

THE HAMLYN LECTURES

**CRIME AND THE
CRIMINAL LAW**

Reflections of a Magistrate and Social Scientist

Second Edition

Barbara Wootton

STEVENS

CRIME AND THE CRIMINAL LAW:

Reflections of a Magistrate and Social Scientist

BY

BARBARA WOOTTON

SECOND EDITION

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Baroness Wootton of Abinger
1981

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Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a Scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

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The fifteenth series of Hamlyn Lectures was originally delivered in November 1963 by the Baroness Wootton of Abinger, M.A., (HON.) LL.D., at Sheffield University.

AUBREY L. DIAMOND,

Chairman of the Trustees.

March 1981

INTRODUCTION

It is not an easy task, in an area where change is as rapid as in criminal law and practice, to update discourses which are already 17 years old. I can but hope that the procedure which I have adopted will be acceptable to readers. I have made as few changes as possible in the original text, but, after consultation with the publishers, have generally modernised terminology, for example, substituting "The Crown Court" for "Quarter Sessions," "Court of Appeal" for "Court of Criminal Appeal" and "theft" for "larceny." Most of the statistics, for example those relating to the volume of crime, remain as printed in the original lectures; but corresponding figures for more recent dates are included in the Postscripts to each chapter, which also record relevant new developments in crime and criminal law, together with some after-thoughts of my own. After much reflection, it seemed to me that it would be more appropriate to attach such new material in each case to the chapter to which it related, rather than to write what would amount to a single additional chapter, covering the whole ground, which would only be intelligible in the light of constant reference back to the relevant lecture.

Apart from these technical details, my task would have been incomparably more burdensome had it not been for the generosity of Messrs. George Allen & Unwin who gave me permission to incorporate verbatim in this revision of my Hamlyn lectures sundry passages from my book on *Crime and Penal Policy* which they published in 1978. Incidentally, readers may like to know that they will find in that book (now paperbacked) much fuller treatment of many of the topics discussed in this new edition of the lectures. For my part I am most happy to use this introduction as an opportunity to express to Messrs. Allen & Unwin my deeply felt appreciation of an exceptionally

helpful concession which greatly exceeded anything for which I had hoped.

Barbara Wootton

House of Lords
January 1981

Chapter 1

A MAGISTRATE IN SEARCH OF THE CAUSES OF CRIMES

As the only layman who has yet given the Hamlyn lectures, I cannot but be both dazzled by the eminence of the distinguished lawyers who have preceded me and deeply sensible of the honour paid to me by the Trustees. I can only hope that the occasional choice of a layman, and particularly of a specimen of that peculiarly English genus, the lay magistrate, might have appealed to the Founder of this Trust. For Emma Hamlyn's objective, you may remember, was that the common people of this country should realise the privileges which they enjoy in law and custom, and should recognise the responsibilities and obligations attaching to them; and these are certainly matters which are constantly brought to the notice of magistrates and of the common people with whom they have to deal. At all events let me say at once that the reflections on crime and the criminal law which I propose to offer to you are the product of a dual experience extending over more than 30 years—experience, that is to say, on the one hand as a magistrate, and on the other hand as a professional social scientist.

The social scientist who finds himself on the Bench can hardly fail to be sadly impressed by the scale and persistence of criminal behaviour; and by the gross failure of our society to eradicate this. Year by year the criminal statistics record a persistent upward trend in the number of persons convicted of offences in England and Wales, up to a total of 1,152,000 in 1961. In the past ten years such convictions, though actually fewer in 1951 than before the war, have

increased by nearly 60 per cent.¹ If, moreover, attention is confined to indictable offences (which are generally, though not in every instance correctly, regarded as the more serious crimes), the increase is more dramatic still. Indictable offences known to the police had reached by 1961 a figure of between two and a half and three times what they were in 1938, and nearly 54 per cent. above what they were ten years earlier. True, there have been moments of hope. A slight drop in the total between 1945 and 1946 was followed immediately by a rise and then by a substantial fall which left the 1949 figure lower than any since 1944. After another slight rise in 1950 and a larger one in 1951 a continuous fall was recorded for the next three years, the figure for 1954 being the lowest for ten years; but the effect of this improvement has, alas! been wholly obliterated by the steady and substantial increase which has continued in an unbroken series year by year since 1954.

