

THE MODERN APPROACH TO CRIMINAL LAW

COLLECTED ESSAYS

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PREFACE

THE learned editors of this volume felt that, as they are also contributors to it, the Preface ought to be written by me, as Chairman of the Department of Criminal Science, rather than by themselves. I am glad to be able to do so, for the range of topics treated in the book and the fact that the authors of the articles represent several universities illustrate, I venture to think, the success of the policy of the Department which, from its inception, has sought to act as a centre of collaboration in Criminal Science and in promoting the new methods of approach to it. The volume comprises essays which elucidate some of the leading principles of criminal law, indicate the main lines of the development of our penal system and demonstrate the importance of comparative studies in penal law.

The aim of the first part of the book is to investigate the meaning and scope of criminal science, and it begins with a reprint of an essay by the late Professor Kenny. No doubt the theories of Lombroso, which he examines, have encountered criticism, but the editors rightly regard the modern approach to criminal law as taking account of the steps towards it by those who have passed from us. Moreover, it was felt that this would be a tribute to one who initiated in Cambridge a tradition of the scientific study of criminality—a tradition which our Department is endeavouring to maintain and to propagate as widely as possible. The article on "The meaning and scope of Criminal Science" by Dr. Radzinowicz and Mr. Turner is essential for acquainting readers with the exact meaning of a term which was unknown in English law until we selected it as the expression of the aims of our Department.

The second part of the book deals with some of the leading problems of criminal science and penal administration, which may be included under the general head of "Criminal policy". The first article, which is the substance of three lectures delivered by Dr. Radzinowicz at the Sorbonne in May, 1940, surveys the main achievements of English penal administration, points to its liberal and social character and compares it with the systems of some other European countries. In general, the essays in this part

deal with the leading incidents in the career of a criminal after the law has decided to take proceedings against him. The problem of punishment is tackled in six of the papers, for I may include under that head not only the article by Dr. Wortley and two others in the titles of which "Punishment" is expressly mentioned, but also the three by Dr. Radzinowicz, which are numbered 9, 10 and 11. No. 10 is especially valuable as discussing the careers of those who, after serving their terms of imprisonment or undergoing other forms of punishment or restraint, are free again; for what they do then is, to some extent, a gauge of the value of the punishment awarded to them. Unfortunately, as Dr. Radzinowicz points out, the official information available on this subject is at present inadequate. The articles by Dr. Stallybrass and Dr. Wade are also incorporated in this part, because they deal with modern instances of the urgent necessity of maintaining a just balance between the principle of effective detection and prevention of crime and the principle of safeguarding the personal liberty and rights of property of the individual.

The third part of the book is devoted to investigating some leading rules relating to English criminal law in general or to some of the particular offences comprised in it. Here, Mr. Turner, Dr. Jackson and Mr. Seaborne Davies have illuminated regions of the law that have been somewhat obscured by doubts or inconsistent interpretations.

The fourth part consists of two articles that are studies in criminal science from the comparative point of view. Dr. Stallybrass writes of the Italian "Progetto Nuovo" in comparison with English criminal law, Dr. Radzinowicz of "International collaboration in Criminal Science", and in this connection attention may be called to his article on "The Persistent Offender" in the second part of the book, which examines the English system in comparison with similar foreign laws and experiments. The value of scientific comparison of various systems of law is that, where the systems reveal a practical identity of particular rules, this may be the foundation of international unification of at least some parts of that branch of the law; and where, as frequently happens, there are points of difference or even of direct conflict, they may quite well be instructive as throwing light on the national characteristics of the particular States concerned.

It is hoped that this volume will be of some use to teachers and students of criminal law in English-speaking countries. It

will, I think, also be of some interest to those who are concerned in the administration of criminal justice and to those who have at heart the reform of criminal law.

P. H. WINFIELD.

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I

THE ITALIAN THEORY OF CRIME: CESARE LOMBROSO

By PROFESSOR COURTNEY KENNY

LITTLE more than a year ago—in October 1908—Cesare Lombroso wrote of himself as being “near the end of a career in which I have been a leader in new movements of thought; near the close of a life passed in contending for great ideas.” The prophecy has come true all too soon. That brave and persistent career of conflicts is over.

