf. Wolkmer, A. C., *História do direito no Brasil*, 5ª ed., Rio de Janeiro, 2009, p. 105; Saldanha, N., *A Escola do Recife*, São Paulo, 1985, pp. 101-102). Tobias Barretto is considered the main representative of the “School”, although there is no proper common project and its representatives do not feel belonging to a group. The differences and divergences between Tobias Barretto and João Vieira are an example of the non-existence of this common project.

⁴ Marcela Varejão's book *Il positivismo dall'Italia al Brasile* dedicated a whole chapter to the positivist “influence” in João Vieira de Araújo's works with a good documentary survey (cf. Varejão, M., *Il positivismo dall'Italia al Brasile. Sociologia del diritto, giuristi e legislazione (1822-1935)*, Milano, 2005, pp. 415 ss.). However, the excessive generic nature of the influence concept forestalled Varejão to go beyond the mere identification of adherence and the existence of references to the *scuola positiva* within João Vieira's texts. Deepening the historical analysis of João Vieira's works, i. e., investigating how positivism appears within his texts, allows us to go beyond the mere recognition of influences. For example, notwithstanding João Vieira's loud adherence to the Italian positivism, he upheld the “classical” 1830 criminal code and was quite timid when he was using these ideas in the elaboration of specific legal institutes and practical proposals of penal reform for the Brazilian context, as detailed in Sontag, R., *Código criminológico?* *Ciência jurídica e codificação penal no Brasil (1888-1899)*, Rio de Janeiro, 2014.

⁵ “O positivismo foi a doutrina que, até o momento, recebeu, maior atenção por parte de historiadores e cientistas sociais que se voltaram para a história intelectual do período [second half of the nineteenth century]” (Alvarez, M., “A Criminologia no Brasil ou Como Tratar Desigualmente os Desiguais”, *Dados, Revista de Ciências Sociais*, vol. 45, 4, 2002, p. 677). Alvarez's reasoning also includes Comtean positivism and all those who did not deal with criminal issues. As the Italian *scuola*

to compile these general features and it is already possible to put into discussion some relevant historical interpretations. Besides the compilation and critical evaluation of the existing analysis, some lines of interpretation will also be essayed here.

The opposition “*scuola classica*” versus “*scuola positiva*” has often served to delineate the paths of Brazilian criminal law history. But why was a scheme heavily marked by the propaganda purposes of its creators - the positivists, especially Enrico Ferri - so successful? In the first place, it is quite true that it draws clear limits to the research subject. In the second place, it proposes a very clear historical schematization, in spite of being simplistic. These two factors help to make comprehensible the existence of a good number of works about the topic, in comparison with others as important as this. It is a theme that sometimes appears *en passant*, as in the research of Lília M. Schwarcz on racist ideas in Brazil; sometimes with a focus on forensic medicine; sometimes addressing jurists and their discourses - the latter will be the path that we will follow because this is an article on history of legal thought.

2. Everything started in 1884: Recife versus São Paulo

Everything started in 1884. Generally, historiography indicates the year of publication of the books “*Menores e Loucos*” written by Tobias Barreto and “*Ensaio de Direito Penal*” by João Vieira de Araújo as the landmark of the Brazilian trajectory of the Italian *scuola positiva*⁶.

Regarding the first book, and using once again Evaristo de Moraes’ words, the *status* of “first critic of Cesare Lombroso in Brazil” fits Barreto very well. In 1929, the Spanish scholar Jimenez de Asúa, in his “*Un Viaje al Brasil*” – a kind of report of his visit to Brazil –, noted that “Tobias Barreto was not affiliated with the penal positivism of the Italian school, and was the first Brazilian critic of Lombroso: but he was not a blind follower of classicism, he indeed professed an unjustified antipathy to the master Francesco Carrara”⁷. With this small fragment we can perceive a first shortcoming of

positiva is a specie of the genus positivism, his conclusion also applies for our subject. The last vast work of the Brazilian historiography on this issue is Dias, R. F., *Pensamento criminológico na Primeira República: o Brasil em defesa da sociedade* [Ph.D thesis], Curitiba, 2015. For a good historiographical survey on the *scuola positiva*’s presence in Latin America, cf. Rotondo, F., “Penalística positivista italiana e América Latina: tendências e interpretações historiográficas”, *Revista brasileira de ciências criminais*, 170, 2020.

⁶ Theodolindo Castiglione was very specific – if it is possible - about the arrival date of the Italian *scuola positiva* in Brazil: “*Pelo o que chegou ao nosso conhecimento, os juristas que, pela primeira vez, trataram, no Brasil, das teorias de César Lombroso, foram Tobias Barreto e João Vieira de Araújo. (...) Temos em mãos a terceira edição de Menores e Loucos, em que se reproduzem a apresentação dos editores da primeira edição, em março de 1884, a apresentação da segunda, em 1886, e a introdução de Tobias: em nenhuma ‘advertência’ ou introdução se verifica que os capítulos, que compõem o livro, foram anteriormente publicados. Clovis Bevilacqua, entretanto, informa, textualmente, o seguinte: ‘A primeira edição dos Menores e loucos é de 1884; mas o livro já havia aparecido, desde 1882, nas colunas do Diário de Pernambuco. (...) Assim, de acordo com os elementos de que dispomos, em que se destaca a palavra de Clovis Bevilacqua, Tobias Barreto foi o primeiro crítico brasileiro de César Lombroso’*” (Castiglione, T. “A repercussão da escola positiva no Brasil”, in *Lombroso perante a criminologia contemporânea*, São Paulo, 1962, pp. 269- 270).

⁷ “*Tobias Barreto no se afilió al positivismo penal de la escuela italiana, y fué el primer crítico brasileño de Lombroso: pero tampoco era ciego secuaz del clasicismo profesando una injustificada antipatia al maestro Francesco Carrara*” (Jimenez de Asúa, L., *Un viaje al Brasil*, Madrid, 1929, p. 29).

the opposite concepts “*scuola classica*” versus “*scuola positiva*” – this topic will be further discussed.

The strong scientific trend of the so-called “Recife School”⁸ – of which Tobias Barretto is considered the main exponent – induced Moacyr Benedicto de Souza⁹ to point out *scuola positiva*’s influences on “*Menores e Loucos*”. An example of that would be the passage in which Tobias Barretto argued that the normal or abnormal state should be a strictly medical decision. Although this statement allows an increase of the medical space within judicial courts, its main purpose was reassuring the borders between medicine and law, while the positivist trend was to dissolve these boundaries. If this were not the case, Tobias Barretto’s criticism of “the scientific hyperbolism of physicians, when they invade other scholar’s domains”, highlighted by Evaristo de Moraes¹⁰ as one of his main objections against Lombroso, would be absolutely incomprehensible. On the other hand, Tobias Barretto’s antipathy towards Carrara is undeniable¹¹. The binomial “*scuola classica*” versus “*scuola positiva*”, therefore, can only provide a blurred image of these scientific quarrels, and the reason for that is Barretto’s quite different cultural orbit: he was dubbed “*teuto-sergipano*” because his main scientific dialogues targeted Germany. His germanism made the typical Italian scientific identitarian framework somewhat strange to him¹².

João Vieira de Araújo’s “*Ensaio de direito penal*”, as we shall see, is a good example of the tortuous presence of the *scuola positiva* in his work: Lombroso and the positivists are mentioned in the Introduction, but they are not quoted so often in the passages that referred to the construction of legal institutes¹³.

For the final milestone of the Italian *scuola positiva* pathway in Brazil, the usual landmarks are no longer so precise. Two relatively recent works, by Marcos Alvarez¹⁴ and Ricardo de Brito A. P. Freitas¹⁵, indicated the 1930s as a legitimate date to conclude a study on the importance of the presence of Italian *scuola positiva* in Brazil. Most historians adopt this framework, even implicitly, although some of them advance in later decades, such as Moacyr Benedicto de Souza, who indicates the 1940s as the period of the greatest “influence” of the *scuola positiva* in Brazil¹⁶. However, the 1930s and 1940s literature would require an analysis that could take into consideration the

⁸ Wolkmer, *História do Direito*, p. 105; Saldanha, *A Escola de Recife*, pp. 101-102.

⁹ Souza, M. B. de, *A influência da escola positiva no direito penal brasileiro*, São Paulo, 1982, pp. 41-42.

¹⁰ Moraes, “Primeiros adeptos e simpatizantes”, p. 145.

¹¹ Varejão, *Il positivismo dall’Italia al Brasile*, pp. 217-219.

¹² About Barretto’s germanism, see cf. Losano, M., *Un giurista tropicale: Tobias Barreto fra Brasile reale e Germania ideale*, Roma, 2000.

¹³ See Sontag, “*Código criminológico?*”, pp. 42-54; and Dias, *Pensamento criminológico no Brasil*, pp. 186 ss., arriving to the same conclusions about this topic of Barretto’s thought.

¹⁴ Alvarez, “A Criminologia no Brasil”, p. 678.

¹⁵ Freitas, R. de B. A. P., *As razões do positivismo penal no Brasil*, Rio de Janeiro, 2002, p. XXVII.

¹⁶ Souza, “A influência da escola positiva”, p. 31. But he indicates the 1962 book “*Lombroso perante a Criminologia Contemporânea*” written by Theodolindo Castiglione as “one of the most important contributions to the updating of the doctrine of criminological positivism initiator” (Souza, “A influência da escola positiva”, p. 53).

dialogues with the “*tecnicismo giuridico-penale*”¹⁷. For this reason, we will focus on the pioneers of the late nineteenth century and early twentieth century.

Both Tobias Barretto and João Vieira de Araújo were professors at the Law School of Recife. Then, was Recife the gateway to Italian *scuola positiva* in Brazil? In terms of chronological precedence, it is true¹⁸. Notwithstanding, a clear opposition between Recife and the other imperial Law School in São Paulo sounds like an exaggeration¹⁹.

One of the most important researches in Brazilian historiography that traced the differences between Recife and São Paulo is Lília M. Schwarcz’s classic book “*O espetáculo das raças*” (“The Spectacle of the Races”) on racist thought in Brazil between 1870 and 1930. About our issue – the *scuola positiva* – Schwarcz states that “from Recife came the theory, the new models – criticised in their excesses by São Paulo jurists”²⁰. By “new models”, Schwarcz understood, substantially, the Italian *scuola positiva*, especially in its racist dimension. Sometimes, the debate opposing Recife and São Paulo was harsh: one example was the contest by João Vieira de Araújo²¹ and João Monteiro²² when discussing the 1893 penal code draft²³. Nevertheless, Schwarcz description of the differences between the two law schools is not sufficiently precise. João Vieira is among the *recifenses* who settled up their own scientific identity by belonging to the *scuola positiva*. But not everyone did it. In other words, João Vieira is one of the few extreme cases in terms of gestures of adherence for that period (last years of the nineteenth century and first years of the twentieth century). Moreover, criticism of the “excesses” of the *scuola positiva* is a very recurrent *topos* also in Brazil, including Recife. Tobias Barretto – considered the greatest exponent of the so-called “Recife School” – conveyed exactly this criticism against *scuola positiva*, which Schwarcz considered typical of São Paulo scholars. Schwarcz’s sources were

¹⁷ As in the case of João Vieira, an analysis of the *scuola positiva*’s “influence” on Roberto Lyra’s thought should be split into several planes. The gestures of adherence are quite clear, but Lyra was nationalistic enough to claim for a “Brazilian penal school”. Regarding the *tecnicismo*, his debate with the main Brazilian *tecnicista*, Nelson Hungria (with whom he worked together in the review commission that resulted in the 1940 penal code) is very famous. For Lyra, *tecnicismo* renders the jurist a “*escafandrista do vazio*” (Lyra, R., “Método jurídico e direito penal”, *Revista Forense*, fev. 1946, p. 382), but for the teaching of criminal law one should follow the “*calçada da lei, que é a firme e reta*” (Lyra, R., *Guia do Ensino e do Estudo de Direito Penal*, Rio de Janeiro, 1956, p. 52). By this way, he transposed many features of the *tecnicista* concept of legal science to the teaching level. From this point of view, the opposition between Lyra and Hungria is not as symmetrical as a certain memory of Brazilian criminal law intended. About these features of Lyra’s thought, see Sontag, R., “‘Verbalismo de jornal’: ensino do direito penal, ciência e lei em Roberto Lyra”, *Revista brasileira de ciências criminais*, 25, 2017.

¹⁸ Cf. lastly Dias, *Pensamento criminológico*, especially p. 376.

¹⁹ Cf. Dias, *Pensamento criminológico*, whose reconstruction also do not give an exaggerated importance to the differences between São Paulo and Recife, similarly with the emphasis of the first version of this article and with Sontag, “*Código criminológico*”?

²⁰ “[d]e Recife vinha a teoria, os novos modelos – criticados em seus excessos pelos juristas paulistas” (Schwarcz, L. M., *O espetáculo das raças: cientistas, instituições e questão racial no Brasil – 1870-1930*, São Paulo, 1993, p. 184).

²¹ Araújo, J. V. de, “O projeto de código penal e a faculdade de São Paulo”, *Revista Acadêmica da Faculdade de Direito do Recife*, 1894.

²² Monteiro, J. et al, “Parecer da congregação da faculdade de Direito de São Paulo (projecto João Vieira de Araújo n. 250/1893)”, *Revista da faculdade de Direito de São Paulo*, 2, 1894.

