

## REVIEW ARTICLE

### THE BLACK SHEEP

V.A.C. GATRELL, BRUCE LENMAN and GEOFFREY PARKER (eds.), *Crime and the Law: The Social History of Crime in Western Europe since 1500* (The Europa Social History of Human Experience, gen. ed. Neil McKendrick), London: Europa Publications Ltd. 1980. xii, 337pp., Appendixes, Index. £20.00.

In 1896 the 'father of scientific criminology', Cesare Lombroso, reported to the IVe Congrès International de l'anthropologie criminelle his discovery of physical similarities between criminals and the Western Dinka.<sup>1</sup> I do not know what led Lombroso to single out the Dinka specifically, but the object of the exercise was to substantiate his general thesis that the criminal was 'atavistic' - an evolutionary throw-back displaying physical characteristics (which Lombroso called 'stigmata') common to primitive races. Lombroso's theories are now regarded as little more than a curiosity, yet in this particular instance the muddle is an interesting one. Lombroso is not regarding the Dinka as atavistic. On the contrary, they are considered 'normal' primitives. It is only when a 'normal' primitive happens to be born in a 'modern' environment that an atavistic 'criminal type' results. It was Lombroso's ambition to assemble a complete catalogue of identikit pictures defining the full range of 'criminal types'. But what is the relation between Lombroso's criminal types and those who have actually committed crimes? A streak of illogicality in the original premise, combined with Lombroso's

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<sup>1</sup> Stephen Jay Gould, *The Mismeasure of Man*, 1984, p.125.

obsession with observation, measurement and classification, ensured that the final synthesis was rich in ambiguities. With the Sicilian Mafia in mind, Lombroso wrote that there are European societies where violent crime is endemic (this was, perhaps, to be explained by the presence of racially 'primitive' groups in the Mediterranean). In societies where participation in a vendetta is considered to be normal one cannot take this as a *prima-facie* indication of the presence of a criminal type. The proof of this, according to Lombroso, lies in the fact that the *leaders* of the Mafia are only very rarely criminal types. The idea is that just as 'primitives' born into a 'modern' environment become criminals, so a 'modern' born into a 'primitive' environment will probably become a chieftain. Lombroso is advancing the same ideas which led Edgar Rice Burroughs to write nineteen Tarzan books.

We can see in Lombroso's theories a particularly unhappy connubium of rigid biological determinism and cultural relativism. It is normal for the son of a book-keeper to become a book-keeper; likewise it is normal for the son of a brigand to become a brigand. It is deviant for the son of a book-keeper to become a brigand, but is it equally deviant for the son of a brigand to become a book-keeper? On the whole Lombroso was forced to conclude that it was.<sup>2</sup>

Although we have refined these problems since Lombroso's day, it would be too much to say that we have entirely resolved them. The conundrum persists in ambiguities over the meaning of 'crime' and 'violence'. On the one hand, social scientists are accustomed to treating these under the heading of 'deviant behaviour'. On the other, it is generally recognized that violence is the 'midwife' of social change. What these contrasting ideas produce is a sense that there must exist an area of 'legitimate deviance'. Since, however, 'legitimacy' and 'deviance' are both relative concepts definable only with reference to actual cultures, it is very difficult to give any a priori account of what this might constitute. In the 1970s radical criminologists dealt with this problem by denying that there exists any link between deviance and crime. In a certain sense they are surely right. Crime only comes to exist when it has been enshrined in a specific code of law. The definitions that these codes offer vary tremendously from culture to culture and, within a given culture, from century to century. It is therefore absurd to treat 'crime' as a natural category, or to imagine that the 'criminal' could ever be reduced to a biological type. In

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<sup>2</sup> See Gina Lombroso Ferrero, *Criminal Man according to the Classification of C. Lombroso*, New York etc.: G.P. Putnam's Sons, The Knickerbocker Press 1911, chapter on 'The Habitual Criminal'. See also Marvin E. Wolfgang, 'Cesare Lombroso', in Hermann Mannheim (ed.), *Pioneers in Criminology*, London: Stevens and Sons Ltd. 1960.

another sense, however, the radical argument is not very helpful. The moment a society composes its criminal codes, that society has defined a type of behaviour as deviant. Since 'deviant' only makes sense within a cultural context, the fact that the type of behaviour indicated is deviant in one society, and in that society only, is irrelevant. Non-deviant criminal behaviour is, in other words, a contradiction in terms.