Yet its many years of active struggle cannot be said to have been crowned by final triumph. It was, as Lombroso himself went on to say, “a life richer in controversies than in conquests.” For the theories of criminology which he and his compatriots of his, like Ferri and Garofalo and Colajanni, disseminated so quickly amongst the younger jurists of the Latin lands, did not find equally rapid acceptance in the countries of Teutonic speech. And indeed such measure of acceptance as they there met with is already on the decline. Lombroso lived long enough to see the tide ebbing. On his native soil, no doubt, Italian patriotism may be trusted to sustain for a long time to come the popularity of the Italian criminologists. And the supposed antagonism between their doctrines and the teaching of Catholicism will probably long suffice to commend them to the acceptance of law schools so hostile to the Church as are those of France and Spain and Brazil. But in the cooler latitudes of Leipzig or London or Boston, there is less reluctance to test the brilliant Italian theories by the results of old experience, and to discount their sweeping generalisations by patient analysis.

Yet let us gratefully acknowledge that even on the shores where the tide has ebbed the farthest, it has left behind it treasures of great price. Lombroso's exaggerations are dismissed; but the dismissal throws into relief many a novel fact which we owe to him, rich in practical suggestions. So is it with every new school of thought as it arises and passes on. To the eighteenth-century jurists we owe a lasting debt for having rationalised and human-

ised criminal punishment; although we have outgrown their naïve belief that those reforms would render punishment a universal panacea for crime. And if we decline to follow those nineteenth-century thinkers whom Lombroso trained or inspired, in their efforts to discover in every cracksman or pickpocket a physiological anomaly, and to resolve criminal law into a branch of medicine, we still shall hold them in enduring honour for having taught us the necessity of "individualising" our penal discipline to the circumstances of each particular offender, so that the shoe shall always fit the foot. Former lawyers—says Van Hamel epigrammatically—bade men study Justice, but Lombroso bids Justice study men. Each precept is good. But better still is the combination of the two.

The jurists of ancient Italy laid the foundations of the law of modern Europe; and in Italy again, in the eighteenth century, Beccaria and Filangieri began the movement which gave that law a new spirit. She was thus the fitting home for yet another great departure. The old criminal lawyers, says Ferri, thought of the guilt, but Beccaria thought of the man. There was need of yet a third school which should devote itself to studying the man as guilty. In Italy, again, it was that this further juristic advance began. At the Prisons Congress of 1870 at Cincinnati, two years before Lombroso's earliest book on Criminology, his compatriot Beltrani-Scalio gave out the watchword, "Study the individual offender" ("Studiare il delinquente. Ecco il bisogno"). Lombroso drove home this injunction; and it is his great service to mankind.

So far back as 1822 a great pioneer of evolution, Geoffroy St. Hilaire, had sent forth from the Jardin des Plantes his famous treatise on Monsters, which disclosed the scientific causes of anatomical malformations. Two generations later, Lombroso, in the pages of *L'Uomo Delinquente*, essayed to create an equally scientific teratology of the abnormalities of men's moral nature. It was but a step farther along St. Hilaire's path of evolution, which Darwin meanwhile had trodden smooth and wide. And like St. Hilaire and Darwin, Lombroso laboured patiently at the accumulation of facts. True, he did not scruple to say that "perhaps the strongest argument in favour of my theories is that they have been adopted by such men of genius as Zola and Daudet and Tolstoi; whose field of work lies so far away from my own". But the fact that his theories were crowned by the approval of many a brilliant novelist

was far less important than the fact that they had been elaborated by many a year of painstaking observation.