This increase, moreover, has not been evenly spread over different categories of crime. Known offences of violence against the person have increased to nearly six and a half times the 1938 total, cases of receiving and sex offences to about four times, burglary to between three and four times, and theft and frauds to between two and three times. It almost looks as if the nastiest offences were setting the fastest pace. Among non-indictable offences convictions for drunkenness have risen by nearly 42 per cent. since 1938, the increase having raced ahead in the past 10 years; whilst the increase in traffic offences in the same period, perhaps surprisingly, amounts to only about 50 per cent.; but it is a sobering thought that these last now account for no less than 61.8 per cent. of all the convictions recorded in the criminal courts. In the course of these lectures I shall frequently have occasion to include

¹ All the figures in this chapter relate to 1961 or before. Most of them are updated to 1978 in the postscript which follows this chapter (see p. 26).

traffic offences along with other crimes; and for this I make no apology, since not only do these offences occupy a large proportion of the time of the courts, but much of more general application is also to be learned from them.

It is a depressing story. Admittedly the picture presented by the criminal statistics, the whole range and compilation of which are now under review by a Departmental Committee, may be somewhat distorted. But there is very little reason to suppose that the distortion is in the direction of underestimation. And the gloom is not dispelled by the discovery that the harder we try, the less apparently do we succeed. Penal treatments could be described as cumulative failures. The more anyone experiences them, the greater the probability that he will require further treatment still. In their recent study of persistent offenders Hammond and Chayen² found that the greater the number of previous court appearances, the greater the risk of reconviction; and this trend was present alike amongst those who had been sentenced to preventive detention and amongst those who, though liable to this sentence, had actually been otherwise dealt with. Out of a group of 318 in the latter class 58 per cent. of those with less than 10 previous court appearances, 71 per cent. of those with 10 to 19 previous appearances and 81 per cent. of those with 20 to 29 previous appearances were reconvicted within a two- to three-year period. Amongst those released from preventive detention³ the corresponding figures were 55 per cent., 66 per cent., and 63 per cent.—the trend being less marked because the number in the group (108) was not so large.

Of course there is nothing unexpected in this. In the world as it is, the longer one's criminal record, the less the chance of living in any way that does not lengthen it still further. But the trend is worth recording if only because it

² Hammond, W. H. and Chayen, E., *Persistent Criminals* (H.M.S.O., 1963), p. 102.

³ Preventive detention has since been abolished: see Postscript to Chapter 2, p. 55.

is open to more than one interpretation. No doubt it is likewise true that the risk of requiring an operation for cancer is greater in someone who has already undergone one operation for this disease than in one in whom it has not made itself apparent. The nature of the disease is not understood, and the treatment therefore palliative rather than curative: and the same could be true of criminality. At the same time a more sinister interpretation in the case of criminality is also possible—namely, that the treatment itself aggravates the disease.

Meanwhile the sociologically-minded magistrate (and indeed any judicial personage in whom curiosity has not been wholly stilled) will certainly hunger for explanations of the persistence of these ugly blemishes upon an otherwise tolerably civilised society. He will ask himself, first: why do people commit crimes? and secondly, perhaps, why do people refrain from committing them?

To the first of these questions, he will still get but a dusty answer; for aetiological research in criminology tends to be as inconclusive as its volume begins to look impressive. From the crude criminal statistics, the most striking and consistent answers that suggest themselves are that crime is the product of youth and masculinity. At least detected indictable crime is clearly and consistently the special province of the young male. In 1961 87.1 per cent. of all those convicted of indictable offences were males: 10 years earlier the figure was 88.1 per cent.; and in 1938 it stood at 87.7 per cent. If allowance is made for differences in the population at risk, male criminality at all ages (as measured by indictable offences) in 1961 was between seven and eight times as great as that of females, the ratio ranging from 10 to one in the under 14 age group down to rather more than four to one among the over thirties. Ten years earlier the corresponding figures were eight to one at all ages taken together, rather more than 12 to one amongst the under fourteens and nearly five-and-a-half to one for those over 30; whilst in 1938 the ratios stood at more than seven-and-a-half to one at all ages

together, at 17 to one in the youngest and at nearly four-and-a-half to one in the oldest age group. Thus it would seem that the overwhelming dominance of the male in this, as in many other fields, although clearly subject to challenge, cannot yet be said to be seriously threatened. Indeed, while for many years now overcrowding in men's prisons has been a persistent nightmare, a not infrequent problem in Holloway Gaol has been the lack of sufficient inmates to keep the place clean.

