



A HISTORY OF  
**ENGLISH CRIMINAL  
LAW**  
and its Administration  
from 1750

VOLUME 5

THE EMERGENCE OF PENAL POLICY

BY

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## PREFACE

THIS fifth volume of *A History of English Criminal Law and its Administration* covers the years from the 1830s to the outbreak of the First World War: the Victorian and Edwardian periods. It was an era which witnessed the birth of criminology and the emergence of a penal policy. We have found it fascinating to retrace the endeavours to uncover the roots of crime and to evolve a combination of diverse measures for the control of crime. An added fascination has been the inter-action between what was going on in these spheres on the Continent of Europe, in the United States of America, and in this country. It is a story of recurring dilemmas, many of which are still with us today. Since Volume 4 was published, in 1968, there has been a remarkable upsurge in historical studies of crime, criminal justice and punishment. We have done our best to take these into account and we acknowledge our debt to them.

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October 1984

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PART 1

SEARCHING FOR THE ROOTS OF CRIME



## CHAPTER 1

# ENGLISH REACTIONS TO POSITIVISM

### §1. THE EARLY INFLUENCES

It is an almost instinctive response on the part of those who are not criminals to look upon those who are as being different. From there it is a short and easy path to the assumption that this difference originates in characteristics peculiar to the transgressor's individuality alone. Moreover, the perception of these individual variations, especially in their more extreme forms, grips the imagination, prompting impressions which one is the more reluctant to abandon since they are associated with some specific, concrete case or, still more, with series of cases. It has also been suggested, not without justification, that the strong and persistent inclination to assign the cause of crime to the endogenous constitution of the criminal, has been fostered by a more or less inarticulate, subconscious, and yet very real, sense of relief, in that such an explanation seems to free society from a share of responsibility for the crime committed in its midst.

This interpretation came to the forefront in the 1880s with the emergence of what has become known as the Positivist School in criminology. It was this school, launched by Cesare Lombroso, Enrico Ferri and Raffaele Garofalo, which made the first systematic and persistent attempt to enquire into the personal characteristics of the offender, to formulate the thesis of the individual causation of crime in the context of social environment, and to construct a bold new conception of criminal law and penal policy based on the negation of free will.<sup>1</sup> It was a school which rejected the concepts of criminal responsi-

<sup>1</sup> *Cesare Lombroso* (1835–1909). Lombroso's first four articles, leading to his major book, were: "The existence of a Median Fosette in the cranium of a criminal" (1871); "On the Criminally Insane in Italy in '68, '69 and '70" (1871); "Anthropometry of 400 Venetian Criminals" (1872); "Emotions and Passions of Criminals" (1874) (all in Italian and not translated into English). *L'Uomo Delinquente* was published in 1876 (252 pp.), a second much larger edition in 1878 (740 pp.), the fifth and last in 1896–97 (3 vols. of nearly 2,000 pp.). It was never translated into English in its entirety but the third volume, which contains revisions, was published as *L'Homme Criminel* (Paris,

bility and punishment proportionate to the gravity of crime, the basic tenets of the classical school of criminal jurisprudence. It advocated the replacement of retributory punishment by what it called "sanctions," adapted to the dangerousness of an offender and the category to which he belonged. It argued that a wide range of indeterminate measures of a curative, reformatory and incapacitating nature should be made available to the courts, their contents and duration being largely determined by the administrative authorities.<sup>2</sup>

The Italian positivists were not the first to attempt to explain criminal behaviour in this way. As Bernaldo de Quirós has observed, the history of ideas "does not advance by leaps. Its ages preserve the footprints of forerunners and founders just as the geologic strata preserve the fossilized species from which are derived those that people

1887), later as *Le crime, causes et remèdes* (Paris, 1899); and appeared in the U.S.A. in 1912 as *Crime, Its Causes and Remedies*, under the auspices of the American Institute of Criminal Law and Criminology. For an excellent critical evaluation of Lombroso see Marvin E. Wolfgang, "Cesare Lombroso" in H. Mannheim (ed.), *Pioneers in Criminology* (2nd ed., 1972), pp. 232–291. See also H. Mannheim, "Lombroso and his Place in Modern Criminology" *Sociological Review* (1936), vol. 28, pp. 31–49, reproduced in *Group Problems in Crime and Punishment* (1955), pp. 69–84. Still very instructive is Alfred Lindesmith and Yale Levin, "The Lombrosian Myth in Criminology" *American Journal of Sociology* (1937, vol. 42, pp. 653–671. And for more recent critical reassessment see S. J. Gould, *The Mismeasure of Man* (New York, 1981), pp. 122–142.