Born in 1835, of a Jewish stock, Lombroso was educated for the medical profession; and, after some years of service as a surgeon in the Italian army, undertook work in a lunatic asylum. Here he introduced—a novelty then in Italy—the practice of noting carefully the physical peculiarities of patients: their weights; their skulls, teeth, nails, eyes, ears, skin; their muscular strength, their sensibility to pain. He was ridiculed in consequence as “the scales-and-weights surgeon” (*l’alienista della stadera*). The study of insanity soon suggested that of crime. His habit of careful attention to minute facts he carried into criminology. Hence arose his first jural treatise, *Anthropometry of 400 Venetian Criminals*, published in 1872. By 1892 he could boast of having already made personal notes on no fewer than twenty-five thousand delinquents. In the prisoners whom he examined, Lombroso was struck by the frequent recurrence of certain characteristics—as, for instance, a small cranial capacity, a small weight of brain, a great length of arm, a retreating forehead, a protruding under-jaw; a scanty beard and a thick head of hair; projecting ears and squinting eyes; a tendency to left-handedness; a lessened sensitiveness to pain, but a more than doubled susceptibility to climatic, magnetic, and meteorological changes. To trace in a man’s body some revelations of his mind was nothing new. Homer had been careful to fit mind and body together when creating Thersites (ii. 217):

His figure such as might his soul proclaim;
One eye was blinking and one leg was lame,
His mountain-shoulders half his breast o’erspread,
Thin hairs bestrewed his long mis-shapen head.

But Lombroso took up the study, and pursued it no less systematically—and far more comprehensively—than Lavater himself. By putting together the anatomical and physiological abnormalities which he had noticed in his prisoners, he constructed a specific type of human being which he pronounced to be criminal—the “*Delinquente nato*” (as Ferri in 1880 named it). “There are more peculiarities,” he declared, “in the skull of the criminal than in that of the lunatic.” To this type he felt satisfied that most great offenders must belong. Its characteristics involved so much which was suggestive of the ape that it was an easy inference to regard them as returns to an ancestral animalism. But, as time went on,

Lombroso laid less and less stress on this atavistic theory; though he remained convinced, with Maudsley, that, just as true poets are such by birth, so are true criminals.

This general type once discovered, Lombroso proceeded to differentiate other types more special. Hump-backed men, he became convinced, are rarely murderers; but they are apt to have a penchant for forgery and for incendiarism. Amongst highwaymen he found dark eyes and thick black hair to be common; whilst mere thieves had grey eyes and were usually men of less height and weight and strength than the highwayman. Lombroso might, however, have paused to consider whether these puny thieves are not withheld from emulating the exploits of Dick Turpin rather by mere muscular inaptitude than by any innate psychological destiny.

The study of one extreme suggested the study of its opposite. He turned from these degenerates to the vanguard of our race. But here a surprise awaited him. In his *Uomo di Genio* he disclosed it: "My results prove that genius, the highest product of evolution, possesses many retrogressive characteristics; whilst, on the other hand, the criminal, so many of whose peculiarities are retrogressive, manifests others which are amongst the latest results of evolution, whether physical, like deficiency of molar teeth, or mental, like the craving for novelty."

Many of the characteristics which are innate in born criminals may in other men be acquired gradually through vice or disease, as in habitual inebriates. In both classes the offender is beyond reformation; and society, in its own defence, must send him into permanent seclusion as "unassimilable". But beyond these incorrigibles there lie other groups; less interesting to Lombroso, but surely of far greater numerical importance. There are those whose mental taint, though often innate, does not amount to insanity: the epileptic, the neurasthenic, the weak-minded. There are those, again, who yield easily to impulse, the "criminals of passion". And there are those who yield easily to temptation, the "criminals of opportunity". The latter two are obviously corrigible; though Lombroso shrewdly suspected that, prisons being what he had seen them, the chances of correction, and possibly even the chance of reparation, would be greater out of prison than in. The study of all these various types had naturally a growing fascination for so devoted a biologist; a fascination which, however, led him to overlook the external influences exercised by social environment. Taunted by the sociologists with this omission, Lombroso

made in his later days the lame apology that he had said nothing about Environment "because its operation is so unmistakable that I saw no need to mention it; and therefore did not uselessly waste words upon what was already obvious." But the omission, whatever its cause, had soon been repaired by his colleagues. Lombroso had laid the biological basis of the New Criminology; Garofalo worked out its legal bearings; and Ferri, stirred by the study of Karl Marx, enriched it with an ample sociological commentary.