²³ Araújo, J. V. de, “Projecto de código penal. Exposição de motivos”, *Revista acadêmica da faculdade de Direito do Recife*, 1893. For more details about the debate around this code draft, see Sontag, “*Código criminológico*”?, pp. 253-332.

insufficient for these purposes: because her analysis focused on the universe of the law journals of the two law schools, and due to that, it missed a very important lode of debate on the features that might distinguish Recife and São Paulo. Not by chance, Clóvis de Carvalho Júnior²⁴ was able to approach the first steps of the Italian *scuola positiva* in Brazil basically through São Paulo jurists, such as Pedro Lessa and Cândido Motta. The only Recife scholar mentioned by Carvalho Júnior was João Vieira de Araújo - which is still unilateral, since other minor jurists, evoked by Schwarcz, wrote articles praising the *scuola positiva* in the Recife Law School journal²⁵. In any case, Cândido Motta is one of the few jurists of the late nineteenth century who showed adherence to the *scuola positiva* that is comparable to João Vieira de Araújo.

Still on the “reception” of positivist ideas in Recife, Schwarcz states that “unlike other journals, in this case [the Recife Law School journal] it is possible to see a more immediate acceptance of notions of evolutionism and especially of studies that see race as a fundamental element. Among the authors cited, two of them, known for their studies in the area of criminology, draw attention. In fact, the emphasis given to Lombroso and Ferri attests to the relevance that these scholars will have in the journal”²⁶. The large number of articles on criminal law in the Recife Law School journal, according to Schwarcz, should be a sign of the greater importance of the “reception” of racist ideas in Recife²⁷. About these statements, some remarks are necessary. The attention paid to the theories of Lombroso and Ferri on its own does not say so much about racism. The most eloquent example of racist theory in Recife - with the *mestiçagem* concept - is Sylvio Romero’s writings, who practically did not devote his theories to criminal law. It is possible, in fact, to find references to race in some articles published in the Recife Law School journal. But, it would be enough to evoke two eloquent counter-examples: Tobias Barretto and João Vieira de Araújo. Race may even have appeared in the writings of both, but with a very restricted function in the criminal sphere²⁸. Tobias Barretto was a sharp critic of determinism to the point of affirming the impossibility of sociology as a field of study, and, in criminal law, if his ideas were not intended to suffrage free will, they were equally distanced from any racist determinism. Moreover, racist issues are traceable also in São Paulo’s jurists, such as Cândido Motta²⁹. Therefore, Schwarcz’s division between a determinist period (1870-1920) and a non-determinist period (after 1920)³⁰ and her statements about the special

²⁴ Carvalho Junior, C. de., “Escola positiva penal”, *Ciência Penal*, 4, 1975.

²⁵ About these jurists, see also lastly Dias, *Pensamento criminológico*, pp. 296-307.

²⁶ “diferentemente do que ocorre com os demais periódicos, nesse caso [da revista da faculdade de Direito de Recife] é possível perceber uma aceitação mais imediata das noções do evolucionismo e em especial dos estudos que vêem na raça um elemento fundamental. Dentre os autores citados chamam a atenção dois deles, conhecidos pelos estudos na área de criminologia. Com efeito, o destaque dado a Lombroso e Ferri atesta a relevância que esses teóricos terão na revista” (Schwarcz, *O espetáculo das raças*, p. 156).

²⁷ “a preponderância de artigos sobre direito criminal não parece, portanto, acidental. Faz parte de um debate específico, de uma seleção intencional de autores e teorias. Em Recife, esse esforço todo resultou na reelaboração dos modelos científicos então disponíveis, com um acento especial a essa área nova do direito criminal em suas determinações raciais” (Schwarcz, *O espetáculo das raças*, p. 159).

²⁸ Dias also noted this detail of João Vieira’s thought (Dias, *Pensamento criminológico*, p. 200) that was pointed out in the first version of this article.

²⁹ Cf. Dias, *Pensamento criminológico*, pp. 336 ss.

³⁰ Addressing the turn of the nineteenth century to the twentieth century, Elizabeth Cancelli seeks to displace the description of the positivist influence in Brazil from the emphasis on racism, thus questioning the necessary link between positivism and racism (Cancelli, E., “Criminosos e não-criminosos na história”, *Textos de História, UnB*, 2001, p. 1). It sounds like a very interesting guide for

place of racism as a general feature of the Recife Law School are not entirely convincing.

Drawing conclusions about the differences between Recife and São Paulo from these assumptions, Schwarcz stresses that: as “for the entrance examination, if 'notions of anthropology' were required in Recife, in the faculty of São Paulo, knowledge in 'psychology and logic' were required, which reveal different attentions in each of the courses: in the academy of Recife, the emphasis was on physical anthropology studies, and with it phrenology and racial determinism; in the school of São Paulo, the focus was on the philosophical perspective and a more distant debate from the biological sciences”³¹. About the centrality of “racial determinism” thesis, some caveats have already been made above. Regarding the difference between physical anthropology and philosophical vision, once again, the scheme is probably too narrow. In several Recife’s jurists thought, even the interest on physical anthropology came from philosophy. Not by chance, Clóvis Bevilacqua wrote a book entitled “*Juristas philosophos*” with some chapters dedicated to Recife Law School jurists, such as Tobias Barretto and Sylvio Romero³². The number of works dedicated to “pure” philosophy - that is, not specifically to the philosophy of law - among Recife’s jurists is large, and this justifies their presence in so many books on the history of Brazilian philosophy³³.

Regarding biology, within Tobias Barretto’s generational turn, Schwarcz states that “from that moment on, a new conception of law is built: a 'scientific' notion, in which the discipline appears allied to evolutionary biology, natural sciences, and to physical and deterministic anthropology. At the same time, in its affirmation movement, law distances itself from other human sciences, seeking to associate itself with areas that found only rules and certainties in their paths”³⁴. The demonstration of this thesis is made with a quotation on law as a sign of civilization, but this is little significant of any

new researches in order to comprehend racism in more complex ways within the history of Brazilian thought. Not by chance, Dias noted that “*a questão da raça, a partir dos moldes europeus, aparece explicitamente no pensamento de João Vieira, Viveiros de Castro, Phaelante da Camara, Severino Prestes e Candido Motta. Na verdade, embora não apareça com tanta ênfase como se poderia supor, poderíamos afirmar que a desigualdade dos homens pelo critério racial era como uma espécie de pressuposição comum que, muitas vezes, até prescindia de ser explicitada. Ainda que ela não apareça tanto ou explicitamente é inegável que os adeptos da criminologia positivista, a qual partia do pressuposto da desigualdade entre os homens, pensada inclusive em termos raciais, assimilavam este discurso racial naturalmente. A recepção da criminologia positivista implicava a absorção também da ideia da desigualdade natural entre os homens, como uma verdadeira premissa e a raça era, justamente, um dos fatores que determinavam esta desigualdade*” (Dias, *Pensamento criminológico*, p. 374).

³¹ “quanto ao exame de admissão, se em Recife se exigiam ‘noções de antropologia’, na faculdade paulista requeriam-se conhecimentos em ‘psicologia e lógica’, quesitos que revelam atenções diferentes em cada um dos cursos: na academia de Recife, a aproximação com os estudos de antropologia física, e com ela a frenologia e o determinismo racial; na escola paulista, um acento na perspectiva filosófica e um debate mais distante das ciências biológicas” (Schwarcz, *O espetáculo das raças*, p. 159).

³² Cf. Bevilacqua, C., *Juristas philosophos*, Bahia, 1897.

³³ Cf., for example, Paim, A., *A Escola do Recife. Estudos Complementares à História das Idéias Filosóficas no Brasil*, vol. V, 3ª ed., Londrina, 1997 and Robledo, A. G., *La filosofía en el Brasil*, Mexico, 1946.

³⁴ “a partir desse momento uma nova concepção de direito se constrói: uma noção ‘científica’, em que a disciplina surge aliada à biologia evolutiva, às ciências naturais e a uma antropologia física e determinista. Paralelamente, em seu movimento de afirmação o direito distancia-se das demais ciências humanas, buscando associar-se às áreas que encontravam apenas leis e certezas em seus caminhos” (Schwarcz, *O espetáculo das raças*, p. 149).

turn. Surely, evolutionism and naturalism are important topics in Barretto's generation works, however, this does not necessarily mean “biologism”. In other words, it is necessary to understand well the meaning of “biologism”. It would not be accurate to identify any organic metaphor (organicism) with the strong Lombrosian “biologism” which was criticised by Tobias Barretto and which is not so central in João Vieira de Araújo's thought in criminal law, that is, the thesis would not apply to the two main representatives of the Recife's Law School in the criminal law field. If the transposition of the model of the so-called “hard” sciences - such as biology - is a trait of the social and human sciences of that time, this does not mean that legal science has left aside the dialogue with sociology, with philosophy, and so on. Contact with all these areas still prevails, even if these jurists preferred scientific authors. Herbert Spencer - widely quoted in Recife - is still a philosopher-sociologist, even though he is a Darwinist. Therefore, the relationship with biology, particularly in the criminal law field, which should lead to the confirmation of Schwarcz's interpretation, is oblique. So, if there is any difference between São Paulo and Recife from this point of view, it is unlikely the difference between biological and philosophical approach. “Biologism” – in a wide sense – may be considered a widespread topic in that epoch – not only in Recife.

Moreover, it is not explained how the philosophical character of São Paulo in comparison with Recife could be compatible with the following statement about the *paulista's* political pragmatism (another conclusion often repeated by Brazilian legal historiography): “while Recife was prepared to produce doctrinators, 'men of science' in the sense conferred to it at that epoch, São Paulo was responsible for the formation of the great politicians and bureaucrats of the State”³⁵. If we are dealing with a sociological thesis about the professional profile of the bachelors of the two Law schools, it would be possible to raise the objection that not a few Recife bachelors made their careers on politics (this is the case of João Vieira, who, besides being a lawyer and professor, was a deputy for several legislatures). In this case, Schwarcz's thesis is not fully demonstrated because there is not a survey on the profile of both Law Schools bachelors in order to acknowledge if João Vieira was a rule or an exception. If it is a thesis on the self-image of the journals of their Law Schools, how could we explain the political issues found by Schwarcz himself in the application of scientific ideas (that is, in the application of science to the resolution of Brazilian political problems) in the pages of Recife's journal? Specifically, on criminal matters, we should note that the perception of typical Brazilian problems among jurists was marginal - very different, for example, regarding the writings of the anthropologist-physician Raymundo Nina Rodrigues. Anyway, this is an interesting interpretation that should be evaluated more carefully in the available sources, even though the result is unlikely to be a strong difference between Recife and São Paulo.

3. How and why is there *scuola positiva* in Brazil?

3.1 Paper-based circulation

³⁵ “enquanto Recife educou, e se preparou para produzir doutrinadores, 'homens de sciencia' no sentido que a época lhe conferia, São Paulo foi responsável pela formação dos grandes políticos e burocratas de Estado” (Schwarcz, *O espetáculo das raças*, pp. 183-184).

Tobias Barretto, notwithstanding his germanism, never made a stay in Germany. And the ideas of the *scuola positiva* did not depend much on the presence of Brazilians scholars in Italy or Italians in Brazil.

Nowadays, university's internationalization policies have made the circulation of Brazilian professors abroad and of foreign professors in Brazil very common. One of the consequences of this scenario is that the circulation of the ideas and texts of foreign intellectuals is much more complex: sometimes the texts of the foreign scholar are already known in Brazil before his visit to a Brazilian university; other times, a Brazilian professor meets the foreigner scholar in a seminar outside the country, invites him to conferences in Brazil and a wider knowledge of the foreign scholar work among us arrives afterwards; and so on. In the case of the early twentieth century, the flows tended to be much simpler: first, the texts became famous within Brazilian jurists, and then their authors occasionally (and numerically few in comparison with the number of foreign jurists known and appreciated by the Brazilian public) visits the country.

One of the few cases of circulation of criminal law scholars between Italy and Brazil – of course, in the period we are analysing – was Enrico Ferri's visit in 1908.

Ferri's visit to Brazil was regarded as a great event. The press followed every step of the distinguished guest from his departure from the port of Genova on board of the *Principe di Udine* on the 6th of June 1908³⁶ until his return on the 5th of December 1908³⁷. After passing through Buenos Aires, on his way back, Ferri landed at the port of Santos on the 1st of November 1908³⁸. After a few days in São Paulo, he went to Rio de Janeiro³⁹, Petrópolis⁴⁰, Campinas⁴¹ and returned to São Paulo⁴² before his departing to Italy from Santos. Reception committees have been created for every single arrival or departure of the famous visitor. Associations of Italian immigrants⁴³, professors and students⁴⁴, the Institute of Brazilian Lawyers⁴⁵, the Chamber of Deputies⁴⁶, among others, made a point of being present through the creation of these committees and also by promoting welcoming ceremonies. Parties and banquets were offered by prominent personalities from the Brazilian political and cultural scenario⁴⁷, as well as by workers' associations⁴⁸ - after all, the foreign visitor was an important exponent of the Italian socialist party.

A propos, Ferri's stay in Brazil was a great event also because of the political dimension. Our famous Italian deputy was accompanied on several occasions by the

³⁶ “Viagem de Enrico Ferri á America”, *Correio paulistano*, 5 de junho de 1908, p. 2, col. 6.

³⁷ “Enrico Ferri”, *Correio paulistano*, 5 de dezembro de 1908, p. 3, col. 1.

³⁸ “Enrico Ferri”, *Correio paulistano*, 2 de novembro de 1908, p. 1, coll. 4-5.

³⁹ “Enrico Ferri”, *O Paiz (RJ)*, 16 de novembro de 1908, p. 2, coll. 3-5.

⁴⁰ “Enrico Ferri em Petrópolis – recepção festiva – banquete do Sr. Rio Branco – no palacete da Westphalia”, *Correio paulistano*, 24 de novembro de 1908, p. 2, col. 3.