The trouble is that it is easier to accept this sort of argument in principle than in actual practice, for in the latter a more normative sense of deviance is bound to creep in. European criminal codes have changed immensely in the last 200 years, and it is hard to regard a legalistic definition of deviance as particularly informative when this definition is seen to vary from decade to decade. One is left with a residual feeling that certain things are deviant regardless of what, in any given moment, happens to be in the law-books. But what is this sense of deviance, and is it likely to be any more successful in respect of real criminals than Lombroso's 'criminal type'?

Recently such questions have generated a great deal of debate among social historians and criminologists. Much of this debate might seem familiar to anthropologists, as anthropology and criminology are rather analogous disciplines (as is shown by the fact that 'primitive', 'criminal', and 'lunatic' have repeatedly been defined in terms of one another). *Crime and the Law*, edited by V.A.C. Gatrell, Bruce Lenman, and Geoffrey Parker, is a group of essays that attempts to go beyond the usual limitations of such a debate. It would be unfair to present a series of papers as advancing a single and consistent line of argument. Yet the fact that approximately one-third of the text is by the editors themselves helps to keep the main line of argument in focus. Furthermore, the papers by Jennifer Davis, Robert Tombs, and David Phillips all contribute to these main lines of the argument.

In general the authors are concerned that 'crime' should be considered critically, and they attempt to establish a context in which it can fruitfully be studied. This accounts for a concern for terminology and a methodological bias that runs through many of the articles. The difficulty with studying crime is that not only are criminal statistics unreliable, but it is often impossible even to estimate the magnitude of their unreliability. On their own criminal statistics reveal nothing. Their real use is in complementing a picture we can build up from other sources. Thus anyone who has done research in rural Sicily knows that there are few policemen there, and that these are viewed with hostility by the local population. In these circumstances police officials, who write that although reported crime in their zones is very high it still only represents a small proportion of real crime, can be taken as reliable informants. In his article on late Victorian and Edwardian English crime, Gatrell presents the converse argument. In this period the police force was growing in strength and efficiency, and there was an increased willingness on the part of the population to report crime and engage in

prosecutions. The fact that during this period there was a steady decline in crime statistics, Gatrell argues, constitutes good additional evidence for arguing that crime was declining in an absolute sense.

'La peur que la crime éveille est constante,' writes Louis Chevalier, but he adds a paragraph later, 'Plus important que la peur du crime est l'intérêt au crime et à tout ce qui le concerne'.<sup>3</sup> Like the primitive and the lunatic, the criminal plays the role of the 'other' - especially if he is exceptionally violent or if his offence be of a sexual nature. In these latter cases the offender is labelled a 'socio-' or 'psychopath', terms which mean little more than 'bogeyman'. The fear that such criminals provoke is usually out of all proportion to their real incidence in society. Nonetheless, it is a fear that is not easily allayed, and this makes it available for exploitation by both the owners of popular tabloids and political groups. In her examination of the London garotting panic of 1862, Jennifer Davis describes precisely this situation. The crime wave that sparked this panic turns out, on investigation, never to have existed. The panic served instead as a vehicle for a campaign against penal liberalization by anti-reformist groups and a segment of the national press.