The great principle of this new school was to study, not the offence, but the offender. Given a bad man who had shown a bad intention, the question at once arose—how to deal with it. And they ridiculed the lawyer's habit of wasting time on inquiring whether this intention had ended in a mere attempt or in a consummated crime, and what share of the subsequent ill results was due to that crime or to external interference, and what degree of complicity and of responsibility attached to each participator in the crime. Moreover, in their comparative disregard of all offenders who did not manifest the characteristic "psycho-physical anomalies", the new school advocated the treatment of petty offences rather by exacting compensation than by inflicting punishment at all. But this lenity to one class was counterbalanced by trenchant dealing with another. The rational benevolence of the eighteenth-century writers had degenerated in the nineteenth into a weak humanitarianism which, if it could but escape from inflicting present pain, was content to leave the community to run the risk of great future suffering. Against all such short-sighted weakness the new school had the courage to raise an outspoken protest. They realise the evil of rendering prisons so comfortable as to become incentives to crime instead of deterrents. Instead of elevating the incorrigible criminal into a victim or perhaps a hero, Garofalo frankly acknowledges their "repugnance for a being so evil and so unlike a man". Beccaria and Filangieri had contended not only against torture but also against capital punishment. Italy's modern jurists bid society regard its self-preservation as the first consideration, and—usually by imprisonment for life but by death if need be—"eliminate the unassimilable".

A school with theories so novel soon found assailants. Its very biology was attacked; and by competent critics, like Virchow and Sernoff. And no two men are alike; so Lombroso's "normal man" does not exist, but is one of those "metaphysical" abstractions

which he loved to denounce. Again, it was shown that the characteristics which he pronounced to be criminal can be found in many honest men; and that in many of the delinquents in whom they are traceable they are not innate but merely the fruit of penury and hardship. And the growing tendency of science to doubt the inheritance of acquired characteristics is now intensifying this line of objection. Other critics, again, pointed out that, even if Lombroso had depicted his biological type correctly, he had greatly exaggerated the frequency of its occurrence; and that any experienced governor of a gaol could tell him that the general run of prisoners are very much like other folks. Moreover, it is found that criminals are rarely "specialists"; Yvernes ascertained that in France 60 per cent. of the second convictions are for an offence of a different type from the previous one. So even the recidivists show little evidence of being under the influence of a fixed tendency.

And, whether or not the new criminologists had fallen into error or exaggeration in the treatment of the facts which they had investigated, it was obvious that a further group of facts—perhaps still more directly important—had been cavalierly dismissed by them as unworthy of investigation. For they pressed on us a psychology without a psyche. "The wider," wrote Ferri in 1905, "grows the domain of our criminological science, the narrower become those of mere common sense and of religion." The boast is but an ambiguous one! In their zeal for the study of the criminal's physical organisation, the Italian jurists cry: "No metaphysics; no free will; no dream of Responsibility." Our universal consciousness of personal choice in our actions, Ferri dismisses as "a mere subjective illusion". Similarly Garofalo insists that "whenever judges do take the trouble to inquire whether or not a criminal is really responsible, it always turns out that he is *not*." Yet an observer who has spent long years in charitable labours in the prisons of Spain has told us that "I never met (and I never knew any one else speak of having actually met) any prisoner who considered that he had no freedom of will in committing his offences, or that he had been brought to them by a necessity that left him no personal blame." Yet such actual experience we are called upon to ignore, at the bidding of a theory. "The two postulates of the world's traditional systems of criminal justice," says Garofalo, "are that 'Guilt is measured by responsibility' and that 'Punishment should be measured by guilt'. But science has now

proved both these postulates to be false." A further unfortunate result of Lombroso's preference for the physical over the mental side of things was that, in formulating his theories, he took little pains to define with any precision the terms in which he formulated them—an omission which did much to lessen the value of the theories and to facilitate superficial attacks on them. Around even such salient conceptions as those of insanity, epilepsy, genius, nay, of crime itself, he was content to leave a mist of vagueness. This lack of definiteness was the price he had to pay for his lifelong contempt for the metaphysicians, who could have taught him their art of logic.