⁴¹ “Enrico Ferri”, *O Paiz (RJ)*, 10 de novembro de 1908, p. 1, col. 7.

⁴² “O professor Enrico Ferri – partida para S. Paulo – a ultima conferencia do eminente criminalista”, *Correio paulistano*, 29 de novembro de 1908, p. 3, col. 2.

⁴³ See, for example: “Campinas”. *Correio paulistano*, 8 de novembro de 1908, p. 3, col. 2.

⁴⁴ See, for example, “Enrico Ferri”, *Correio paulistano*, 2 de novembro de 1908, p. 1, coll. 4-5; and “Enrico Ferri”, *O Paiz (RJ)*, 16 de novembro de 1908, p. 2, coll. 3-5.

⁴⁵ “Enrico Ferri”, *O Paiz (RJ)*, 27 de novembro de 1908, p. 3, col. 2.

⁴⁶ “Camara”, *O Paiz (RJ)*, 17 de novembro de 1908, p. 5, col. 7.

⁴⁷ “Enrico Ferri”, *O Paiz (RJ)*, 27 de novembro de 1908, p. 3, col. 2.

⁴⁸ “Homenagens a Ferri – manifestação operária – discurso de saudação – conferencia sobre Pio X”, *Correio paulistano*, 27 de novembro de 1908, p. 2, col. 2.

Minister of Foreign Affairs, Baron *do Rio Branco*⁴⁹, he visited the Chamber of Deputies⁵⁰, he was received by the President of the Republic Affonso Penna⁵¹ (patron of the Law School of the Federal University of Minas Gerais), and he also discussed the problem of Italian emigration to Brazil⁵², and so forth.

But what interests us most are Ferri's academic activities in Brazil. In São Paulo, the students' association of the Law School organised a grandiose ceremony in which the keys of the faculty were given to the prestigious Italian intellectual. Our already known Cândido Motta was the one who accompanied Ferri⁵³. In addition, Motta gave a lecture in honour of the visitor emphasizing the "struggle" of the "*scuola positiva*" against the "*scuola classica*" in epic tones, with particular attention to Ferri's role. Ferri's own conference followed the same path: its main purpose was to spread the schools' struggle scheme⁵⁴. In Rio de Janeiro, an equally pompous ceremony was prepared by students and professors. On that occasion, the professor who gave the lecture in honour of the visitor was Esmeraldino Bandeira, a well-known follower of the *scuola positiva*, who spoke exactly about "the evolution of criminal law" up to "the living and vigorous impulse" of "Ferri's theories"⁵⁵.

Not all Ferri's conferences were held in Faculties and only some of them dealt with criminal law issues. Most of his conferences were held in theatres with ticket sales as if they were spectacles. The newspapers reported each one exactly in the section related to cinema, theatrical plays and spectacles in general. In one of them, ironically, the erudite conference of the Italian jurist was advertised right next to the advertising of a nightclub that apparently promoted a series of short films that promised "hours of pleasure and sensation"⁵⁶ (expressions well known at the time to qualify material considered pornographic). The Italian intellectual spoke about womanhood, Émile Zola, the origin of life, among other topics⁵⁷. In Rio de Janeiro, Ferri made a *tour* to the *Casa de Correção* (House of Correction), where he left the following message in the visitors' book: "I visited with interest this penitentiary, which is currently well run, but its construction represents the epoch when it was established and the ideas that then dominated over the 'delinquent man', in which the 'delinquent' was addressed too much and too little concern was addressed to the 'man'"⁵⁸, and he also visited the *Hospital de Alienados* (Psychiatric Hospital), where he was received by the physician Juliano Moreira⁵⁹.

⁴⁹ "Enrico Ferri em Petrópolis – recepção festiva – banquete do Sr. Rio Branco – no palacete da Westphalia", *Correio paulistano*, 24 de novembro de 1908, p. 2, col. 3; "Enrico Ferri", *O Paiz (RJ)*, 19 de novembro de 1908, p. 2, col. 4; "Enrico Ferri", *O Paiz (RJ)*, 22 de novembro de 1908, p. 2, col. 4.

⁵⁰ "Enrico Ferri", *O Paiz (RJ)*, 18 de novembro de 1908, p. 2, col. 2.

⁵¹ "Enrico Ferri", *O Paiz (RJ)*, 22 de novembro de 1908, p. 2, col. 4.

⁵² "Os italianos na America do Sul", *Correio paulistano*, 7 de novembro de 1908, p. 1, coll. 5-7, p. 2, coll. 1-2.

⁵³ "Interior", *O Paiz (RJ)*, 15 de novembro de 1908, p. 4, col. 6.

⁵⁴ "Enrico Ferri, Memória Histórica dos annos lectivos de 1908 a 1909", *Revista da Faculdade de Direito de São Paulo*, vol. XVII (1909), 1910, pp. 240-249.

⁵⁵ "Enrico Ferri", *O Paiz (RJ)*, 21 de novembro de 1908, p. 3, coll. 2-3.

⁵⁶ "Theatro S. Pedro de Alcantara" and "Moulin Rouge", *O Paiz (RJ)*, 20 de novembro de 1908, p. 12, coll. 2-3.

⁵⁷ "6 unicas conferencias scientifico litterarias do professor Enrico Ferri", *O Paiz (RJ)*, 10 de novembro de 1908, p. 10, col. 4.

⁵⁸ "Enrico Ferri", *O Paiz (RJ)*, 26 de novembro de 1908, p. 3, col. 5.

⁵⁹ "Enrico Ferri", *O Paiz (RJ)*, 24 de novembro de 1908, p. 3, col. 3.

Newspapers were publishing the enthusiastic reactions to Ferri's conferences: journalists reported the contents of his lectures⁶⁰; intellectuals made comments or dissertations about Ferri's works; and so forth. An example is the article by the physician João Marcolino Fragoso, who apparently was one of the most important Brazilian scholars undertaking a Lombrosian research in the final years of the nineteenth century⁶¹. According to him, *scuola positiva* had not yet officially acquired ample space in Brazil, but was slowly winning battles against “metaphysics”⁶².

Among Ferri's lectures, the one that caused much reaction was the one about woman's condition. Carmen Dolores (pseudonym of the prestigious writer Emília Bandeira de Melo)⁶³ and Virgolina Mexias⁶⁴ (perhaps a pseudonym, it was not possible to confirm her identity), although sometimes in a respectful tone, strongly criticised Ferri's statements about the biological inferiority of women.

In addition, conferences against Ferri's ideas were organised by the – Comtean - Positivist Apostolate⁶⁵ and by Catholic groups. The last conference in one of this series organised by a Catholic group in the traditional Portuguese Lecture Office (*Gabinete Português de Leitura*) was delivered by Lima Drummond, professor of criminal law at the National Law School of Rio de Janeiro. He was a supporter of the so-called “*terza scuola*”, and perhaps for this reason he is considered a “moderate”⁶⁶. At his conference, Lima Drummond launched virulent criticism against the *scuola positiva* – that he considered old fashioned and inappropriate, in opposition to the new and appropriate “*terza scuola*” - and against Ferri in particular. According to him, criminal anthropology does not even has an object since the anthropological type of criminal does not exist; positivist thought did not respect the boundaries of criminal law; ideas of social responsibility and classification of offenders are mistaken; Ferri's criminal substitutes (*sostitutivi penali*) are “infamies”. Moreover, with his atheistic ideas, Ferri was confronting “the religion of the people who hosted him”. According to Drummond, it would be necessary “to fight relentlessly against this Godless socialism imported from foreign lands that is telling us that we need to tear up the most glorious pages of the Republican Constitution. (...) Before we tear up the Constitution of the Republic, we will ensure the well-being and happiness of the people with their education by the book and the cross, uniting the two ideas of science and faith”⁶⁷. In short, not everything was banquets and flowers in Ferri's visit to Brazil. The resistance to the *scuola positiva* was also noticeable.

⁶⁰ For example: “Enrico Ferri”, *O Paiz (RJ)*, 26 de novembro de 1908, p. 3, coll. 4-5.

⁶¹ Moraes, “Primeiros adeptos e simpatizantes”, p. 148.

⁶² Fragoso, J. M., “Enrico Ferri”, *O Paiz (RJ)*, 17 de novembro de 1908, p. 1, coll. 6-7, p. 2, col. 1.

⁶³ Dolores, C. [Emília Bandeira de Melo], “A semana”, *O Paiz (RJ)*, 29 de novembro de 1908, p. 1, coll. 1-2. For a comment about this Melo's text, see Hellmann, R. M., *Carmen Dolores, escritora e cronista. Uma intelectual feminista da Belle Époque* [ph.D thesis], Florianópolis, 2015, pp. 74-75, pp. 322-327, pp. 435-436.

⁶⁴ Mexias, V., “Microcosmo”, *O Paiz (RJ)*, 25 de novembro de 1908, p. 1, coll. 1-3.

⁶⁵ “Enrico Ferri”, *O Paiz (RJ)*, 27 de novembro de 1908, p. 3, col. 2.

⁶⁶ Dias, *Pensamento criminológico*, pp. 264-286.

⁶⁷ “*combater sem tréguas esse socialismo sem Deus, que, importado de plagas estrangeiras, nos vem dizer que precisamos rasgar as mais gloriosas paginas da Constituição Republicana. (...) Antes de rasgarmos a Constituição da Republica, asseguraremos o bem estar e a felicidade do povo com a sua educação pelo livro e pela cruz, unindo os dois ideaes da Sciencia e da Fé*” (“Contraditas a Ferri”, *O Paiz (RJ)*, 7 de dezembro de 1908, p. 4, coll. 1-4).

It is not my intent to follow all the steps of Ferri's South American *periplo*⁶⁸ because it is enough for us to stress that probably his presence in Brazil was quite exceptional as an event in the history of cultural circulation between Brazilian and Italian cultures in the field of criminal law science. Nevertheless, the comparatively poor circulation of people, the gap between the circulation of people and the circulation of ideas, does not mean that theories travelled by themselves like a self-sufficient *Zeitgeist*. Books and letters travelled and allowed a kind of concrete contact between Brazilian and Italian jurists.

João Vieira de Araújo, for example, was a kind of correspondent for the *Scuola Positiva* journal in Brazil. In a note published in the *O Direito* journal, the birth of the *Scuola Positiva* was reported and a letter written by Giulio Fioretti, one of the Italian journal's directors, addressed to João Vieira inviting him to be a *Scuola Positiva*'s international correspondent⁶⁹. In addition, João Vieira published articles in Italy⁷⁰ and some of his works were reviewed by the Italian scholar Giovanni Albano⁷¹. But, probably, what most boasted João Vieira was the letter exchange with Lombroso himself⁷².

We also found signs of this paper-based circulation regarding Cândido Motta before his personal meeting with Ferri in 1908. Motta's writings were also reviewed in the pages of the *Scuola Positiva* journal⁷³, as a part of the Italian journal discourse on the school's dissemination abroad, which served to endorse the speech of expansion and strength of its ideas. Motta's work on the criminal classification was cited by Enrico Ferri in his book *Sociologia Criminale*⁷⁴, a fact always remembered with great pride.

Translations into Brazilian Portuguese by Italian positivists were also beginning to appear. In 1888, some fragments of Lombroso on the literature and religion of criminals

⁶⁸ I would like to profoundly discuss this issue in another article in the future.

⁶⁹ Soares, A. J. de M., "La Scuola Positiva", *O Direito: revista mensal de legislação, doutrina e jurisprudência*, vol. 55, 1891, pp. 361-362.

⁷⁰ Araújo, J. V. de, "La riforma dei codici criminali [1888]", *Archivio di psichiatria, scienze penali ed antropologia criminale*, vol. 10, 1889; Araújo, J. V. de, "Le scienze criminali al Brasile", *Estratto dalla Scuola Positiva*, anno I, n. 8, 1891; Araújo, J. V. de, "Projecto de código penal"; Araújo, J. V. de, "Il nuovo progetto di Codice Penale Brasiliano", *Scuola Positiva*, 1893.

⁷¹ Albano, G., "A nova escola de direito criminal, nel Diario di Pernambuco del 27 settembre 1888", *Archivio di psichiatria, scienze penali ed antropologia criminale*, vol. 10, fasc. II, 1889, pp. 218-219

⁷² Araújo, J. V. de, "Anthropologia criminal", *O Direito: revista de legislação, doutrina e jurisprudência*, 1889, p. 177; in one of the letters João Vieira de Araújo, the "discipulo devotado e reverente", sent to Lombroso, he mentioned Albano's review, the publication of his article about Brazilian criminal law reforms in the *Archivio*, and his book "*Commentarios ao código criminal*" (Letter dated June 17th, 1889, available at <https://www.lombrosoproject.it/dtl.php?id=4339>). But Vieira de Araújo was not the only one. Francisco Viveiros de Castro also exchanged letters with Lombroso in the 1890s. In one of these letters, Castro said that he was a "pauvre disciple" of the "Italian school", and that the aim of his book "*A nova escola penal*" was the dissemination of the Italian school's ideas. This was a clear exaggeration, because Castro's book also dedicated many pages to the dissemination of other criminological ideas, not displaying a clear preference for the Italian ones (Letter dated August 15th, 1894, available at <https://www.lombrosoproject.it/dtl.php?id=5128&if=2>). I would like to thank Régis João Nodari for making me aware of Francisco Viveiros de Castro's letter and the Lombroso Project website.

⁷³ "La Scuola Positiva all'estero", *La Scuola Positiva*, gennaio 1896, pp. 112-116; "Cândido Motta, Classificação dos criminosos", *La Scuola Positiva*, febbraio 1897, pp. 694-695.