It is perhaps rather curious that no serious attempt has yet been made to explain the remarkable facts of the sex ratio in detected criminality; for the scale of the sex differential far outranks all the other traits (except that of age in the case of indictable offences) which have been supposed to distinguish the delinquent from the non-delinquent population. I have referred to this before⁴ and now do so again because it appears to me that so remarkable a phenomenon has never received the attention that it deserves. It seems to be one of those facts which escapes notice by virtue of its very conspicuousness. It is surely, to say the least, very odd that half the population should be apparently immune to the criminogenic factors which lead to the downfall of so significant a proportion of the other half. Equally odd is it, too, that although the criminological experience of different countries varies considerably, nevertheless the sex differential remains, at least in the more sophisticated areas of the world, everywhere a conspicuous feature. Whether there are exceptions among the underdeveloped communities I would be interested to learn. Yet at least in the world that we know, girls as often as boys may come from broken homes, and stupid, neglectful or indifferent parents have daughters as well as sons; while girls are as likely as boys to be born and brought

⁴ Wootton, Barbara, *Social Science and Social Pathology* (Allen and Unwin, 1959), pp. 30, 31.

up in slum sub-cultures. Yet by comparison with their brothers, only rarely are girls found guilty of crimes.

It seems improbable that this difference is of biological origin. If it was, we might as well forget it, as there would be nothing to be done about it short of biological engineering. The scale of the contrast alone renders a biological interpretation unlikely; for the known personality differences between the sexes are not of this order. For example: the range of masculine capacity to perform intelligence tests overlaps that of females at both ends, an excess of males being found both in the highest grades, and among the morons. But overall differences of the order of 17 to one or even of 10 to one are unknown in respect of intelligence or other attributes which are physically and culturally within the reach of both sexes. Clearly some process of cultural conditioning must be at work in the one sex, from which the other is everywhere exempt. To identify this would make possible a larger reduction in criminality than is offered by any other line of inquiry.

This prospect is so alluring that it is worth giving a good deal of thought to methods by which light might be thrown on the question why the sexes behave so differently. Such investigations are not easy to devise. Any differences between the childhood experiences and upbringing of boys and girls are subtle and elusive. But it might, I think, be worth making an intensive study of samples of the minority of women who do commit typically masculine crimes, in order to see if any differences can be detected between them and their more characteristically law-abiding sisters.

Secondly, it would be of interest to know whether female resistance to criminal temptations is due to internal or external sanctions. Do women have a stronger moral sense, and suffer more from the pangs of conscience, or is it just that they are more timid and dare not therefore risk the possible consequences of getting into trouble? It would not, I think, be beyond the bounds of psychological research to look into that question.

In the third place, attention might be focused upon the very large body of women who are now exposed to much the same temptations as men. It used to be said that the more restricted scope of women's lives and activity was at least in part responsible for their modest contribution to offences against property other than shoplifting—yet although the sex ratio appears to be gradually diminishing, it remains a remarkable fact that the mass exodus of women, especially married women, from their homes into outside employment which has been so striking a feature of the past few years should have had so little apparent effect, one way or the other, upon their disposition to criminal behaviour. Why do they not copy, or share, their husbands' and colleagues' stealing?

Perhaps also a useful fourth line of inquiry might be to examine more closely some of the outstanding differences as between one class of offence and another. Out of the 200 categories into which the Home Office divides the various items in the criminal calendar, adult female convictions actually outnumber those of males only in the following: infanticide, procuring abortion, concealment of birth, offences of prostitution, cruelty to children, brothel keeping and theft from shops and stalls. Of these, infanticide and offences connected with prostitution are not crimes with which a man can be charged, and the reasons for female predominance in all the others are perhaps not far to seek. In all cases except offences of prostitution and shoplifting, the numbers involved are quite small; but it is perhaps of interest that in the last-named, which is far and away the commonest female crime, the feminine lead is not established until after the age of 17. Small boys are much more addicted to shoplifting than are their sisters, even if their Mums are twice as likely to get into trouble for this offence as are their Dads.⁵

In the remaining categories in which male convictions predominate, the size of the differential varies very greatly.

⁵ But see Postscript to this chapter, p. 29.