The deviant in his guise of bogeyman is a social archetype. Lombroso's 'criminal type' or the contemporary term 'psychopath' are nothing more than pseudo-scientific reconstructions of widespread prejudices, and for this reason sometimes offer a window on a society's collective fantasy life. France, in contrast to England, has a well-defined conception of the 'classes dangereuses' (broadly, the marginal poor) and the role that they purportedly play in crime. Frégier, whose writing did much to give the term currency from the 1840s, said, 'when vice...allies itself with poverty in the same individual, it is a proper object of fear to society, it is dangerous' (quoted by Robert Tombs in *Crime and the Law*, p.217). French prisons had been used in the early part of the nineteenth century to house lunatics as well, and it is natural that early French psychiatrists should have expanded their classification of the insane to include criminals also.<sup>4</sup> Criminals were considered to be by and large 'degenerates' - the term having moral, psychological, and physical connotations. As in psychiatry, the concept of 'degeneracy' has had a very rich history in criminology. One could say that all explanations of crime in terms of biological or psychological

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<sup>3</sup> Louis Chevalier, *Classes laborieuses et classes dangereuses à Paris pendant la première moitié du XIXe siècle* (Civilisations d'hier et d'aujourd'hui), Paris: Librairie Plon 1958, pp.v-vi.

<sup>4</sup> See Gordon Wright, *Between the Guillotine and Liberty: Two Centuries of the Crime Problem in France*, New York etc.: Oxford University Press 1983, p.240 and note.

determinism, and many in terms of sociological determinism, are based on some concept of 'degeneracy'.

Paris is a city with both a high incidence of crime and a strong tradition of political violence. It is hard to imagine that there is not some sort of correlation between the two phenomena, yet the tendency of the French police to see all types of violence in terms of the concept of 'degeneracy' make these relations hard to recover. According to Tombs, the French police divided the participants of the 1871 Paris Commune into three groups: 1) the leaders among left-wing intellectuals; 2) the 'malefactors' and 'cosmopolitan dregs'; and 3) the mass of participants who were mere dupes. Tombs suggests that the largest group of participants in the riots was, in fact, young Parisian males. This seems to me a plausible suggestion, for in police reports concerning riots in Palermo from the 1860s to the 1940s one inevitably encounters mention of building workers, vendors and pedlars, cab-drivers, and students. What these groups have in common is that they are young and active, they are frequently out and about, and they are not closely supervised. Curiously however, the French police paid little attention to young workers, artisans, and students during the repression after the fall of the Commune. Instead they concentrated on the more marginal groups that corresponded more closely with their pre-conceived notions about the 'dangerous classes'. Hence the repression fell on beggars, vagrants, the indigent, drunks, those of 'repulsive aspect', prostitutes, pimps, etc. These were rounded up, given summary trials, and sent off to overseas prison colonies.

Tombs points out that historians no less than the French police are guilty of presenting unilateral portraits of Parisian violence. Criminologists often describe the criminal world as a 'subculture', meaning by this that although crime does relate to the society in which it occurs, it is still only a marginal activity. Patterns of crime reflect general social processes only indirectly and imperfectly. In other words, major social change is not likely to be clearly reflected in the behaviour of pick-pockets or muggers. Criminality is a semi-autonomous phenomenon, and patterns of criminal behaviour are conservative and resistant to change. Tombs singles out Rudé and Tilly for criticism on this score. Both tend to interpret collective violence in France against the background of larger-scale social developments. Inevitably a certain straining of the evidence is the result. Tilly takes the participation of building workers in the 1848 uprising in Paris as evidence that the organized working class was beginning to take a leading role in collective violence. But building workers can probably better be considered as a major component of the urban *Lumpenproletariat* which perennially finds itself sucked into riots. What is more, Tilly's interpretation depends on a distinction between *organized* and *disorganized* forms of collective violence which leads him to a covert acceptance of the French police version of the 'dangerous classes'. Essentially Tilly is constructing an

inference: he is assuming that organized collective violence is 1) political in nature and 2) carried out by the organized and politically conscious sectors of the working class. He must also, therefore, assume that disorganized violence - of which criminal violence constitutes a major part - is carried out by marginal and unstable groups, i.e. the dangerous classes. Thus if crime is a marginal and disorganized form of social behaviour, it follows that criminals must emerge from socially marginal and disorganized classes. As it happens, this inference is untrue, France has always had very stringent vagrancy laws, and the French police have traditionally harassed pedlars, street vendors, rag-and-bone men, etc.; but beyond this there is no evidence that a professional criminal is any more likely to emerge from a marginal social background than from any other.<sup>5</sup>