Enrico Ferri (1856–1929). In 1878 Ferri published his dissertation on Criminal Responsibility and the Negation of Free-Will. In 1880 his first course of lectures at Bologna was published. A second, much enlarged edition, appeared in 1884, both of them under the title *I Nuovi Orizzonti nel Diritto e nella Procedura Penale*; a third, under the new title *Sociologia Criminale* appeared in 1892, and a fourth in 1900. It was translated into English in an abridged version, *Criminal Sociology*, by W. D. Morrison, in 1895; the full version appeared in the U.S.A. in 1917 under the sponsorship of the American Institute of Criminal Law and Criminology, and a fifth, posthumous, two-volume edition, by A. Santoro, in 1929. Very important also is his book *L'Omicida nella Psicologia e nella Psicopatologia Criminale* (1st ed. 1895, 2nd ed. 1925 extensively revised, including the 5th ed. of *L'Omicidio-Suicidio* first published in 1883). See also *Studi sulla Criminalità* (Turin, 1st ed. 1901; 2nd ed. 1926), and *Principii di Diritto Criminale* (Turin, 1928), which includes his famous and controversial Draft Penal Code for Italy of 1921. On Ferri see Thorsten Sellin, "Enrico Ferri" in Mannheim, *op. cit.*, pp. 361–384. The time is propitious for a full-scale biography of Enrico Ferri and his extraordinary influence (the book by Bruno Franchi, *Enrico Ferri, Il noto, il mal noto, e l'ignorato* (Turin, 1908), is inadequate).

Baron Raffaele Garofalo (1852–1934). Garofalo's essay *Di un criterio positivo della penalità* (1880), "Concerning a positive criterion of punishments," grew into his major and only book, *Criminologia* (Naples, 1885). The second edition appeared in 1891. It was published in French in 1905 and was translated into English for the American Criminal Law Series in 1914 (reprinted 1968). On Garofalo see, Francis Allen, "Raffaele Garofalo" in Mannheim, *op. cit.*, pp. 318–340.

The two main organs of the school were *Archivio de Psichiatria e Antropologia Criminale* (founded 1880), and *Scuola Positiva* (1892). In 1912 the "Scuola d'Applicazione Giuridico-Criminale," the first Institute of Criminology, was founded by Ferri in Rome. See L. Radzinowicz, *In Search of Criminology* (1961), pp. 6–9.

<sup>2</sup> For a fuller discussion of the contrasts between the classical and the positivist schools, see L. Radzinowicz, *Ideology and Crime* (1966), pp. 1–59.

the earth to-day."<sup>3</sup> The Lombrosian doctrine is now regarded as the Lombrosian myth, and can be placed, together with the theories of his forerunners, in the historical repository of criminology. The writings of the Lombrosian criminologists are no longer read and, indeed, are hardly readable. It is like moving about in a bewildering, fantastic antique shop, out of this world, and even the elements of truth which were the fruits of the anticipation and perceptions of superior minds, are submerged or distorted by an incongruous amalgamate of hypotheses, comparisons, generalisations and illogical conclusions. But at the time their impact was far reaching and instantaneous. The birth of criminology as a separate discipline will forever be associated with their names and writings, and few disciplines have known a period so controversial and so vital.

There were the physiognomists like J. K. Lavater, who in the eighteenth century related the anti-social tendencies of the criminal to the irregularities of his outward features. There were the phrenologists, F. J. Gall and G. Spurzheim, who, in the first quarter of the nineteenth century, maintained that each bodily and mental function had its own organic seat in the brain and affected its configuration and thus the shape of the skull; a theory which was expanded to apply also to criminal behaviour, and became known as the "localisation theory." There were those who, like B. A. Morel, in the middle of the nineteenth century, expounded the theory of degeneracy and linked crime to it, "a morbid deviation from the normal type of humanity," hereditarily transmitted. There was a whole school of alienists, who, like Grohmann, distinguished inborn moral obtuseness, inborn brutality and moral idiocy as forms of disorganisation affecting the will, and at the same time pointed to the frequency of deformed cranial and facial characteristics among criminals, especially those of defective mental development. On the mental side, Pinel, at the beginning of the century, and Despine, in the 1860s, described a type of person whose behaviour was violent, cruel or avaricious but who showed no signs of mental confusion. Such people were, in Despine's view, natural anomalies, mental monstrosities, "morally mad." Still other writers, like Griesinger, linked such behaviour to weak-mindedness and an "instinctive," congenitally derived, desire for evil. And there were those like Hubert Lauvergne, the Chief Medical Officer of the convict station at Toulon, who began the empirical investigation of the "moral and intellectual physiology" of the *forçats*.<sup>4</sup>

<sup>3</sup> C. Bernaldo de Quirós, *Modern Theories of Criminality* (trans. A. de Salvio, 1911), p. 1.