⁷⁴ Ferri, E., *Sociologia criminale*, 4^a ed., Torino, 1900, p. 264, note 1.

were translated and commented by Vicente Ferrer de Araújo⁷⁵. The book was released by a publisher from Recife; the translator had a bachelor's degree from Recife Law School and his doctorate from São Paulo. Apparently, Ferrer de Araújo published very little: he was a lawyer and not a professor⁷⁶. In 1891, Octavio Mendes, a professor at the Law School of São Paulo, published the translation of two works by Ferdinando Puglia⁷⁷, which, although not strictly positivist, was close to the Lombroso circle. In the 1930s, several translations of Enrico Ferri's books appeared, but, in view of our time frame, it is enough for us to mention these first ones.

3.2 Authoritarianism?

On the causes of the - sometimes noisy - adhesion of Brazilian jurists to the *scuola positiva*, Ricardo Freitas created an interpretation only in appearance easy to confirm. According to him, “the national doctrine adhered to criminal positivism due, above all, to the authoritarian character that impregnates the entire historical formation of Brazilian society and favours the rise of anti-guarantee criminal ideologies, politically conservative and unfavourable to the validity of human rights”⁷⁸.

Without entering into the discussion about the thesis – perhaps excessively generalist – of an authoritarianism that would mark all Brazilian history, it is enough for our purposes to point out that Freitas' interpretation is based on an analogy: on the one hand, social authoritarianism, on the other, authoritarianism of *scuola positiva*'s ideas. It is possible to accept the two poles of the analogy: there are, in fact, some signs that make a reconstruction of this type perfectly valid. However, it is possible to refine the discourse from a little remark: if *scuola positiva* tended to be less liberal (in terms of criminal policy, than Francesco Carrara's ideas, for example), it was not homogenous⁷⁹. I would like to show only two examples. The *pericolosità* (or *temibilità*), quite rightly, is considered inadequate for a democratic society criminal law, but it is necessary to point out that this criterion, within the positivist thought, also resulted in expanding the

⁷⁵ Araújo, V.F. de, *A litteratura e a religião dos criminosos (dous capitulos de Lombroso): tradução com algumas anotações*, Recife, 1888.

⁷⁶ Cf. Blake, S., *Diccionario bibliographico brasileiro*, 6º vol., Rio de Janeiro, 1900, pp. 358. But this book does not appear on Blake's list.

⁷⁷ Puglia, F., *Da tentativa*, São Paulo, 1891; Puglia, F., *Prolegômenos ao estudo do direito repressivo*, São Paulo, 1891.

⁷⁸ “a doutrina nacional aderiu ao positivismo penal em razão, sobretudo, do caráter autoritário que impregna toda a formação histórica da sociedade brasileira e favorece a ascensão de ideologias penais antiguarantistas, politicamente conservadoras e desfavoráveis à vigência dos direitos humanos” (Freitas, *As razões do positivismo penal*, p. XXVII).

⁷⁹ Exceptional or not, when analysing the “reception” of a set of ideas it is important to bear in mind the existence of that side of the *scuola positiva*. About this dimension of the *scuola positiva*, it is enough for our purposes to mention only that, in Italy, Ferri's penal code draft was criticised for two main reasons: for not being liberal, but also for being a risk to the authority of the State (about this issue, see Sontag, R., “‘Uma linguagem antijurídica’: as críticas ao projeto de parte geral de código criminal italiano da comissão Enrico Ferri na Rivista Penale (1919-1923)”, *Revista brasileira de ciências criminais*, v. 104, 2013). Some positivists have criticised the indiscriminate punitive expansion carried out by the 1930 Fascist penal code. Giulio Andrea Belloni, for instance, denounced the expansive use of the concept of dangerousness (*pericolosità*) by the 1930 penal code far beyond the positivist horizon (Belloni, G. A., “La pericolosità criminale nelle riforme penali dei paesi latini”, *Révue Penale Suisse*, 1935, p. 63). About the complex relationship between *scuola positiva* and Fascism, see Pifferi, M., “Criminology and the Rise of Authoritarian Criminal Law, 1930s-1940s”, Skinner, S. (ed.), *Ideology and Criminal Law. Fascist, National Socialist and Authoritarian Regimes*, Oxford, 2019.

hypothesis of judicial pardon. Despite all their concern with the social defence, within the *scuola positiva*'s there was also a real "humanitarian" concern with the conditions of the prisons⁸⁰; regarding the expansion of the *ius puniendi*, sometimes they were fierce opponents of the existence of moralistic crimes in the legislation⁸¹.

In addition, *scuola positiva*'s ideas are not necessarily contradictory with a liberal view of society, politics and State. As pointed out by Dias, *scuola positiva*'s ideas in Brazil tended to authoritarian schemes and proposals, however, this is not synonym of anti-liberal perspectives. Within all criminal law discourses of the nineteenth centuries there was the tension between liberties and order, i. e., within liberal penal ideology. Therefore, *Scuola positiva* is a particular case – certainly very important and sometimes quite extreme - of emphasis on the order pole⁸².

Certainly, *scuola positiva*'s ideas provided ("authoritatively") tools for social control of "enemies" and "undesirable" people in Brazil⁸³. But it seems more appropriate to seek the main reasons for its relative success in the fact that Italian scholars successfully asserted their ideas as highly modern, and Brazilian legal culture, since the beginning of the nineteenth century, wished to be updated with European modern trends⁸⁴, even if disagreeing or considering certain ideas unsuitable for the national context.

3.3 *Scuola positiva* and the Brazilian legal tradition

Deepening the arrival in Brazil of *scuola positiva*'s ideas requires that we take a closer look at the local tradition. To do so, we need to return to a topic abovementioned: the historiographical category "*scuola classica*" versus "*scuola positiva*".

Probably the most conscious use of this category – somehow contradicting Mario Sbriccoli's statement according to which the survival of this kind of historical interpretation would be due exclusively to a-critical reproduction⁸⁵ – is that of Rafael Mafei Rabelo Queiroz in his book "*A modernização do direito penal brasileiro*"⁸⁶. After

⁸⁰ See Britto, J. G. de L., *Systemas penitenciarios do Brasil*, 1924. Even if, certainly, the control issues were always present within Britto's discourse (and on the whole history of the prison debate in Brazil, as pointed out by Roig, R. D. E., *Direito e prática histórica da execução penal no Brasil*, Rio de Janeiro, 2005).

⁸¹ João Vieira, for example, also with *scuola positiva*'s arguments, proposed in 1893, with his penal code draft, the abolition of adultery as a crime. Cf. Araújo, J. V. de, "Projecto de código penal. Exposição de motivos", p. 85 and Araújo, J. V. de, *O projeto do Código Penal e a Faculdade de São Paulo*, Recife, 1895, pp. 73-74.

⁸² Dias, R., *Pensamento criminológico*, especially pp. 263-264, pp. 388-389.

⁸³ Alvarez, "A Criminologia no Brasil".

⁸⁴ José Reinaldo de Lima Lopes considers it a general feature of the Brazilian legal thought of that period (Lopes, J. R. de L., *Naturalismo jurídico no pensamento brasileiro*, São Paulo, 2014, pp. 27-28, pp. 73-74).

⁸⁵ Sbriccoli, M., "La penalistica civile: teorie e ideologie del diritto penale nell'Italia unita [1990]", in *Storia del diritto penale e della giustizia*, Vol. I, Milano, 2009.

⁸⁶ Queiroz historiographical awareness is perceptible in his pertinent remarks about the caricatural and homogenizing character of the image that positivists made of the "classics", and also the use of quotation marks in the term "war" when referring to the clash between schools (Queiroz, R. M. R., *A modernização do direito penal brasileiro: "sursis" e livramento condicional, 1924-1940*, São Paulo, 2002, pp. 139-140, p. 143).

affirming that the reception of the *scuola positiva* in Brazil would be “an expression of the search to overcome the classical standards of criminal law”, Queiroz highlights an apparently banal but important fact: the reception of these ideas would also be linked to a “desire to incorporate the criminal law doctrine to the standards of science of that time”⁸⁷. In other words, it was a necessity to participate in international debates in the criminal law scientific field. The feeling of updating remained guaranteed by the historicist scheme widespread by the *scuola positiva* itself: the binomial “*scuola classica*” versus “*scuola positiva*” was not only an identity device, but an evolutionist identification device, which deployed the logic of the present and the past. And the past, of course, was the “*scuola classica*”’s place.

But in Brazil's case, the past was not exactly “classic”. Or, at least, some elements used by positivists for the construction of the *scuola classica*’s depiction did not find correspondence in the Brazilian context. Drawing a complete map of Brazilian criminal law in the nineteenth century is excessive for the purposes of this article, but it is possible to highlight some aspects that can help us to understand the presence of the Italian *scuola positiva* in Brazil. Miguel Reale, for example, although he points out that Francesco Carrara was used by Brazilian jurists in the nineteenth century, states that “until the last decades of the last century, that is, until the end of the Second Reign, we cannot speak of frequent dialogue (...) between Brazilians and Italians with regard to the legal problem. The meetings are sporadic, when they do not take place thanks to indirect sources, by information gathered from French authors”⁸⁸. In fact, it is still possible to find French translations of Ferri’s books in Brazilian legal libraries and antique bookstores. And later on, Reale adds: “it can be said, therefore, that, in general, the great masters of Brazilian Law in the imperial period wrote under the direct and predominant French or German doctrines influence, without ever being detached, it is good to remember, from the vigorous roots of the Portuguese tradition”⁸⁹.

Ricardo Freitas, in a more recent research, confirms Miguel Reale's general impression. Even though the binomial “*scuola classica*” versus “*scuola positiva*” being a central category of Freitas' narrative, he observes, referring to the Brazilian criminal law literature prior to the *scuola positiva*, that “it would be better if we called it traditional or non-positivist jurists, since they limited themselves, for the most part, to commenting the criminal code of the Empire based, above all, on the French doctrine

⁸⁷ “expressão da busca pela superação dos padrões clássicos de direito penal”; “desejo de incorporação da doutrina jurídico-penal aos padrões de ciência da época” (Queiroz, *A modernização do direito penal brasileiro*, p. 21).

⁸⁸ “até as últimas décadas do século passado, ou seja, até o fim do II Reinado, não se pode falar em diálogo freqüente ou em convívio entre brasileiros e italianos no que tange à problemática jurídica. Os encontros são esporádicos, quando não se verificam graças a fontes indiretas, por informações hauridas em autores franceses” (Reale, M., “A cultura jurídica italiana no Brasil”, *Revista Brasileira de Filosofia*, São Paulo, vol. IX, fasc. I, n. 33, 1959, pp. 105-107).

⁸⁹ “pode-se dizer, pois, que, em geral, os grandes mestres do Direito pátrio, da época imperial, escrevem sob direta e predominante influência de doutrinas francesas ou alemãs, sem jamais se desprenderem, é bom lembrá-lo, das raízes vigorosas da tradição lusitana” (*Ibid.*). The German “influence” in the nineteenth century Brazilian legal culture recurs on private law, and not on criminal law (cf. Queiroz, R. M. R., *O direito a ações imorais - Paul Johann Anselm von Feuerbach e a construção do moderno direito penal*, São Paulo, 2013; Sena, N. N. E. de, Sontag, R., “The Brazilian Translation of Franz von Liszt’s *Lehrbuch des deutschen Strafrechts* (1899): A History of Cultural Translation between Brazil and Germany”, *Max Planck Institute for European Legal History Research Paper Series*, n° 2019-17).

and not on the Italian one”⁹⁰. Freitas' remark is particularly pertinent because, instead of trying to follow the binomial orthodoxy - which would be possible using the Ferrian interpretation according to which there is a practical branch of the *scuola classica* - he makes the category more flexible. Freitas still observes that in two important jurists of the Empire, Thomaz Alves Júnior and Braz Florentino, Francesco Carrara is not mentioned⁹¹. His conclusion - which, in spite of everything, does not forego the term “classical” - is that “the classical Brazilian doctrine, being linked to the criminal law tradition of French classicism, opts for its poorer theoretical aspect, less linked to the guarantees and more to the technical solutions represented by the mere exegesis of criminal texts”⁹².

It is quite true that the presence of a unitary national code shaped the Brazilian criminal literature of the nineteenth century. Indeed, most of the existing books on criminal law are comments on the 1830 code. If these comments were limited to mere exegesis, if these comments were also concerned about the political effects of technical choices (the “civic commitment” of the Sbriccolian *penalistica civile* concept) and with the civilizational aspect of criminal law (which could be an adequate translation of the expression “guarantee” applied to the nineteenth century), our conclusions should probably be more tinted. For example, Thomaz Alves Júnior - who fits very well within Miguel Reale and Ricardo Freitas statements about the proximity to the French and Portuguese traditions - criticised the death penalty in his comments, the flogging as a public penalty against slaves and, in particular, depreciated the *horrenda exceptio* of the 10th of June 1835 which expanded the legal possibilities of death penalty for slaves compared to what was already prescribed in the 1830 criminal code⁹³. João Luiz Ribeiro's book on this statute brings several statements of Brazilian jurists against the death penalty, sometimes in journalistic articles, sometimes in the exercise of some legal function (judges, lawyers, counsellors within the State Council, etc.)⁹⁴. Therefore, it is not excluded, at least, the existence of dispersed “civic commitments” and perhaps connected with a private law commitment: the abolition of slavery⁹⁵.

⁹⁰ “melhor seria se os chamássemos de penalistas tradicionais ou não-positivistas, pois limitaram-se, na sua maior parte, a comentar o código criminal do Império com base, sobretudo, na doutrina francesa e não na italiana” (Freitas, *As razões do positivismo penal*, p. 283).