Tilly's explanation differs from that of the French police only in that whereas the latter tend to classify all manifestations of social unrest as criminality, Tilly treats even non-political forms of collective violence as forms of protest. But this is just to substitute one mono-causal explanation of a complex phenomenon with another. Any close study of a major breakdown of public order will certainly come up with something much more chaotic, as distinct groups of varying social complexion and with differing goals and patterns of behaviour are momentarily brought together in the same public square. Above all, one needs to retain the sense that crime is a semi-independent phenomenon; that petty theft, burglary, and armed robbery exist in times of social peace as well as those of crisis; and that as a consequence, any explanation of crime as a form of social protest is highly artificial.

In other essays a large number of authors are critically discussed. Taken together, at least two lines of attack emerge. First, authors are criticized for failing to realize that the police and the magistracy occupy an inherently ambiguous position in society. Secondly, authors are criticized for portraying justice before the great nineteenth-century reforms as unremittingly punitive and brutal. Concerning the first, the police and the magistracy might conceivably be visualized in one of two contrasting models. They might be considered as that part of the state apparatus which searches out and destroys dissident elements within the population. They might equally be considered as a politically independent body dedicated to protecting and assisting the ordinary citizen. It would be idle, however, to

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<sup>5</sup> See, for example, Charles Tilly, 'Collective violence in European perspective', in Hugh Davis and Ted Robert Gurr (eds.), *Violence in America, historical and comparative perspectives*, Beverly Hills etc.: Sage Publications 1979. For French police attitudes, see Wright, op.cit., pp.153-62, and Richard Cobb, *The Police and the People: French Popular Protest, 1789-1820*, London etc.: Oxford University Press 1970.

ask which of these two models is the real one, for the police and magistracy are quite capable of assuming either role. The public, of course, prefers that the police and the magistracy play the second of the two roles: and, for their own part, the police and magistracy would clearly prefer to be regarded in this light. This helps explain why the police are usually so anxious to make political terrorists appear as common criminals or even to lock up political dissidents in mental asylums. Much criminological theory lends itself too easily to such types of manipulation.

Iain Cameron in his study of crime and repression in the Ancien Régime criticizes the naive notion that what the police mainly do is chase thieves.<sup>6</sup> I doubt that anyone could seriously advance such an idea about the French police; concerning the English police, however - at least in certain periods - the claim is more plausible. In the book under review Gatrell argues that the social consensus in late nineteenth-century England enabled the police to approximate more closely the ideal of a politically neutral force dedicated to the protection of society. The result of this, he suggests, was that they were able to achieve much greater success at catching criminals. The moral here seems to be that as long as a society can agree on a clear-cut distinction between legitimate forms of protest and dissent and illegitimate forms of crime, it will have a police force which is relatively successful at repressing crime. In cases where this distinction breaks down the police will be forced to assume the role of a politically partisan, repressive force. In such a case their popularity will decline, and they will become less successful at catching criminals.

The relation between crime, on the one hand, and the police and magistracy on the other, is not a straightforward one. The same might be said of the relation of either to criminal law. This point is very clearly set out by the editors of *Crime and the Law* in their Introduction. Neither criminal law, nor law enforcement procedures, should be seen as responses to levels of crime, real or imagined. Nor should they be seen as nothing more than reflections of underlying social and economic change. In other words, just as Tombs objects to the assimilation of crime under the heading of 'social protest', the editors are objecting to any treatment of the police, the magistracy, and the criminal codes that considers these either as straightforward responses to patterns of crime or as simple reflections of social processes. A source of distortion is that a historian usually encounters the police and magistracy only in connection with other social events - rick- or machine-burning, struggles between the law and trade unions, Irish republican violence, suffragette

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<sup>6</sup> Iain Cameron, 'Introduction', in *Crime and Repression in the Auvergne and the Guyenne: 1720-1790*, Cambridge: Cambridge University Press 1981.