<sup>4</sup> On these precursors, see G. Antonini, *I Precursori di Lombroso* (1900), Havelock Ellis, *The Criminal* (1890), pp. 26-39, and, for a brief sketch, W. A. Bonger, *An Introduction to Criminology* (1936), pp. 56-58.

The contemporary scientific influences were even more important in the development of positivist criminology. At the time when Lombroso began his work, anthropology had entered upon a new phase, largely through the efforts of Paul Broca, who defined it as the "natural history of man." Lombroso was impressed by his novel methods. He was also attracted by the thesis of Rudolf Virchow, that the evolution of man from lower animals implied the possibility of organic and moral regression to the standards of primitive man. He was further influenced by Hakel's evolutionary "law of recapitulation," according to which the development of the individual recapitulates that of the race. Not least he was affected by the discoveries of Darwin. One quotation is enough to show the closeness of the link. "With mankind," wrote Darwin, "some of the worst dispositions, which occasionally without any assignable cause make their appearance in families, may perhaps be reversions to a savage state, from which we are not removed by very many generations. This view seems indeed recognised in the common expression that such men are the black sheep of the family."<sup>5</sup> Even the study of society by Comte and Spencer, then the guiding minds in sociology, had a distinctly organic bent.

In England similar hypotheses emerged, but they were fewer, and certainly much less articulate and vocal. Some, in fact, were merely isolated comments, or asides. Nevertheless, a few stood out because they were expounded by men with rather exceptional knowledge, gained by direct experience of dealing with prisoners.

Phrenology made little impact. M. B. Sampson and George Combe argued that "error of judgment or conduct" arose from defective conditions of the brain, conditions resulting from hereditary transmission influenced by subsequent external circumstances. Sampson concluded that it was therefore irrational to inflict punishment on the sufferer of an "ill-conditioned brain;" crime could only be diminished by "directing our sole efforts to the mitigation of his infirmity." Combe insisted that criminals should be classified according to their mental states and a mode of treatment applied according to the qualities of the individuals in each class; in extreme cases of incorrigibility they should be perpetually imprisoned.<sup>6</sup>

<sup>5</sup> Charles Darwin, *The Descent of Man and Selection in Relation to Sex* (1871), Vol. 1, p. 173.

<sup>6</sup> M. B. Sampson, *Criminal Jurisprudence considered in Relation to Mental Organization* (1841) (published in the U.S.A. as *Rationale of Crime* (1846)) and *The Phrenological Theory of the Treatment of Criminals Defended* (1843), p. 6. Also George Combe, *Remarks on the Principles of Criminal Legislation and the Practice of Prison Discipline* (1854), esp. pp. 21–49. On Combe (1788–1858), see *DNB*, vol. 4, pp. 883–885. For an attack on phrenology see J. J. S. Wharton, *Criminal Jurisprudence considered in relation to Man's Responsibility: repudiating Mr. M. B. Sampson's Phrenological Theory and His Philosophy of Insanity* (1841). Although discredited by the middle of the century, belief in the value of phrenology as a means of identifying criminals lingered on.

By the 1860s those who ruminated on the causes of crime turned their attention to individual stigmata. For example, Thomas Beggs, though he acknowledged the influence of social factors, had no doubt that paupers and criminals were "a deteriorated class" whose condition arose from "defects of organisation," from "weak or diseased brains;" they were "physically stunted, scrofulous or feeble," and being "constitutionally incapacitated" they were "indisposed to learn or follow any fixed or settled pursuit." This condition was hereditarily transmitted.<sup>7</sup> And the Reverend Henry Lettsom Elliot, who acknowledged crime to be learned behaviour, nevertheless insisted that nearly 15 per cent. of first convictions were due to inherited "physical causes," which co-existed with "peculiarities of form and outward development".<sup>8</sup> H. J. C. Beavan, reviewing the development of "criminal psychology," took it for granted that everyone would agree with him that "the physiognomy of criminals . . . once seen, is never forgotten."<sup>9</sup> It was Dr. G. Mackenzie Bacon who raised the question, which constituted the essence of this emerging line of criminological inquiry:

"Much information has been collected as to the causes favourable to crime, but while it is well-known that poverty, disease, intemperance, ignorance, and bad education or associates, are powerful influences in its development, these are but exciting and proximate causes:— The question remains, what else is there behind in operation, that makes some fall victims and others not, and what are the specialities that predispose some, as it were, by nature to crime?"<sup>10</sup>

All this remained impressionistic until systematic medical examination of prisoners began to be made. This pioneering work was carried out independently by three prison doctors, two of them

See the letter from Dr. J. G. Davey, President of the Bristol Phrenology Society, making such claims, in *The Social Science Review* (1864), vol. 2, n.s., pp. 81–83. Also the informative article by M. T. Parssinen, "Popular Science and Society: the Phrenology Movement in Early Victorian Britain" *The Journal of Social History* (1974), vol. 8, pp. 1–20, and Roger Cooter (1981), "Phrenology and British Alienists, ca. 1825–1845" in Andrew Scull (ed.), *Madhouses, Mad-Doctors and Madmen* (Univ. Pennsylvania Press, 1981), pp. 58–104.