⁹¹ *Ibid.* pp. 283-284.

⁹² “a doutrina clássica brasileira, vinculando-se à tradição jurídico-penal do classicismo francês, opta pela vertente teórica mais pobre, menos vinculada ao garantismo e mais às soluções técnicas representadas pela mera exegese dos textos penais” (*Ibid.* p. 284).

⁹³ Alves Junior, T., *Anotações theoricas e praticas ao código criminal*, Tomo I, Rio de Janeiro, 1864, pp. 92-97; Alves Junior, T., *Anotações theoricas e praticas ao código criminal*, Tomo II, Rio de Janeiro, 1870, p. 25. For a historiographical analysis of this issue, see Sontag, R., “‘Curar todas as moléstias com um único medicamento’: os juristas e a pena de prisão no Brasil (1830-1890)”, *Revista do Instituto Histórico e Geográfico Brasileiro*, vol. 471, 2016, pp. 56-60 and Sontag, R., “«Excepção única á civilização christã»: o problema dos açoites na literatura jurídico-penal brasileira (1824-1886)”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, vol. XLIX, 2020.

⁹⁴ Ribeiro, J. L., *No meio das galinhas as baratas não tem razão: a lei de 10 de junho de 1835: os escravos e a pena de morte no Império do Brasil, 1822-1889*, Rio de Janeiro, 2005.

⁹⁵ Cf. Moraes, E. de, *A campanha abolicionista (1879-1888)*, Rio de Janeiro, 1924; Dal Ri Júnior, A., “La storiografia giuridica brasiliana letta attraverso l’esperienza storiografica penale”, Sordi, B. (a cura di), *Storia e Diritto: esperienze a confronto: incontro internazionale di studi in occasione dei 40 anni dei Quaderni fiorentini, Firenze, 18-19 ottobre 2012*, Milano, 2013. Moraes narrates the commitment - theoretical and practical - of several legal actors in defence of slaves in criminal situations; Dal Ri Júnior suggests the historiographical hypothesis of the connection between the civic commitment within the criminal law field and the slavery abolition commitment. For an attempt of confirming this

Thereupon, how was the positivist memory regarding Brazilian legal history? Let's start with the words of an Italian jurist who dealt with Latin America criminal law tradition.

“The young and dynamic civilizations of Latin America have soon and largely offered application fields to such new directives [of the *scuola positiva*] of criminal law: because if those civilizations are less loaded with experience, they were less burdened with traditions, and therefore less worried about dogmas that draw strength from their own age (...). Within a similar anti-traditional context, the government of innovators introduced the revolutionary criminological principles (...) into the vast domain of the Soviet revolution; but the Italian word struggled to penetrate into a circle more directly inspired by the Germanic culture and did not reach it entirely”⁹⁶.

The author of the above fragment, Giulio Andrea Belloni, was a convinced Ferrian⁹⁷. After the 1930 Rocco penal code, he was still defending the Ferrian unitary solution (sanction) against the dualist one (penalties and security measures). In the cited article, his aim was to evaluate the influence of the notion of dangerousness (*pericolosità*) on Latin American penal reforms. For him, the lack of tradition in Latin America would make it even more open to the reception of *scuola positiva*'s ideas than the revolutionary URSS.

Moreover, Belloni's argument about the lack of tradition was probably learnt from his master. In 1908, Ferri told the students of the São Paulo Law School that “the youth must continue the work begun by his generation and, above all, the youth of the new countries can better carry out this mission because it does not have to impede his steps the strength of tradition and routine”⁹⁸.

Lack of tradition. I do not pretend to confirm or deny the aforementioned comparison Brazil *versus* Europe in terms of tradition regarding criminal law. It is enough for our purposes state that *scuola positiva*'s ideas did not find, in Brazil, an absolutely open field. The enthusiastic Brazilian propagandist of the *scuola positiva*, Viveiros de Castro⁹⁹, noticed, for example, the resolute resistance to “new ideas” among law practitioners. Rosa del Olmo, on the other hand, in her study on Latin American criminology, points out that, in Brazil, the reception of positivist ideas was more critical

historiographical intuition, see Sontag, “«Exceção única á civilização christã»: o problema dos açoites na literatura jurídico-penal brasileira (1824-1886)”.

⁹⁶ “*Campi d'applicazione le giovani e dinamiche civiltà dell'America latina hanno presto e largamente offerto a tali nuove direttive del diritto penale [della scuola positiva]: perché se quelle civiltà sono meno cariche d'esperienza, si trovavano meno gravate da tradizioni, e perciò meno succubi di dogmi che traggono forza dalla propria vetustà [...]. Un corrispondente stato di fatto antitradizionale e di governo di novatori introduceva i principi criminologici rivoluzionari, da tali parole asseriti, nel vasto dominio della rivoluzione sovietica; ma la parola italiana stentava a penetrare in una cerchia ispirata più direttamente alla cultura germanica e non vi giungeva intera*” (Belloni, *La pericolosità criminale*, pp. 57-58).

⁹⁷ Belloni was a direct disciple of Enrico Ferri. As Bruno di Porto explains, Belloni “*studiò giurisprudenza a Roma, pubblicando ancora studente un breve saggio di criminologia (Preliminari alla criminologia, Roma 1922) e laureandosi in diritto penale con E. Ferri*” (Di Porto, B., “Belloni, Giulio Andrea”, in *Dizionario Biografico degli Italiani*, vol. 7, 1970).

⁹⁸ “*cumprer a mocidade continuar a obra encetada pela sua geração e, sobretudo, a mocidade dos paizes novos melhor pode executar essa missão porque não tem a impedir-lhe os passos a força da tradição e da rotina*” (“Enrico Ferri, Memória Histórica”, p. 250).

⁹⁹ Castro, F. V. de, *A nova escola penal*, Rio de Janeiro, 1894.

than in other Latin American countries, such as Argentina¹⁰⁰. Marcos Alvarez, in trying to understand 'how' these ideas were received in Brazil, argued that one of the salient features of Brazilian criminal positivism was the eclecticism, i. e., the mixture with traditional patterns¹⁰¹.

On the other hand, it is quite true that enthusiasm for “novelty” infected several Brazilian jurists. As an example, it will be enough to evoke the texts of pure *scuola positiva*'s propaganda that appeared at the end of the nineteenth century. The most famous is “*A nova escola penal*” (“The New Penal School”) written by the abovementioned scholar Viveiros de Castro. We can mention also several articles published in legal journals, such as some by João Vieira de Araújo that, as a rule, made nothing else but summarize the main ideas of Italian positivists¹⁰². Not by chance, for example, Marcos Alvarez research highlighted the lack of originality of these Brazilian jurists, notwithstanding his methodological perspective of seeking the “originality of the copy”¹⁰³.

In this aspect, it is possible to further scrutinize the already evoked thesis about the willingness of Brazilian jurists to insert themselves into the international debate in order to propose an interpretation capable of overcoming the blind alleys of the use of the binomial “*scuola classica*” versus “*scuola positiva*”¹⁰⁴.

One of the possible ways to seek the “originality of the copies” is to analyse the “functionalization” of foreign forms to deal with typical national issues – although it is not always so easy to specify what a typical national issue is. Lília Schwarcz has found this “functionalization” for the theme of Brazilian racial diversity. However, Schwarcz's thesis is fully convincing for fields that are not specifically criminal - such as Sylvio Romero's works on *mestiçagem* and Raymundo Nina Rodrigues medical texts or when jurists dealt with criminological issues, racism appeared frequently, even if not always

¹⁰⁰ Olmo, R. del, *A América Latina e sua criminologia*, Rio de Janeiro, 2004, p. 267

¹⁰¹ Alvarez, “A criminologia no Brasil”, p. 686. Dias noticed the same fact (Dias, *Pensamento criminológico*, pp. 268, pp. 284-285, pp. 319-320).

¹⁰² Araújo, J. V. de, “A nova escola de direito criminal. Os juristas italianos E. Ferri, F. Puglia e R. Garofalo”, *O Direito: revista de legislação, doutrina e jurisprudência*, vol. 47, 1888; Araújo, J. V. de, “Anthropologia criminal”. For a detailed analysis of these texts, see Sontag, “*Código criminológico*”?, pp. 55-58.

¹⁰³ Alvarez, “A criminologia no Brasil”, p. 686.

¹⁰⁴ Most studies on the “influence” of positivism in Brazil, despite using the aforementioned binomial, usually make reservations - some of which have already been mentioned here - that demonstrate the attempt to apply such a category in a conscious and critical manner. In some cases, however, the traps of the binomial schematism and the excessive generic character of the notion of “influence” fully reach the historical narrative that was intended to be constructed. Elizabeth Cancelli, for example, considers the “reception” of the *scuola positiva* the great rupture in the history of Brazilian criminal law between the nineteenth and twentieth centuries. With this starting point, Cancelli comes to find positivist “influences” in the most unusual places, such as in the 1890 penal code (Cancelli, “Criminosos e não-criminosos na história”; Cancelli, E., “Na virada do século: a cultura do crime e da lei”, *Seminários, nº 1, Crime, criminalidade e repressão no Brasil República, Arquivo Público do Estado de São Paulo*, 2001), a code that was written almost by a single jurist that was clearly anti-positivist. Marcela Varejão is also induced to the same error through the concept of “influence” when addressing the 1890 code (Varejão, *Il positivismo dall'Italia al Brasile*, pp. 432-433). Another example of the use of the scheme “*scuola classica*” versus “*scuola positiva*” with little critical conscience is the Ph. D. thesis of Bartira Macedo de Miranda Santos' (Santos, B. M. de M., *As idéias de defesa social no sistema penal brasileiro: entre o garantismo e a repressão de 1890 a 1940* [Ph.D. thesis], São Paulo, 2010).

explicitly functionalized for solving Brazilian problems¹⁰⁵. Within the specific criminal law field, this type of “functionalization” seems to have been marginal - a conclusion consistent with Marcos Alvarez's statement about the lack of originality of Brazilian jurists.

In these circumstances, another possible way out is to verify the points that got the reader specifically interested in the text to be received. A full reception would no longer be reception, but plagiarism. The selection of topics can be a hint of a sort of “functionalization” in the reader's context. Ricardo Freitas sought to identify the recurring themes among the Brazilian positivist jurists, but the result of this observation basically indicated that the Brazilian scholars were attentive to what was central in the positivist texts¹⁰⁶. Marcos Alvarez also took these paths and perceived Brazilian eclecticism¹⁰⁷. The presence of the criticism against positivist exaggerations even among Brazilian jurists that appreciated Lombroso, Ferri or Garofalo works confirms this conclusion. Therefore, we are dealing with a type of reception that indicates that the Brazilian scholars were attentive not only to *scuola positiva* ideas, but also to the debate that existed around them. For this reason, Alvarez disagrees with Pierre Darmon's thesis according to which Latin America became an *eldorado* for the *scuola positiva* at the time of its decadence in Europe¹⁰⁸. In other words, the cases of enthusiastic reception of these ideas were not necessarily signs of ignorance of the debate that existed in Europe around them.

All these clues apparently lead us to a dead end. However, comparing these results with Michele Pifferi's conclusions on the presence of *scuola positiva*'s ideas in USA, they can become significant. In the USA, the *scuola positiva*'s receiving process

¹⁰⁵ See, for example, Dias, *Pensamento criminológico*, p. 200, p. 296, pp. 336 ss, p. 374.

¹⁰⁶ The aspects identified by Freitas are: a) the social defense connected to the idea that the criminal is abnormal; b) the preference for social responsibility rather than individual responsibility; c) instead of conceptualizing the crime, addressing the causes of crime; d) rigorous criminal policy. On the last point, we must remember that Freitas assumes that *scuola positiva* is necessarily authoritarian (Freitas, R. de B. A. P., “Condenados à civilização: o positivismo naturalista e a repressão penal no alvorecer da República”, Brandão, C., Saldanha, N., Freitas, R. de B. A. P. (coords.), *História do direito e do pensamento jurídico em perspectiva*, São Paulo, 2012, p. 378).

¹⁰⁷ Eclecticism (as the tendency to consider a positive theoretical behaviour to avoid rigidities of theoretical systems) has already been noted in several jurisdictions. The elements considered as unilateral and that which would need to be mitigated and accommodated in the name of eclecticism may vary. In the Spanish case of the nineteenth century, some of the relevant poles were retribution and prevention, justice and utility, as Emilia Iñesta-Pastor well pointed out (Iñesta-Pastor, E., “La interpretación del eclecticismo en la doctrina y en la legislación penal de la España del siglo XIX”, *Ivs Fvgit*, vol. 19, 2016, pp. 212-213). We can say that *scuola positiva* brought new terms to be accommodated and mitigated. Luigi Lacchè, in his powerful analysis of the eclectic canon in Italian legal culture prior to the specialisms of the late nineteenth and early twentieth centuries, in addition to indicating some of the terms of eclecticism of that time in Italy (Lacchè, L., “Il canone eclettico. Alla ricerca di uno strato profondo della cultura giuridica italiana dell'Ottocento”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, vol. 39, 2010, pp. 203-205, p. 211), correlates eclecticism with a certain figure of jurist. According to Lacchè, “lo studio della prospettiva eclettica lascia intravedere in effetti un terreno vastissimo e ‘informe’. Mentre l'organizzazione della cultura giuridica per ‘scuole’ offre una più netta fisionomia (con il pericolo però di assolutizzare, irrigidire, parcellizzare, isolare, allontanare), l'eclettismo appare anzitutto come un atteggiamento, una postura del giurista della Restaurazione” (Lacchè, “Il canone eclettico”, p. 206). There is not yet a detailed historiographic verification of whether this pattern also existed in the nineteenth century Brazilian legal culture, despite some mentionings of our historiography to eclecticism within legal discourses of that epoch.