demonstrations, etc. This leaves the mistaken impression that the police spend most of their time dealing with this sort of thing. Basing himself on Old Bailey records in a disturbed period in eighteenth-century London, Langbein in a recent article points out that the overwhelming amount of court business was simply concerned with various types of theft. Langbein goes on to argue that 'virtually all the offences had been felonious since the middle age'<sup>7</sup> thus rejecting Douglas Hay's contention that the late eighteenth- and early nineteenth-century criminal codes were essentially class legislation. Langbein then cites Richard F. Sparks' contention that if capitalism has a legal cornerstone this should be sought in the law of contract rather than in the criminal statutes relating to theft.<sup>8</sup> This seems to me the crucial point. The editors describe these same criminal codes as 'a world made safe for capitalism'; and it would certainly be an exaggeration to claim that criminal law can never be class-based. But even admitting that the dice are heavily loaded against the poor and unprotected, it still remains true that only a very small percentage of them will ever find themselves charged with committing a felony. To imagine that capitalism, or any other social system, can be founded on criminal statutes which affect the lives of only a small proportion of individuals, rather than on civil law which impinges upon the lives of everyone, is not only wrong in itself, but equally manifests a misunderstanding about the marginal nature of crime.

Perhaps the most interesting article in this collection is that of Bruce Lenman and Geoffrey Parker on state law and community law. This article is a criticism of the 'Durkheim theory...that European penal systems became progressively less barbaric with the passage of time' - what David Phillips in another article calls the teleological 'Whig' history of criminal justice, viz. one of progressive amelioration. In constructing their argument Lenman and Parker contrast 'state' law and 'community' law. By the latter they mean traditional and informal systems of mediation in contrast to formalized, state-supported, legal structures. Lenman and Parker argue that until very recent times individuals in Europe were far more likely to settle their disputes through traditional procedures or through arbitration by important figures in their communities than by recourse to the legal system of the state. The state was ill-equipped to intervene in local disputes. Rather, its sphere of action consisted of exceptional cases which seemed to threaten the general security, or sense of moral integrity, of the

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<sup>7</sup> John H. Langbein, 'Albion's Fatal Flaws', *Past and Present*, no. 98 (1983), pp.96-120.

<sup>8</sup> Richard F. Sparks, 'A Critique of Marxist Criminology', *Crime and Justice: An Annual Review of Research*, Vol. II (1980), pp.159-210.

particular society. These were a well-defined class of 'heinous crimes'. Lenman and Parker give a typical list: 'witchcraft and heresy, parricide and infanticide, sodomy and incest, arson and murder (sc. homicide by stealth, in secret or by premeditation)'. These were all considered crimes 'crying to heaven for punishment'. Alongside these one should no doubt add a number of crimes directly against the state such as treason, coining, and smuggling.

State intervention was thus exceptional, and the aim of any such incursion was repression and punishment. Community law, however, had a quite different scope: instead of punishment it aimed at achieving settlements. The expected end to local disputes would be some form of 'accomodement légal' in which the injured party received some form of compensation. Community law was often very corporative in spirit: nobles, clergy, merchants, artisans each developed independent procedures for dealing with disputes with their respective groups. Community justice depended, moreover, upon traditional concepts of hierarchical authority: a noble in respect to his suite, a landowner in respect to his tenants and labourers, a factory-owner to his hands, or a master-craftsman to his apprentices were all 'paternal' figures permitted to wield wide authority over those below them.

Thus Durkheim's distinction between medieval societies in whose criminal law 'punitive' elements predominated and modern legal systems in which 'restitutive' elements were preponderant is based on an illusion. In the exceptional cases where the state intervened justice was indeed punitive, but in most other disputes a more restitutive system prevailed. The important point is that the punitive nature of state justice was tied to the exceptional nature of state intervention. Severity and infrequency are two sides of the same coin: one cannot be understood in isolation from the other. This point, Lenman and Parker go on to argue, holds for modern legal systems as well. If the severity of earlier justice must be seen in the context of the intermittent nature of the contact between the state and society, the gradual humanization of modern criminal justice cannot, in its turn, be considered in isolation, but rather in the context of the gradual extension of state law into areas formerly occupied by community law. As the state begins to take over the role of community law it must change its methods; it must become less intermittent, less punitive, and more concerned with arbitration and settlement.