But when all these deductions from Lombroso's fame have been made, how much remains! It is idle to speak of his doctrines as "a nineteenth-century astrology or alchymy". There was real genius in the intuition which led him, amidst his studies of insanity, to see the social importance of carrying forward their results and methods into the domain of crime. And the tenacious industry with which he pursued the path thus opened; the courageous energy with which he announced and disseminated the discoveries to which it led him; and the no less courageous modesty with which he frankly modified his generalisations when flaws in them became obvious—all these are merits which every scholar must admire.

His courage was manifested in his frank criticisms of what he saw around him in the field of law. A jurist audacious enough to smile even at the House of Commons, and to pronounce the admiration for Parliamentary institutions to be "the grossest of modern superstitions"; was pretty certain to take an independent view of the merits of mere tribunals and their procedure. Even so admired and so widely copied an institution as the Jury he attacked. He saw that this "bizarre creation" (as Garofalo terms it) often gives acquittals which are obviously at variance with the probabilities of the case; and he advised its abolition, except in political prosecutions where the interest of the government is so obviously engaged as to render necessary some such check upon the subservient zeal of the judges. Tarde, usually a hostile critic of the Lombrosians, praises them for "heaping their sarcasms on trial by jury"; as they indeed do. Ferri demands its abolition "in the name of the fundamental reason and final purpose of every criminal trial". Yet, as Garofalo laments, "in our Italian Parliament, not a single member has raised his voice for its abolition."

Let him rejoice to know that in England four-fifths of our indictable crimes are now disposed of by magistrates without any jury. The facility of appeal, which has gone so fatally far in the United States, Lombroso condemned still more bitterly. "Here in Italy," he writes, "justice is rendered ridiculous by appeals; they deprive punishment of all promptitude and all certainty"; a guilty man sometimes seeing his conviction reversed for some technical or even verbal error. The censure recalls the frequent regrets of our own new Court of Criminal Appeal, that it is not allowed to send such a man back for a fresh trial. The power of pardon, "one of the many inconsistencies of modern criminal law," he similarly condemned. It was a condemnation in which he found himself in the unaccustomed company of Beccaria and Filangieri; and which may not seem wholly inexcusable to those who have seen Home Secretaries become timid or docile in the presence of newspapers that drive a profitable trade in patronising the perpetrators of sensational crimes. Carrying into the unfamiliar field of law the calm habits of the laboratory, Lombroso even condemned that "litigious" method of criminal procedure, whose equal struggle between Crown and defendant modern English jurists pride themselves on having substituted for the old "inquisitorial" investigations. Even in the oral public examination of the witnesses he saw little value; it seemed to him "a useless, and sometimes erroneous, repetition of what has already been set down in their depositions. The presence of the public and the onslaughts of the counsel for the defence may confuse them now; whereas in a little room, before only two or three persons, it is much easier both to recollect facts and to recount them." Hence his followers condemn the English admission of the public to that preliminary examination (as also our readiness to concede at its termination a release on bail). But whatever the circumstances under which witnesses might recount their narrative, their testimony carried much less weight in Lombroso's eyes than it does in those of lawyers. He was eager to supplement it—indeed he speaks as if almost content to replace it—by "the gigantic evidence" which biology could disclose about the prisoner's personal characteristics and his present emotions. On the importance of testing these emotions he insisted much. All novel-readers remember how vividly Sir Walter Scott had realised that the pulse may prove a tell-tale as to what is passing in the mind. Cœur de Lion, in *The Talisman*, clasps the wrist of the Arab physician in order to detect whether