<sup>7</sup> Thomas Beggs, "Causes of Crime" *Transactions of the National Association for the Promotion of Social Science 1868* (1869), pp. 338–348, at p. 342 (hereinafter cited as *Transactions N.A.P.S.S.*). Also, Samuel P. Day, *Juvenile Crime; its Causes, Character and Cure* (1858): "The hereditary character of crime is admitted, for the physical diagnosis silences doubt" at p. 54.

<sup>8</sup> H. L. Elliot, "What are the Principal Causes of Crime considered from a Social Point of View?" *Transactions N.A.P.S.S. 1868* (1869), pp. 324–337, at pp. 335–336.

<sup>9</sup> H. J. C. Beavan, "Criminal Psychology," *The Social Science Review* (1865), vol. 3 n.s., pp. 224–230, at p. 228.

<sup>10</sup> G. Mackenzie Bacon, "The relation of Crime and Insanity, illustrated by Recent Cases" *ibid.* (1864), vol. 1, n.s., pp. 431–447, at p. 432.



concurrently and the other following close on their heels. The results of the first two investigations anticipated even Lombroso's earliest papers, and all three investigators made their conclusions known well before *L'Uomo Delinquente* was published. All received international recognition.<sup>11</sup>

Dr. G. Wilson based his findings on the measurements of the heads of 464 convicts; J. Bruce Thomson drew upon 18 years' experience as the Prison Surgeon at Perth in Scotland, and particularly, it seems upon 673 prisoners who were placed on his "register" as "requiring care and treatment on account of their mental condition;" and David Nicolson relied on the cases he observed as a medical officer in English convict prisons, but he provided no statistics. There were differences in emphasis and shades in the comments and conclusions of these three pioneers, but hardly any difference in their fundamental diagnosis. They left many questions unanswered because they often used terms without a clear definition of what they really meant by them. They focused their studies primarily on the hard core of prisoners, the habitual criminals. Although they did not entirely rule out possibilities of reforming such people, they regarded them as, in the main, incurable and therefore incorrigible. And again, although they recognised the importance of environmental factors in the production of crime, they conceived habitual or "thorough" criminality as a matter of individual disposition.

A few of their characterisations illustrate their approach and conclusions. "Moral imbecility" and "criminal deficiency" were associated with insufficient cranial development and with physical deterioration: 40 per cent. of all convicts were invalids and the proportion was even higher in the "professional thief class." The criminal class was "*sui generis* . . . distinct from other civilized and criminal men," marked by "peculiar physical and mental characteristics" which were so plain that "all prison officials or detective officers could pick them out at any promiscuous assembly at church or mar-

<sup>11</sup> Dr. G. Wilson's paper "The Moral Imbecility of Habitual Criminals as Exemplified by Cranial Measurements" (read to the Thirty-ninth Meeting of the British Association at Exeter, 1869), is not reproduced in *The Report of the Meeting* (1870), but is quoted in H. Ellis, "The Study of the Criminal" *Journal of Mental Science* (1890), vol. 36, pp. 1-15, at p. 6. J. B. Thomson's two papers were: "The Hereditary Nature of Crime" *ibid.* (1869), vol. 15, pp. 487-498, and "The Psychology of Criminals" *ibid.* (1870), vol. 16, pp. 321-350; Dr. David Nicolson's papers were: "The Morbid Psychology of Criminals" *ibid.* (1873), vol. 19, pp. 222-232 and 398-409; (1874), vol. 20, pp. 20-37, 167-185, 527-551; (1875), vol. 21, pp. 18-31, 225-250, including "typical illustrations of the physiognomy of weak-minded criminals." We know nothing else about Dr. Wilson save that he was a medical officer in the convict prison service; J. Bruce Thomson was, for many years, Resident Surgeon at Perth Prison in Scotland; David Nicolson was Senior Assistant-Surgeon, in the English Convict Prisons Department at Portland, then Medical Officer, Portsmouth Convict Prison. He became Medical Superintendent of Broadmoor Hospital for the Criminally Insane and President of the Medical Psychological Association.