¹⁰⁸ Darmon, P., *Médicos e assassinos na “Belle Époque”*: a medicalização do crime, Rio de Janeiro, 1991.

developed in a perfectly opposite direction: American jurists tended to be even bolder - to European standards - than the Italian positivists themselves. Sometimes, they even criticised Italian *scuola positiva* for its over-commitment with “traditional” standards¹⁰⁹.

Therefore, it is necessary to be prudent when evaluating the presence of the *scuola positiva* by analysing the eloquent gestures of adhesion of João Vieira de Araújo or Viveiros de Castro. The seduction of the historicist scheme “*scuola classica*” versus “*scuola positiva*” certainly provided a reliable compass for Brazilian jurists: to adhere to the *scuola positiva* seemed to align with what was most “modern”, i.e., to be adequately inserted in the international debate¹¹⁰. But this willingness to be included in the international discussions is not necessarily perfectly analogous to a willingness to transpose those ideas to a national legal context. In the application of *scuola positiva*'s ideas for the elaboration of legal institutes in particular, in the elaboration of criminal reforms applicable to the Brazilian context in the short or medium term (which were not, therefore, mere claims for a very uncertain future), we did not always find the perfect correspondence between the aforementioned inclusion within an international debate and the transposition willingness¹¹¹. There are several facts that allows us to state this lag: Marcos Alvarez's assertion about the Brazilian jurists eclecticism; the fact that Brazilian jurists have not produced any penal code draft as daring as the Ferri project or others that have been experienced in Latin America; and, entering into a very specific case, the mismatch between the eloquent gestures of adhesion (that included the most *scuola positiva*'s radical ideas on penal reform) and the elaboration (theoretical or practical) of positivist penal reforms for the Brazilian legal context in João Vieira de Araújo's thought and action¹¹².

¹⁰⁹ Pifferi, M., “L'influenza della scuola positiva negli Stati Uniti. Luci ed ombre di un successo culturale”, in *Diritto penale XXI secolo: atti del convegno nazionale in ricordo di Giuliano Marini: scuola positiva e codice Rocco*, Torino, 21-13 ottobre 2010.

¹¹⁰ Not by chance, even jurists that did not adhere specifically to the *scuola positiva* sometimes deployed the same argumentative pattern, such as Lima Drummond, as we have already seen.

¹¹¹ Certainly, there was also transposition, even if in a lower degree. For some examples of national issues discussed with positivistic parameters (also among non-jurists), see, for example: Santos, *As idéias de defesa social no sistema penal brasileiro*, pp. 93-98, pp. 117-124.

¹¹² Rebeca Dias does agree with this interpretation that I have proposed in the first version of this article and in my book published in 2014, but she has added that João Vieira was not so timid in his positivist concrete proposals for the short term considering the “legal culture of that epoch”: “*não considero, tendo em vista o contexto e o estado da cultura jurídica penal da época, tão tímidas as suas propostas quanto indica Ricardo Sontag*” (Dias, *Pensamento criminológico*, pp. 214-215). The limited range of João Vieira's concrete proposals for the short term and for the Brazilian context were evaluated in my interpretation regarding only his theoretical proposals, and, in this sense, the gap between these dimensions is not denied by Dias. Therefore, I do not think there is contradiction between my interpretations and Dias'. Moreover, the six arguments about João Vieira's draft brought by Rebeca Dias are not enough to refute my interpretation. The six arguments are: 1) the definition of mental alienation was borrowed from the 1889 Italian code, which had been suggested by Lombroso; 2) the fact that the draft avoided the cellular regime, following Ferri's opinion; 3) the advocacy of the death penalty in Garofalo's terms; 4) the inclusion of conditional sentence; 5) the limitation of conditional release based on dangerousness, which could sound very positivist; 6) the advocacy of recidivism based on dangerousness, as supported by the positivists. To restate my interpretation, I will discuss only some of Dias' arguments because it is enough to assert João Vieira's shyness regarding his concrete reform proposals in comparison with his own positivistic ideas. About the first argument, the fact that the definition was accepted in a code considered liberal like the Italian one of 1889 is a sign that there was no challenge to the standards of the “legal culture of that epoch”; about the third, the advocacy of the death penalty was not an exclusivity of the positivists, they only updated and created new versions of old arguments for the debate, furthermore, although João Vieira was a supporter of this kind of penalty, he did not include it in his draft because of the limitations imposed by the 1891 Brazilian constitution; about

Back to Belloni's discourse, although the thesis of the lack of tradition is quite weak, this does not mean that it cannot be transformed into a historiographically relevant clue.

In Italy, as we already know, Enrico Ferri analysed the preceding Italian criminal law literature with the general term “*scuola classica*”. A general category which was then subdivided into two streams: the “doctrinal” one, represented by Francesco Carrara, and the “forensic [or judicial]” one¹¹³. According to Ferri, Carrara's greatness was linked to his capacity of going beyond legislation: he was a system builder, useful not only for legal practitioners, but also for the legislator. In the Ferrian depiction about Carrara, the ambiguity of the “*scuola classica*” concept is clearly perceptible: it meant esteem for the capacity to go beyond the *tecnicismo* (referred to in a much more pejorative way by Ferri with the expression “*neoclassicismo*”), and, at the same time, the attempt to enclose it in a past whose importance is that of a phase already overcome, according to the evolutionist scheme.

Taking into consideration the Ferrian subdivision between these two types of “classical” criminal law literature, it is not difficult to argue that, in Brazil, a tradition of great systematic treaties was not formed at least until the first decades of the twentieth century. Then, Ferri's contempt for “forensic” criminal law literature, in some Brazilian positivist authors, became a somehow different depiction of the national criminal law past.

The enthusiastic propagandist Viveiros de Castro, for example, observing the flourishing of the *scuola positiva* in Brazil, stressed that a Brazilian *scuola classica* probably did not even exist because of the lack of doctrinal reaction against positivists. At the bottom of this Viveiros de Castro's perception, probably there was the aforementioned absence of a great systematic treaty within nineteenth century Brazilian criminal law literature. Not by chance, he asserted that the greatest battle for the consolidation of the new school in Brazil was to overcome the diffuse resistance in judicial practice - among judges, for example - but not in the universities, in the high legal culture¹¹⁴. With a strong dose of rhetoric, he said that Brazilian jurists “are limited to practical works, forms and annotations, without criteria, philosophy, or science, books of commercial speculation of real business”¹¹⁵. In the antipodes of the Ferrian discourse, that had on its back the powerful Carrara's shadow, Viveiros de Castro regretted that “our criminalists summarize their science in discussing procedural nullities, chicanes and foolishness of village *rábulas*”¹¹⁶.

the sixth, Dias himself pointed out that Araújo did not propose in his draft what he advocated in theory, that is, the draft offered an hybrid solution that mixed subjective and objective criteria, in the wake of the 1889 Italian code, that is, a great example of my interpretation regarding the difference between theoretical horizon and reform proposals concretely putted forward by João Vieira.

¹¹³ Ferri, E., *Principii di diritto criminale. Delinquente e delitto nella scienza, legislazione, giurisprudenza in ordine al Codice penale vigente – Progetto 1921 – Progetto 1927*, Torino, 1928, pp. 39-40.

¹¹⁴ Castro, *A nova escola penal*, pp. 10-11.

¹¹⁵ “*limitam-se a obras de praxe, formulários e anotações, sem critério, sem philosophia, sem sciencia, livros de especulação mercantil, de verdadeiro negocio*” (*Ibid.* p. 8).

¹¹⁶ “*os nossos criminalistas resumem sua sciencia em discutir nullidades de processo, chicanas e parvoices de rabulas de aldeia*” (*Ibid.* p. 67).

Even avoiding the rhetoric and the strong negative evaluations of Viveiros de Castro, there is a point of interest in his discourse: the testimony of the inexistence of a point of reference like Francesco Carrara in the Brazilian nineteenth century criminal law literature. Until it was possible to use European references - particularly Italians, but also Germans, such as Feuerbach, who is mentioned as the representative of “classicism” in Germany in the introduction written by José Hygino Duarte Pereira to his translation of Franz von Liszt's *Lehrbuch des deutschen Strafrechts*¹¹⁷ - the opposition between *scuola classica* and *scuola positiva* seemed to work. On the other hand, there is a discursive change when this scheme is transplanted to the Brazilian context - as Viveiros de Castro's passages abovementioned: we have found a struggle against an “emptiness”. The previous tradition¹¹⁸ (partially affectionate for code comments) became “invisible”, and then – it is true - very distant from Carrara's style. But this commentary tradition deserves a more comprehensive analysis less loaded with later negative evaluations. Only then it would be possible, for example, to adequately assess what was provisionally called above “dispersed civic commitment”.

Years later, Aníbal Bruno - a jurist close to the *scuola positiva*, but with a deep dialogue with the *tecnicismo* – manifested an analogous evaluation of the Brazilian criminal law literature of the nineteenth century, although the focus of his discourse was a compliment to the former professors of the Recife Law School. Among the old praised professors was José Hygino, who had not left great books, probably because of his other activities, such as those of magistrate and politician. However, Hygino had translated Franz von Liszt's famous *Lehrbuch*, whose publication, according to Aníbal Bruno, was a great event within Brazilian criminal law literature because it “supplied (...) the absence of true treaties in the Brazilian criminal doctrine, since, in general, our literature has been restricted to the work of commenting on the articles of the Code”¹¹⁹.

In the essay “*Le scienze criminali in Brasile*” by João Vieira de Araújo, published in the *Scuola Positiva* journal, he regretted that “the studies that have so far been carried out in Brazil have tended especially towards theoretical and dogmatic explanations [on the 1830 criminal code] without concern for the practical and executive part”¹²⁰. By “practical and executive part” João Vieira understood the lack of coordination with the “mode of execution of the penalty”. But the important point for us is the nod to the existence only of a commentary tradition in the Brazilian criminal law literature of the nineteenth century. Although João Vieira does not completely dissociate himself from the literary genre 'commentary', in his first important book of 1884, he states that a

¹¹⁷ Pereira, J. H. D., Prefacio [dez. 1898], in Liszt, F. von, *Tratado de direito penal alemão*, Tomo I, Rio de Janeiro, 1899, p. XXXIV.

¹¹⁸ And which was not always reproduced in a prevalent way by writing (cf. Adorno, S. *Os aprendizes do poder: o bacharelismo liberal na política brasileira*, São Paulo, 2005; Fonseca, R. M., “Os juristas e a cultura jurídica brasileira na segunda metade do século XIX”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, 35, 2006).

¹¹⁹ “*supria [...] a ausência de verdadeiros tratados na doutrina criminal brasileira, visto que, em geral, a nossa literature se tem restringido à obra de comentários aos artigos do Código*” (Bruno, A., “O pensamento jurídico penal brasileiro – a faculdade do Recife”, *Revista Forense*, vol. XCI, fasc. 470, 1942, p. 251). For a historiographical development of this perception, see Sena, Sontag, “The Brazilian Translation of Franz von Liszt's *Lehrbuch des deutschen Strafrechts* (1899): A History of Cultural Translation between Brazil and Germany”.

¹²⁰ “*gli studii finora poco estesi e poco profondi che si sono coltivati fra di noi tendevano specialmente alla esposizione teorica e dommatica [del codice del 1830] senza preoccuparsi affatto della parte pratica ed esecutiva*” (Araújo, “Le scienze criminali in Brasile”, p. 2).

developing of the teaching of “philosophical criminal law” was necessary, which would be the purpose of his book¹²¹. It seems to be an exaggeration to assert the inexistence of some sort of philosophy in the prior criminal law literature (even if in the interstices of the exegetical tradition), but it is possible to consider this João Vieira’s remarks as another indication of the lack of great treaties in Brazilian criminal law tradition of the nineteenth century.

Going back to the article published in the *Scuola Positiva* journal, João Vieira classifies the Brazilian 1890 penal code as a “genuine metaphysical school product”¹²². However, he does not mention any Brazilian representative of the “metaphysical school” which to “affiliate” the code to, as it used to happen in the discourse of the Italian positivists who, starting from the scholars chronologically closest to the 1889 Zanardelli code, in a continuous genealogical line, reached Francesco Carrara or even Cesare Beccaria. The lack of this point of reference in João Vieira’s speech is a significant sign, because it was very common within *scuola positiva*’s scholars to seek important jurists of the past to oppose their own theories. This “lack” in the memory of Brazilian jurists is a fact that should not be neglected, considering that in the cradle of the *scuola positiva* – Italy - this memory had a fundamental role in the construction of the “school”’s identity, in particular with Enrico Ferri’s speeches about Carrara’s thought. In this case, the excessive “fidelity” of Brazilian jurists in using the binomial “*scuola classica*” versus “*scuola positiva*” can become, paradoxically, an indication of a specificity of its use in the local context.

On the one hand, we have the absence of a reference point classifiable as a “classical” treaty in the memory of Brazilian positivists; on the other hand, unlike the Italian context, there was in Brazil, since 1830, a strong legislative point of reference: a unitary and very prestigious criminal code. Unfortunately, since the reception of the *scuola positiva*’s ideas in Brazil until the substitution of the 1830 code (1884-1890) only six years had passed, i.e, it was a short phase, but in which João Vieira de Araújo published some important works. That’s why he is an important character of this history.

