

# Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-first

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## I. Introduction

Seeking to explain America's dramatic punitive turn in the last quarter of the twentieth century, social theorists have frequently noted the concurrent rise of retributive and expressive themes in the logic of legislation and in the operation of the courts and police.<sup>1</sup> The post-World War II period of expansive social policy, including the embrace of rehabilitation as the main objective of criminal law, did indeed see imprisonment rates at or near the average for the twentieth century, and in the 1960s and 1970s a steady decline led to the century's low in 1973.<sup>2</sup> In the late 1970s, as rehabilitation came under mortal attack from both the left and the right, imprisonment rates began a relentless rise that has only begun to show signs of exhaustion in recent years and that has produced an imprisonment rate more than four times the rate in 1970.<sup>3</sup> There are empirical reasons for doubting that penological change alone had much to do with the shift toward high incarceration rates;<sup>4</sup> this Article offers a somewhat different historical interpretation linking penological ideas and carceral outcomes. Rhetoric consistent with retribution and other expressive themes in penalty, combined with the dramatic repudiation of the rhetoric of rehabilitation by many of

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1. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 144–45 (2001); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 831–33 (2000); Jonathan Simon, *Sanctioning Government: Explaining America's Severity Revolution*, 56 U. MIAMI L. REV. 217, 219–21 (2001).

2. See MICHAEL H. TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 30 fig.2.1 (2004) (showing a decline in prison rates in the 1960s and 1970s); Douglas Dennis, *Foreword: A Consumer's Report*, 14 ST. LOUIS U. PUB. L. REV. 1, 4 (1994) (noting the importance of post-World War II reforms in exposing prison abuses and moving toward a rehabilitation model of corrections); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1038 (1991) (discussing efforts of the "mental hygiene movement" to recast rehabilitation in a medical framework).

3. TONRY, *supra* note 2, at 26–27.

4. See Kevin R. Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEXAS L. REV. 1787 (2006) (citing the incarceration explosion over the last quarter century and offering historical, political, and cultural theories for these rates).

those who had long supported it,<sup>5</sup> has covered over the enduring role of positivist criminology as a source domain for American penal law throughout the twentieth century and into the beginning of the twenty-first.<sup>6</sup>

Positivist criminology, broadly conceived, is the project of subjecting criminal behavior to scientific study and bringing the findings of this science to bear in the practice of criminal justice.<sup>7</sup> In Italy, where positivism originally arose, proponents viewed themselves as in opposition to the dominance of legal officials and legal reasoning over the crime control activities of the state.<sup>8</sup> Many jurists shared this perception and vigorously fought off the effort of the "criminal anthropologists," as these early criminologists described themselves, to claim a role in the state's power to punish.<sup>9</sup> The broad penal code revision by Italy in 1898 specifically rejected the view of the positivist school.<sup>10</sup> In the United States, however, lawyers were among those who most eagerly embraced positivism, and both criminologists and lawyers have assumed that rule of law is compatible with science-informed criminal policy.<sup>11</sup> As the author of a glowing account of Lombroso's ideas published in a journal favored by the Legal Realists concluded, "where the man of science has led the way the man of law must follow."<sup>12</sup>

The first great wave of enthusiasm for positivist ideas in the Progressive Era was primarily focused on the incapacitation of dangerous criminal types, mostly through imprisonment, with the aim of preventing crime and

5. GARLAND, *supra* note 1, at 64–68 (arguing that rehabilitative penology was damaged less by empirical evidence of failure than by a loss of confidence in the fundamental approach by the middle class professionals who had carried the banner for reform from its earliest inception). The view that rehabilitation suffered from a failure of cultural confidence by its supporters was argued in a somewhat different way by Francis Allen even before the major increase in imprisonments. See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* 8 (1981) (arguing that the passage of "new" laws indicates that public attitudes toward crime control reflect a move away from a rehabilitative ideal and toward the view that the purpose of imprisonment is to punish).

6. After years of disrepute among American legal elites, jurists, and law professors, retribution won renewed recognition from these sectors starting in the 1970s with the resurrection of the death penalty and continuing with increasing momentum through the 1980s and 1990s. GARLAND, *supra* note 1, at 9; TONRY, *supra* note 2, at 21–22. The expressive function of punishment, either as a new logic behind retribution or as an alternative, has become more prominent in the same time period.