his blood "throbs like theirs who poison princes"; and in *Peveril* King Charles tests Fenella's apparent deafness by making Lady Derby feel if her heart beats quicker when he announces alarming news. But Scott little foresaw that this clue was to be developed into a forensic instrument of mechanical precision. Lombroso dwells with enthusiasm on the revelations of guilt or innocence that can be elicited by using the hydrosphygmograph or the volumetric glove. By these a prisoner's wrist and hand are immersed in a confined volume of water or of air, whose oscillations, as his pulse varies, are registered by a needle upon a moving chart. The investigating expert talks to him of incriminating circumstances, or shows him the instruments of the crime or the relics of the victim; and the needle records his excitement or his indifference.

To make an accused person thus the involuntary subject of a biological experiment may seem to us a process that savours rather of the laboratory than of the law-court. But Lombroso had a savant's eagerness in the pursuit of truth; and was too little of a jurist to realise that law-courts must content themselves with just so much of the truth as is sufficiently obvious to the popular eye to make its assertion by physical force not only right but also politic. Hence he censured the sweeping presumptions of innocence by which the law safeguards the accused; why should the slightest degree of malice be treated as more probable than the heinous? In a born criminal or a recidivist the very reverse would be true. To his scientific eye it seemed that—as Garofalo puts it—"Our present laws and law-courts protect the criminal against society, rather than society against the criminal." Indeed this last-named disciple of Lombroso expressly condemns the great Italian jurists of the eighteenth century for having reformed away the mediæval course of criminal procedure and substituted "one which treats every accused person as if he were a victim of persecution".

But if this hostility to English methods startles us, let us set off against it Garofalo's own calculation that in England murders are less frequent than in eight other great countries of Europe, and twelve times less frequent than in Italy. And let us bear in mind the striking words written by Ferri only four years ago: "In England the criminal law is uncodified and very defective. But the judges are excellent; and consequently the practical working of criminal justice is satisfactory. In Italy, on the other hand, we possess a Code on which twenty-five years' labour has been lavished. But our judges are incompetent in point of learning and

moreover are in subjection to the Executive—so the administration of our criminal justice is in disrepute, it is impotent against evil-doers and vexatious to honest men.”

Yet though our English procedure has indeed succeeded, and to a degree probably without parallel, in restraining crime, and at the same time in retaining the confidence of the masses of the people, it by no means follows that it has nothing to learn from Lombroso's bold criticisms. Assuredly there are certain other unwelcome truths which he showed a like courage in propounding, which we have great need at the present time to lay to heart. In the interests of the next generation he insisted that the law ought not only to permit, but to command, divorce in any case of grave crime or of chronic alcoholism, of insanity or of inveterate epilepsy. And the force of statistics brought him to the still more unpopular conclusion that “in proportion as women take a more and more active share in the struggle for life, the more rapidly does crime increase amongst them”. And amidst the general modern readiness to treat organised disturbances of the public tranquillity as acts venial or even laudable, and to regard “political” motive as a sufficient excuse for any violence, he insisted on the fact that “though crimes due to political motive may be less wicked, they are more dangerous to society than ordinary crimes are”. It is well, just now, to turn over the pages of *Gli Anarchici*, and ponder there Lombroso's warning that “history abounds in instances of the union of political zeal with a criminal disposition. In the early stages of rebellions, and in all riots, criminals are generally prominent. For the vehemence of their abnormal characters hurries them in advance of the wavering and the timid; and the example set by them soon creates excesses of violence by a very epidemic of imitation.” (P. 48, cf. p. 36.)

Whether or not, however, we consent to be taught these further lessons by Lombroso, we shall still be in his debt for those we have already learned from him. But for his labours we should not now be beginning to grapple with the problems of vagrancy; nor have become convinced of the perils of solitary confinement; nor have learned to reclaim first offenders by release into a period of well-supervised probation, and to protect ourselves against hardened ones by secluding them in preventive detention. Nor should we have realised to the full the importance of the individualisation of offenders, which enables us not merely to separate from the common herd of criminals the classes suited to these two