Positivists would hardly be able to deny that the Brazilian 1830 criminal code was “classic”. However, in some points it was heterodox. To mention only the main heterodoxy, the 1830 code regulated the application of *ex delicto* compensation and attributed it to the criminal court itself (not to a civil one). Due to this sort of characteristic - which was in the direction of some *scuola positiva*’s demands¹²³ - João Vieira joined the chorus of praise to the 1830 criminal code. When, on the eve of the Republic, the hypothesis of replacing the old code was raised, João Vieira had a clear opinion against this attempt. At the same time, it was under discussion the Italian penal code draft that resulted in a code considered “classic”: the 1889 Zanardelli code. João Vieira, informed about the subject, probably saw in this further reaffirmation of “classicism” an untimely moment to try to replace the Brazilian 1830 criminal code. If in Italy the *scuola positiva*’s ideas had little influence in the new code, the risk of a further reaffirmation of “classicism” would be even stronger in Brazil. These circumstances had an impact on João Vieira’s reformism, that is, on the theoretical and

¹²¹ Araújo, J. V. de, *Ensaio de direito penal ou repetições escriptas sobre o Código Criminal do Império do Brazil*, Pernambuco, 1884, pp. V-VII.

¹²² Araújo, “Le scienze criminali in Brasile”, p. 2.

¹²³ Garofalo, R., *Riparazione alle vittime del delitto*, Torino, 1887.

practical elaboration of reforms directed to the Brazilian context. Along with the enthusiastic adherence to the most reformist ideas of the *scuola positiva*, he was quite prudent in trying to transpose them into the Brazilian context, since his main concern was to preserve the 1830 code. An example of this stance was his opposition, in 1888, to the replacement of the “classic” 1830 criminal code¹²⁴.

Somehow, João Vieira's fears came true with the promulgation of the 1890 penal code. This code was drafted almost authorially by João Baptista Pereira, who never concealed his antipathy for the *scuola positiva*. If the 1830 code was not a good counterpoint to the construction of the “school” identity of the Brazilian positivists, the 1890 code well suited to this function. Although the nickname “the worst penal code in the world”¹²⁵ was not coined by a positivist critic of the 1890 code, it is quite true that the supporters of the *scuola positiva* could have been the inventors of this nickname¹²⁶. In Italy, for the positivists, the old Tuscan code was the best finished example of “classicism” in criminal legislation. The Zanardelli code was still considered “classic”, but even so, it was a “step forward”. Unlike the Brazilian case, the Italian draft was discussed for a long time and some positivists intervened (albeit marginally) in its elaboration, including as deputies, as is the case of Enrico Ferri¹²⁷. In Brazil, on the other hand, the 1830 code seemed, despite being “classic”, closer to *scuola positiva*'s expectations, while the 1890 code was farther away from their expectations.

João Vieira expressed several times his dislike for the 1890 code, including by elaborating the first draft to replace it in 1893. The positivist Aurelino Leal even said, in 1896, that the 1890 code would carry in itself the “germs of crime” (“*germens do crime*”)¹²⁸. Esmeraldino Bandeira, as Minister of Justice, in his report for 1909, affirmed that this code was “archaic and incomplete”, and, considering “the modern orientation of criminal law and attentive to the advances of contemporary penology, it is not possible to betray the elaboration of a new Penal Code any longer”¹²⁹. Despite Bandeira's harsh criticism, the replacement of the 1890 code would take place only ten years after the replacement of the prestigious Italian penal code of 1889.

¹²⁴ Araújo, “La riforma dei codici criminali [1888]”; Araújo, J. V. de, *Nova edição oficial do código criminal brasileiro de 1830, ante-projecto (1889)*, Rio de Janeiro, 1910. Notwithstanding Ferri's excitement in stating that the 1893 João Vieira's code project “*ha adottato parecchie proposte della nuova scuola*” (Ferri, *Sociologia criminale*, p. 58), João Vieira himself did not classify his own project as positivist. João Monteiro's negative opinion about the project was that it had no identity. Monteiro was anti-positivist, but he renounced criticising the project for being overly positivist (Monteiro *et al*, “Parecer da congregação”, p. 51). Effectively, it seems that Vieira's aim was much more to retrieve a return to the situation previous to the 1890 penal code, i. e., to return to the solid bases of the 1830 criminal code adding little changes to it. In this sense, João Vieira's anti-reformist opinion against the substitution of the 1830 criminal code in 1888 is not in contradiction with his reformist attitude after 1890. For a detailed analysis of this issue, see Sontag, “*Código criminológico*”?, pp. 253-332.

¹²⁵ Monteiro *et al*, “Parecer da congregação”, p. 10.

¹²⁶ About the positivist criticism against the 1890 penal code, see Alvarez, M., Souza, L. A. F. de, Salla, F. A., “A sociedade e a lei. O código penal de 1890 e as novas tendências penais na Primeira República”, *Justiça & História*, vol. 3, n. 6, 2003.

¹²⁷ About the construction of the 1889 Italian penal code, see Lacchè, L., “Un Code Pénal Pour l'Unité Italienne: le code Zanardelli (1889) – La Genèse, le Débat, le Projet Juridique”, *Seqüência (Florianópolis)*, vol. 35, n. 68, 2014.

¹²⁸ Leal, A., *Germens do crime*, Bahia, 1896.

¹²⁹ “*atrazado e incompleto*”; “*a moderna orientação do direito criminal e attentos os avanços da penologia contemporânea, não é possível protrahir por mais tempo a elaboração de um novo Código Penal*” (Bandeira, E., *Relatório dos anos de 1909 e 1910 apresentado ao presidente da Republica dos Estados Unidos do Brazil em abril de 1910*, Rio de Janeiro, 1910, p. XX, p. XXXII).

4. Concluding remarks

The existing studies on the presence of the *scuola positiva* in Brazil have already established some safe foundations for the study of this theme, from some chronological milestones (1880s until approximately 1940s) to the list of authors that should be taken into consideration (pioneers, such as João Vieira de Araújo; and late representatives, such as Roberto Lyra or even Theodolindo Castiglione). In this article, our main focus was on the pioneers.

A part of Brazilian historiography sought to escape the traps of the generic 'influence' concept and of its unidirectional note that in fact is too narrow for historical analysis of cultural dialogues¹³⁰. Historiographical endeavours to avoid unidirectional narratives have been made by analysing 'how' *scuola positiva*'s ideas arrived in Brazil. Among the various useful paths that has been built up with this methodological conscience, we tried to follow those that seem historiographical dead ends: the lack of originality of Brazilian *scuola positiva*'s representatives and the difficulty in finding Brazilian variations in form or content, that is, in finding the ties between the texts and the Brazilian context without falling into the generic mention of the social transformations of the period. In addition to the points that historiography has already been able to examine, we have followed the analysis of the binomial "*scuola classica*" versus "*scuola positiva*" as a device of identity construction, i.e., that depends on the elaboration of a memory about the past. This emphasis allowed us to throw light on the specifically legal context that is part of the Brazilian "originality of copies" of Italian *scuola positiva*.

In this sense, the lack of great treaties - in the Carrarian style, which Ferri called the "doctrinal" strand of the "*scuola classica*" - within Brazilian criminal law literature of the nineteenth century tended to generate the sensation of "emptiness". It lacks a strong reference point for the fulfilment of the "*scuola classica*" memory place of the *scuola positiva*'s narrative. The strong points of reference that remained were legislative: the 1830 criminal code, a prestigious and unitary code much earlier than the first Italian unitary code, and the discredited 1890 code. Brazilian positivists considered both "classics", but the former was well appreciated by jurists such as João Vieira de Araújo because of its heterodoxy, which brought it closer to a number of *scuola positiva*'s claims. But, in 1890, a new code was promulgated. A code that was, for

¹³⁰ For a criticism of unidirectional historical narratives regarding relationships between legal cultures, see, for example: Foljanty, L., "Legal Transfers as Processes of Cultural Translation: On the Consequences of a Metaphor", *Max Planck Institute for European Legal History Research Paper Series*, n° 2015-09 (what Foljanty calls in critical tones "cartographical approach" is very similar to what we have seen here as narratives based on the influence concept) and Duve, T., "História do direito europeu – perspectivas globais", *Revista da Faculdade de Direito da UFPR*, vol. 60, n° 3, 2015, p. 410 (what Duve calls sender-centrism, i. e., approaches that fail to comprehend the local conditions of the re-creation of a foreign legal object, in my opinion, it's precisely the theoretical lack of the influence approaches in Brazilian historiography). Critical approaches regarding influence (and unidirectional) narratives and methodological conscience about it (see for example Flores, A. de J., Machado, G. C., "Tradução cultural: um conceito heurístico alternativo em pesquisas de direito", *História e cultura*, vol. 4, n° 3, 2015) are growing in Brazilian legal historiography in the last years, although some flaws of the influence narratives were glimpsed by some former Brazilian scholars such as Miguel Reale in 1968 (*apud* Lopes, *Naturalismo jurídico*, pp. 265-266).

positivist standards, even more “classic” than the previous one, reversing, in a certain way, the expectations of the continuous evolution of the *scuola positiva*’s history view. Unlike the Italian 1889 code - which, although was still considered “classical”, had prestige - the Brazilian 1890 code became the perfect counterpoint for Brazilian positivists: the piece that would fit perfectly into the “*scuola classica*” versus “*scuola positiva*” scheme. If there was a lack of doctrinal references for this binomial scheme to work when transplanted to the Brazilian context, the 1890 code had become a fundamental gear for this transposition¹³¹.

The historiographical attempts to understand the presence of *scuola positiva* in Brazil were more fruitful when they emphasized the willingness of Brazilian jurists to insert themselves in the international debate. An insertion that, as shown here, was not necessarily symmetrical to the will ‘to transpose’. In other words, the desire for insertion did not necessarily correspond to the desire to use such models for the specific social or criminal problems of Brazilian society or to transform such models according to Brazilian requirements. On the other hand, in terms of replacement of the doctrinal reference by the legislative one, it is possible to glimpse an effective transposition of the Italian model in the sense of being clearly perceptible the presence of the national context in the discursive configuration and in the memorial places of Brazilian positivists narratives.

Bibliographical References

“6 unicas conferencias scientifico litterarias do professor Enrico Ferri”, *O Paiz (RJ)*, 10 de novembro de 1908, p. 10.

Adorno, S. *Os aprendizes do poder: o bacharelismo liberal na política brasileira*, São Paulo, 2005.

Albano, G., “A nova escola de direito criminal, nel Diario di Pernambuco del 27 settembre 1888”, *Archivio di psichiatria, scienze penali ed antropologia criminale*, vol. 10, fasc. II, 1889, pp. 218-219.

Alvarez, M., “A Criminologia no Brasil ou Como Tratar Desigualmente os Desiguais”, *Dados, Revista de Ciências Sociais*, vol. 45, 4, 2002, pp. 677-704.

Alvarez, M., Souza, L. A. F. de, Salla, F. A., “A sociedade e a lei. O código penal de 1890 e as novas tendências penais na Primeira República”, *Justiça & História*, vol. 3, n. 6, 2003, pp. 97-130.

Alves Junior, T.:

- *Anotações theoreticas e praticas ao codigo criminal*, Tomos I-II, Rio de Janeiro, 1864 and 1870.

Araújo, J. V. de:

¹³¹ “[O] Brasil absorve o discurso de embate entre escolas, sobretudo os adeptos da nova escola, justamente porque este discurso é uma criação ferriana, mas como não tínhamos um Carrara, principal alvo de Ferri nesta disputa, por ser o grande representante da cultura jurídica penal a que Ferri procurava fazer frente, cabe a pergunta: o que era então identificado com a escola clássica no Brasil? Quem e o que encarnava este título? Para João Vieira de Araújo, o classissismo estava encarnado no código republicano, como vimos. Na opinião de Viveiros de Castro, a nova escola no Brasil deveria fazer frente, não a uma sólida e sofisticada cultura jurídica penal, mas a uma cultura penal pobre, repetidora das teorias e autores franceses (identificados com a escola clássica), presa a um toso formalismo e reproduzida por juristas pedantes e superficiais, apegados à beleza das palavras e resistentes às verdades da ciência” (Dias, *Pensamento criminológico*, p. 246), that is, Dias does agree with the interpretation that was proposed in the first version of this article, though it was not explicitly mentioned in the fragment that was just quoted (cf. also Dias, *Pensamento criminológico*, p. 410).