7. HUGH D. BARLOW, *INTRODUCTION TO CRIMINOLOGY* 25–58 (2d ed. 1981).

8. MARY GIBSON, *BORN TO CRIME: LOMBROSO AND THE ORIGINS OF BIOLOGICAL CRIMINOLOGY* 6 (2002) (noting that positivists rejected the "old regime" in favor of social reform brought about by objectivity and empiricism).

9. See *id.* at 128 (describing the difficulties of moving positivist theories from academia into Italy's criminal justice system).

10. When Italy adopted the new Zanardelli Criminal Code of 1889, the ideas of Lombroso and other positivists were specifically urged and rejected. See GIBSON, *supra* note 8, at 6 (arguing that positivist ideas had far more influence on the police and penal administration in Italy).

11. See Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 310 (1974) (mentioning Lombroso's comment that America "gave a warm and sympathetic reception" to his work); Cara W. Robertson, *Representing "Miss Lizzie": Cultural Convictions in the Trial of Lizzie Borden*, 8 YALE J.L. & HUMAN. 351, 376–78 (1996) (discussing early support for Lombroso's ideas in the United States).

12. Helen Zimmern, *Criminal Anthropology in Italy*, 10 GREEN BAG 342, 346 (1898).

eugenically limiting the spread of criminal traits in the population.<sup>13</sup> In the post-World War II era, positivism reached its peak, now with a softer focus on individualized diagnoses, with therapy—widespread adoption of treatment and rehabilitation as the main purpose of penal custody—and with the emergence of the ALI's Model Penal Code (MPC) as the most influential law reform approach.<sup>14</sup>

In the 1970s, American crime control policies seemed to turn sharply away from positivism, rejecting the rehabilitative idea in favor of the economic logic of deterrence,<sup>15</sup> the moral logic of retribution, and a populism that combined a shallow version of these earlier logics with an expressive focus on identifying a shared enemy.<sup>16</sup> All of these seemed to repudiate positivism with its emphasis on individualized diagnosis, scientific expertise, and its mid-twentieth-century concern with treatment.<sup>17</sup> The major landmarks of late twentieth-century penal law, including the Federal Sentencing Guidelines,<sup>18</sup> the Anti-Drug Abuse Act of 1986,<sup>19</sup> and California's "Three Strikes" law,<sup>20</sup> seem roughly consistent with all three of these and certainly have contributed, along with many similar laws, to higher incarceration rates.<sup>21</sup>

Yet that leaves out much of the heritage of positivism and specifically its focus on dangerous persons and their penal incapacitation. While rarely the chief purpose asserted for contemporary criminal legislation, incapacitation—the premise that punishments like imprisonment can ensure that persons with a proclivity for committing crimes will be unable to do so in the community while they are in prison—has been a background theme in

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13. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE 58–59 (1980).

14. See, e.g., Sanford Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 978–79 (1999) (outlining the peak of the rehabilitative model in the late 1960s); Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 17–18 (2003) (stating that the 1970 Model Penal Code adopted a guiding principle of rehabilitation).

15. The case that crime control could most effectively be achieved by clear deterrence signals, drawing on basic economic theory and rejecting positivist criminology, was most forcefully and influentially stated in JAMES Q. WILSON, THINKING ABOUT CRIME (1977).

16. See ALLEN, *supra* note 5, at 33–34 (listing various criticisms of the rehabilitative ideal); Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1659–60 (1992) (expressing surprise at the popularity of retributivism in the wake of its virtual extinction in the 1950s and 1960s); Kadish, *supra* note 14, at 978 (discussing the backlash to the rehabilitative model).

17. Vitiello, *supra* note 2, at 1016 (mentioning the "growing faith in psychiatry and science" as a factor in the rise of positivist rehabilitation).

18. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 202, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

19. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., and 31 U.S.C.).