This is not the only consequence attendant upon the extension of state law. In 1764 Cesare Beccaria argued that the deterrent effect of punishments stemmed more from their inevitability than their severity. As David Phillips points out in his contribution to the book, if punishments were certain then they could be lenient; if punishments were uncertain, intermittent, and lottery-like in their application they would need to

remain exemplary and severe.<sup>9</sup> This argument was immensely influential; Voltaire took it up in France as Bentham later did in England. By the mid-nineteenth century this line of reasoning had produced major changes in the criminal codes of every country in Europe. There was, however, a catch to this. Certainty of punishment could only be achieved by greatly increasing the efficiency of criminal justice. This meant a much larger police force. There is thus a double line of reasoning linking the humanization of the criminal codes to the changing role of the state in society. This liberalization was, first, a consequence of the extension of the state into areas formerly under informal systems of community control. Equally, however, the extension of state power was itself a consequence of the decision to abandon a policy of intermittent and exemplary justice for one combining certainty with greater leniency. In the wake of this decision came courts of increasing complexity, a police force, and eventually a state penal system.

In this process the concepts of 'crime' and 'criminal' were redefined as well, to the point where it is by now difficult even to think of criminals and crime outside a context which includes law-books, police, courts, and prisons. Historians of crime, writes Gatrell in his conclusion, are primarily concerned with 'the use of power'. Criminology, the 'new criminology' likes to say, is the analysis of the processes of 'rule-making' and 'rule-breaking'. Since rule-breakers presupposes rule-makers, the history of crime implies the whole social history of power. It is not the basic conceptual definitions that change in this landscape, for Langbein is making a good point when he insists on the age and stability of the notion of 'felony'. It is not a definition of 'burglary' in the abstract that changes, but the policies and tactics used by power which can serve to make both burglary and burglars appear in one light or another. What always exists is a set of frontiers, real or tacit. On one side, rule-breaking is defined as 'crime' and the rule-breaker is liable to all the sanctions reserved for the 'criminal'; on the other side, the rule-breaker is considered to be outside the bounds or pale of state justice, and is therefore liable only to the sorts of punishment provided by the traditional community. It is the ability to determine where these frontiers are, rather than the ability to redefine what is meant by 'crime', that serves as the dynamic and strategic element.

In this, it is the state which is revealed as having both the power of 'loosening' and that of 'binding'. For better or for worse, the extension of state power outwards and downwards has the effect of dissolving the restrictive bonds and hierarchies of the traditional community. People are accorded civil rights, which can include freedom of movement and the freedom to

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<sup>9</sup> See also, for Beccaria's influence, the early chapters of Elie Halévy, *The Growth of Philosophic Radicalism* (transl. M. Morris), London: Faber and Gwyer 1928.

enter into contractual obligations. With the power of 'loosening', however, comes the power of 'binding', for in freeing himself from his traditional community an individual makes himself liable for all the obligations of state law. This power of binding should not be considered simply as a facet of modernization and social development, for there inevitably remain in newly-enfranchized communities forms of behaviour that might or might not be considered criminal. Many of the old procedures for the settlement of disputes are likely to persist, and the state has the choice either of moving to attach the remnants of the old system as a subordinate branch of its own system of justice or of moving to suppress them. Established feuds and vendettas are likely to persist as well as traditionally tolerated forms of social banditry. The state has the choice of turning a blind eye to this, moving to suppress it, or even of turning it to its own use as an instrument of destroying its enemies and aggrandizing its own power. The decision of which tactic to employ is rarely taken on abstract grounds alone, for the state is not an abstract entity, but a complex political and administrative structure. This means that the 'threshold of criminality' is located within the landscape of power.

Anthropologists tend to see the dissolution of traditional communities in terms of broad social transformations, and neglect the knotty problems of struggles for power which seem to be the inevitable concomitants of societies in transition. Adopting a perspective in which the relation between authority and society involves a continual skirmish over the frontier that defines criminality and legitimates punitive action on the part of the state, helps put the problem of this dissolution in a more realistic light.

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