- *Ensaio de direito penal ou repetições escriptas sobre o Código Criminal do Império do Brazil*, Pernambuco, 1884.
 - “A nova escola de direito criminal. Os juristas italianos E. Ferri, F. Puglia e R. Garofalo”, *O Direito: revista de legislação, doutrina e jurisprudência*, vol. 47, 1888, pp. 481-487.
 - “Anthropologia criminal”, *O Direito: revista de legislação, doutrina e jurisprudência*, 1889, pp. 177-184.
 - “La riforma dei codici criminali [1888]”, *Archivio di psichiatria, scienze penali ed antropologia criminale*, vol. 10, 1889, p. 53.
 - “Le scienze criminali al Brasile”, *Estratto dalla Scuola Positiva*, anno I, n. 8, 1891, pp. 1-5.
 - “Projecto de código penal. Exposição de motivos”, *Revista acadêmica da faculdade de Direito do Recife*, 1893, pp. 49-212.
 - “Il nuovo progetto di Codice Penale Brasiliano”, *Scuola Positiva*, 1893, p. 1050.
 - “O projeto de código penal e a faculdade de São Paulo”, *Revista Acadêmica da Faculdade de Direito do Recife*, 1894, pp. 139-215.
 - *O projeto do Código Penal e a Faculdade de São Paulo*, Recife, 1895.
 - *Nova edição official do código criminal brasileiro de 1830, ante-projecto (1889)*, Rio de Janeiro, 1910.
- Araújo, V.F., de, *A litteratura e a religião dos criminosos (dous capitulos de Lombroso): tradução com algumas anotações*, Recife, 1888.
- Bandeira, E., *Relatório dos anos de 1909 e 1910 apresentado ao presidente da Republica dos Estados Unidos do Brazil em abril de 1910*, Rio de Janeiro, 1910.
- Belloni, G. A., “La pericolosità criminale nelle riforme penali dei paesi latini”, *Révue Penale Suisse*, 1935, pp. 52-63.
- Bevilaqua, C., *Juristas philosophos*, Bahia, 1897.
- Blake, S., *Diccionario bibliographico brasileiro*, 6º vol., Rio de Janeiro, 1900.
- Britto, J. G. de L., *Systemas penitenciarios do Brasil*, 1924.
- Bruno, A., “O pensamento jurídico penal brasileiro – a faculdade do Recife”, *Revista Forense*, vol. XCI, fasc. 470, 1942, pp. 247-252.
- Cancelli, E.:
- “Criminosos e não-criminosos na história”, *Textos de História, UnB*, 2001, pp. 53-81.
 - “Na virada do século: a cultura do crime e da lei”, *Seminários, nº 1, Crime, criminalidade e repressão no Brasil República, Arquivo Público do Estado de São Paulo*, 2001, pp. 1-6.
- “Camara”, *O Paiz (RJ)*, 17 de novembro de 1908, p. 5.
- “Campinas”. *Correio paulistano*, 8 de novembro de 1908, p. 3.
- “Cândido Motta, Classificação dos criminosos”, *La Scuola Positiva*, febbraio 1897, pp. 694-695.
- Carvalho Junior, C. de., “Escola positiva penal”, *Ciência Penal*, 4, 1975, pp. 99-128.
- Castiglione, T. “A repercussão da escola positiva no Brasil”, in *Lombroso perante a criminologia contemporânea*, São Paulo, 1962, pp. 269-290.
- Castro, F. V. de, *A nova escola penal*, Rio de Janeiro, 1894.
- “Contraditas a Ferri”, *O Paiz (RJ)*, 7 de dezembro de 1908, p. 4.
- Dal Ri Júnior, A., “La storiografia giuridica brasiliana letta attraverso l’esperienza storiografica penale”, Sordi, B. (a cura di), *Storia e Diritto: esperienze a confronto: incontro internazionale di studi in occasione dei 40 anni dei Quaderni fiorentini, Firenze, 18-19 ottobre 2012*, Milano, 2013, pp. 141-180.
- Darmon, P., *Médicos e assassinos na “Belle Époque”: a medicalização do crime*, Rio de Janeiro, 1991.
- Di Porto, B., “Belloni, Giulio Andrea”, *Dizionario Biografico degli Italiani*, vol. 7, 1970.
- Dias, R. F., *Pensamento criminológico na Primeira República: o Brasil em defesa da sociedade* [Ph.D thesis], Curitiba, 2015.

- Dolores, C. [Emília Bandeira de Melo], “A semana”, *O Paiz (RJ)*, 29 de novembro de 1908, p. 1.
- Duve, T., “História do direito europeu – perspectivas globais”, *Revista da Faculdade de Direito da UFPR*, vol. 60, nº 3, 2015, pp. 384-412.
- “Enrico Ferri”, *Correio paulistano*, 2 de novembro de 1908, p. 1.
- “Enrico Ferri”, *Correio paulistano*, 5 de dezembro de 1908, p. 3.
- “Enrico Ferri”, *O Paiz (RJ)*, 10, 16, 18, 19, 21, 22, 24, 26, 27 de novembro de 1908, pp. 1-3.
- “Enrico Ferri em Petrópolis – recepção festiva – banquete do Sr. Rio Branco – no palacete da Westphalia”, *Correio paulistano*, 24 de novembro de 1908, p. 2.
- “Enrico Ferri, Memória Histórica dos annos lectivos de 1908 a 1909”, *Revista da Faculdade de Direito de São Paulo*, vol. XVII (1909), 1910, pp. 251-259.
- Ferri, E.:
- *Sociologia criminale*, 4ª ed., Torino, 1900.
 - *Principii di diritto criminale. Delinquente e delitto nella scienza, legislazione, giurisprudenza in ordine al Codice penale vigente – Progetto 1921 – Progetto 1927*, Torino, 1928.
- Flores, A. de J., Machado, G. C., “Tradução cultural: um conceito heurístico alternativo em pesquisas de direito”, *História e cultura*, vol. 4, nº 3, 2015, pp. 118-139.
- Foljanty, L., “Legal Transfers as Processes of Cultural Translation: On the Consequences of a Metaphor”, *Max Planck Institute for European Legal History Research Paper Series*, nº 2015-09, pp. 1-18.
- Fonseca, R. M., “Os juristas e a cultura jurídica brasileira na segunda metade do século XIX”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, vol. 35, 2006, pp. 339-372.
- Fragoso, J. M., “Enrico Ferri”, *O Paiz (RJ)*, 17 de novembro de 1908, pp. 1-2.
- Freitas, R. de B. A. P.:
- *As razões do positivismo penal no Brasil*, Rio de Janeiro, 2002.
 - “Condenados à civilização: o positivismo naturalista e a repressão penal no alvorecer da República”, Brandão, C., Saldanha, N., Freitas, R. de B. A. P. (coords.), *História do direito e do pensamento jurídico em perspectiva*, São Paulo, 2012, pp. 358-378.
- Garofalo, R., *Riparazione alle vittime del delitto*, Torino, 1887.
- Hellmann, R. M., *Carmen Dolores, escritora e cronista. Uma intelectual feminista da Belle Époque* [ph.D thesis], Florianópolis, 2015.
- “Homenagens a Ferri – manifestação operária – discurso de saudação – conferencia sobre Pio X”, *Correio paulistano*, 27 de novembro de 1908, p. 2.
- “Interior”, *O Paiz (RJ)*, 15 de novembro de 1908, p. 4.
- Iñesta-Pastor, E., “La interpretación del eclecticismo en la doctrina y en la legislación penal de la España del siglo XIX”, *Ivs Fvgit*, vol. 19, 2016, pp. 209-230.
- Jimenez de Asúa, L., *Un viaje al Brasil*, Madrid, 1929.
- “La Scuola Positiva all'estero”, *La Scuola Positiva*, gennaio 1896, pp. 112-116.
- Lacchè, L.:
- “Un Code Pénal Pour l'Unité Italienne: le code Zanardelli (1889) – La Genèse, le Débat, le Projet Juridique”, *Seqüência (Florianópolis)*, vol. 35, n. 68, 2014, pp. 37-57.
 - “Il canone eclettico. Alla ricerca di uno strato profondo della cultura giuridica italiana dell'Ottocento”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, vol. 39, 2010, pp. 153-228.
- Leal, A., *Germens do crime*, Bahia, 1896.
- Lyra, R.:
- “Método jurídico e direito penal”, *Revista Forense*, fev. 1946, pp. 381-383.
 - *Guia do Ensino e do Estudo de Direito Penal*, Rio de Janeiro, 1956.
- Lopes, J. R. de L., *Naturalismo jurídico no pensamento brasileiro*, São Paulo, 2014

- Losano, M., *Un giurista tropicale: Tobias Barreto fra Brasile reale e Germania ideale*, Roma, 2000.
- Mendonça, J., *Evaristo de Moraes, tribuno da República*, Campinas, 2007.
- Mexias, V., “Microcosmo”, *O Paiz (RJ)*, 25 de novembro de 1908, p. 1.
- Monteiro, J. *et al*, “Parecer da congregação da faculdade de Direito de São Paulo (projecto João Vieira de Araújo n. 250/1893)”, *Revista da faculdade de Direito de São Paulo*, vol. 2, 1894, pp. 7-118.
- Moraes, E. de:
- “Primeiros adeptos e simpatizantes, no Brasil, da chamada Escola penal positiva”, *Revista Forense*, setembro de 1939, pp. 539-541.
 - *A campanha abolicionista (1879-1888)*, Rio de Janeiro, 1924.
- “Moulin Rouge”, *O Paiz (RJ)*, 20 de novembro de 1908, p. 12.
- “O professor Enrico Ferri – partida para S. Paulo – a ultima conferencia do eminente criminalista”, *Correio paulistano*, 29 de novembro de 1908, p. 3.
- Olmo, R. del, *A América Latina e sua criminologia*, Rio de Janeiro, 2004.
- “Os italianos na America do Sul”, *Correio paulistano*, 7 de novembro de 1908, pp. 1-2.
- Paim, A., *A Escola do Recife. Estudos Complementares à História das Idéias Filosóficas no Brasil*, vol. V, 3ª ed., Londrina, 1997.
- Pereira, J. H. D., Prefacio do traductor [dez. 1898], in Liszt, F. von, *Tratado de direito penal allemão*, Tomo I, Rio de Janeiro, 1899, pp. I-XXIX.
- Pifferi, M.:
- “L’influenza della scuola positiva negli Stati Uniti. Luci ed ombre di un successo culturale”, in *Diritto penale XXI secolo: atti del convegno nazionale in ricordo di Giuliano Marini: scuola positiva e codice Rocco*, Torino, 21-13 ottobre 2010, pp. 537-559.
 - “Criminology and the Rise of Authoritarian Criminal Law, 1930s-1940s”, Skinner, S. (ed.), *Ideology and Criminal Law. Fascist, National Socialist and Authoritarian Regimes*, Oxford, 2019, pp. 105-124.
- Puglia, F.:
- *Da tentativa*, São Paulo, 1891.
 - *Prolegômenos ao estudo do direito repressivo*, São Paulo, 1891.
- Queiroz, R. M. R.:
- *A modernização do direito penal brasileiro: “sursis” e livramento condicional, 1924-1940*, São Paulo, 2002.
 - *O direito a ações imorais - Paul Johann Anselm von Feuerbach e a construção do moderno direito penal*, São Paulo, 2013.
- Reale, M., “A cultura jurídica italiana no Brasil”, *Revista Brasileira de Filosofia*, São Paulo, vol. IX, fasc. I, n. 33, 1959, pp. 103-111.
- Ribeiro, J. L., *No meio das galinhas as baratas não tem razão: a lei de 10 de junho de 1835: os escravos e a pena de morte no Império do Brasil, 1822-1889*, Rio de Janeiro, 2005.
- Robledo, A. G., *La filosofía en el Brasil*, Mexico, 1946.
- Roig, R. D. E., *Direito e prática histórica da execução penal no Brasil*, Rio de Janeiro, 2005.
- Rotondo, F., “Penalística positivista italiana e América Latina: tendências e interpretações historiográficas”, *Revista brasileira de ciências criminais*, vol. 170, 2020.
- Saldanha, N., *A Escola do Recife*, São Paulo, 1985.
- Santos, B. M. de M., *As idéias de defesa social no sistema penal brasileiro: entre o garantismo e a repressão de 1890 a 1940* [Ph.D. thesis], São Paulo, 2010.
- Sbriccoli, M., “La penalística civile: teorie e ideologie del diritto penale nell’Italia unita [1990]”, in *Storia del diritto penale e della giustizia*, Vol. I, Milano, 2009, pp. 493-590.
- Schwarcz, L. M., *O espetáculo das raças: cientistas, instituições e questão racial no Brasil – 1870-1930*, São Paulo, 1993.
- Sena, N. N. E. de, Sontag, R., “The Brazilian Translation of Franz von Liszt’s *Lehrbuch des deutschen Strafrechts* (1899): A History of Cultural Translation between Brazil and

Germany”, *Max Planck Institute for European Legal History Research Paper Series*, nº 2019-17, pp. 1-28.

Soares, A. J. de M., “La Scuola Positiva”, *O Direito: revista mensal de legislação, doutrina e jurisprudência*, vol. 55, 1891, pp. 361-362.

Sontag, R.:

- “‘Uma linguagem antijurídica’: as críticas ao projeto de parte geral de código criminal italiano da comissão Enrico Ferri na Rivista Penale (1919-1923)”, *Revista brasileira de ciências criminais*, vol. 104, 2013, pp. 31-52.
- “‘Código criminológico’? Ciência jurídica e codificação penal no Brasil (1888-1899)”, Rio de Janeiro, 2014.
- “‘Curar todas as moléstias com um único medicamento’: os juristas e a pena de prisão no Brasil (1830-1890)”, *Revista do Instituto Histórico e Geográfico Brasileiro*, vol. 471, 2016, pp. 45-72.
- “‘Verbalismo de jornal’: ensino do direito penal, ciência e lei em Roberto Lyra”, *Revista brasileira de ciências criminais*, vol. 25, 2017, pp. 299-332.
- “‘«Exceção única á civilização christã»: o problema dos açoites na literatura jurídico-penal brasileira (1824-1886)”, *Quaderni fiorentini per la storia del pensiero giuridico moderno*, vol. XLIX, 2020.

Souza, M. B. de, *A influência da escola positiva no direito penal brasileiro*, São Paulo, 1982.

“Theatro S. Pedro de Alcantara”, *O Paiz (RJ)*, 20 de novembro de 1908, p. 12.

Varejão, M., *Il positivismo dall'Italia al Brasile. Sociologia del diritto, giuristi e legislazione (1822-1935)*, Milano, 2005.

“Viagem de Enrico Ferri á America”, *Correio paulistano*, 5 de junho de 1908, p. 2.

Wolkmer, A. C., *História do direito no Brasil*, 5ª ed., Rio de Janeiro, 2009.