20. CAL. PENAL CODE § 667 (West 2006).

21. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 96 (1997).

all of these legislative enactments.<sup>22</sup> Despite the surface rejection of expert-based procedures like parole and the indeterminate sentence, American crime control at the beginning of the twenty-first century remains deeply inscribed by the positivist project (albeit one transformed in some important respects).<sup>23</sup>

At the heart of this project is the conviction—which American penal policies continue to reflect—that crimes are committed by a distinguishable group of persons with a proclivity toward law-breaking and that crime control policies should seek to isolate and repress these dangerous classes.<sup>24</sup> As fiscal pressures force some states to closely examine their priorities, we can expect incapacitation to come even more to the forefront as the chief metric for evaluating the capacity of the criminal justice system to control crime. Some of the characteristics of contemporary penal policy that most reflect this positivist legacy include:

1. *Support for the death penalty as an ultimate form of incapacitation.*—Studies of jurors in capital cases show that an important source of support for the death penalty is the belief that non-capital sentences for murderers are very short and permit the offender to return to the community while still remaining dangerous.<sup>25</sup> Public opinion surveys also show that support for capital punishment drops below 50% when respondents are offered a hypothetical regime where life without the possibility of parole is an alternative.<sup>26</sup> An important segment of death penalty supporters would prefer some other way to guarantee that persons with a proclivity to kill others are never free to continue to act on that desire in the community.<sup>27</sup>

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22. See 18 U.S.C. § 3553(a)(2) (2000) (listing “protect[ing] the public from further crimes of the defendant” as one purpose of federal sentences); Tracey L. Mearns et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1186 n.47 (2004) (“The recent rise in ‘three-strikes’ legislation is obviously driven by incapacitation concerns . . .”).

23. See IMOGENE L. MOYER, *CRIMINOLOGICAL THEORIES: TRADITIONAL AND NONTRADITIONAL VOICES AND THEMES* 53 (2001) (describing how the functionalist perspective that has continued into the twenty-first century built on the positivist approach); Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 764 (2003) (illustrating the similarity with regard to positivist principles between a penal code drafted in 1826 and the Model Penal Code).

24. The continuing vitality of these ideas is evident in a more recent book by JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* (1985).

25. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1091–92 (1995); William W. Hood III, Note, *The Meaning of “Life” for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1624 (1989).

26. Ken Armstrong & Steve Mills, *Death Penalty Support Erodes; Many Back Life Term as an Alternative*, CHI. TRIB., Mar. 7, 2000, at 1; Peter Finn, *Given Choice, Va. Juries Vote for Life*, WASH. POST, Feb. 3, 1997, at A1.

27. Armstrong & Mills, *supra* note 26; Andrew H. Malcolm, *Capital Punishment Is Popular, but so Are Its Alternatives*, N.Y. TIMES, Sept. 10, 1989, § 4, at 4.

2. *Preventive detention.*—Since the 1970s, preventive detention of arrestees pending trial has gone from being a possible violation of the constitutional right to bail, to a well-established power of the federal government and many state governments.<sup>28</sup>

3. *Sexual violent predator civil commitment laws in sixteen states.*—One of the most feared crimes associated with a dangerous class of criminals involves sexual assaults, especially those involving children.<sup>29</sup> Since the 1980s, prosecutors have pressed for tougher sentences against such offenses and have sought to make use of long-dormant “sexual psychopath” laws that had been enacted in many states between the 1930s and the 1950s—and which remained possible but rarely used procedures after the 1960s—to civilly commit sex offenders to preventive confinement following their imprisonment.<sup>30</sup> Sixteen states, including California, have adopted new commitment laws aimed at these offenses, which substantially broaden the reach of preventive confinement, potentially for life.<sup>31</sup>

4. *The renewal of interest in rehabilitation and more indeterminacy.*—There is growing public discussion on the dangers posed by inmates returning to communities from imprisonment after having received little in the way of education or treatment.<sup>32</sup> These individuals are often fated by severe legal limitations on their ability to earn a living, leading to a life of either crime or desperate marginality.<sup>33</sup> This has led to some recurrences of

28. Kurt X. Metzmeier, *Preventative Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Countries*, 8 PACE INT'L L. REV. 399, 409–13 (1996).

29. See Sharon Lamb, *The Psychology of Condemnation: Underlying Emotions and Their Symbolic Expression in Condemning and Shaming*, 68 BROOK. L. REV. 929, 940 (2003) (“Fear is . . . aroused in sex offense cases, particularly those involving child sex offenders. These criminals . . . are usually treated publicly as if they were monsters.”).

30. Most of these original “sexual psychopath” laws were repealed during the 1970s, but during the 1990s many states enacted new “sexual predator” laws with similar purposes. Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 66–69 (1998).

31. Pew Research Ctr., Data Trends: Sex Offenders, <http://pewresearch.org/datatrends/?NumberID=42>.

32. See, e.g., Rex W. Huppke, *Record Numbers of Ex-Cons Return to Illinois Streets*, CHI. TRIB., June 19, 2005, at C1 (“About 21,000 inmates will leave the high-fenced borders of Illinois prisons this year . . . . Most of these inmates are leaving with a bus pass and a few bucks, taking limited skills and a criminal record and jumping the chasm between a cell and law-abiding society.”); Kevin Johnson, *Special Report—From Extreme Isolation, Waves of Felons Are Freed*, USA TODAY, Dec. 12, 2002, at 1A (“Of the record 630,000 felons projected to be released this year from state prisons . . . [m]any are killers, rapists, drug dealers and others who have been in ‘super maximum’-security prisons, which . . . seem[] to abandon any pretense of trying to rehabilitate inmates.”).

33. See JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 93–137 (2003) (discussing the various impediments to inmate reintegration with society); JEREMY TRAVIS, BUT THEY ALL COME BACK: RETHINKING PRISONER REENTRY 4–5 (2000) (evaluating the role of drug treatment both during imprisonment and after release in hopes of reducing recidivism among drug offenders).

rehabilitation talk, but we should look for the main theme to become the need to tie sentence length to individual dangerousness as administratively rather than judicially or legislatively determined.<sup>34</sup>

Throughout the 1980s and 1990s retributive themes were combined with appeals to increase preventive controls.<sup>35</sup> These appeals relied on the strong sense that even the possibility of future violence warranted long imprisonment, which was never consistent with philosophical views of retribution but was compatible with popular notions of retribution.

This Article explores the implications of this positivist hold on the American penal imagination by revisiting the published ideas of the “father” of positivist criminology, the Italian physician and self-described “criminal anthropologist,” Cesare Lombroso.<sup>36</sup> Historians of American criminal justice have remarked on the warm reception that Lombroso’s ideas received in the United States.<sup>37</sup> While European criminologists, jurists, and clergy bitterly debated the terms and implications of Lombroso’s work (and that of his followers), Americans largely embraced Lombroso’s project even as they accepted and shared many of the empirical and moral concerns of his European critics.<sup>38</sup> It is this embrace of positivism, rather than any shift to retribution or expressive moral sentiments, that best explains America’s penal excesses. What is truly distinctive about the present system is the absence of some of the features that formerly limited the punitiveness of the system, including the objective of transforming, at a minimum, the most malleable criminals and the focus on expert evaluation.

This Article takes advantage of the recent republication of key articles by Lombroso in English,<sup>39</sup> a new translation of his important book on women criminals,<sup>40</sup> and a wave of new scholarship on Lombroso<sup>41</sup> to address the

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34. See for example the report of a state advisory commission in California calling for just such a return to indeterminacy, LITTLE HOOVER COMM’N, BACK TO THE COMMUNITY: SAFE AND SOUND PAROLE POLICIES (2003), available at <http://www.lhc.ca.gov/lhcdir/172/report172.pdf>.

35. See Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 111, 138–43 (Jeffrie G. Murphy & Jean Hampton eds., 1988) (arguing that preventative measures serve the same goals as retribution).

36. See GIBSON, *supra* note 8, at 2 (“The term ‘criminology’ did not yet exist when *Criminal Man* was published; Lombroso himself used the phrase ‘criminal anthropology’ to emphasize that human beings, rather than the law, were the objects of his study.”).

37. See *id.* at 3 (“Lombroso’s eclectic theories immediately attracted a large following of students and disciples . . .”); ROTHMAN, *supra* note 13, at 58–59 (“[W]hen the Progressive-minded American Institute of Criminal Law set out to translate the writings of the great European criminologists, their first choice was Lombroso.”).

38. GIBSON, *supra* note 8, at 249–50.

39. THE CRIMINAL ANTHROPOLOGICAL WRITINGS OF CESARE LOMBROSO PUBLISHED IN THE ENGLISH LANGUAGE PERIODICAL LITERATURE DURING THE LATE 19TH AND EARLY 20TH CENTURIES (David M. Horton & Katherine E. Rich eds., 2004) [hereinafter Horton & Rich, THE CRIMINAL WRITINGS].

40. CESARE LOMBROSO & GUGLIELMO FERRERO, CRIMINAL WOMAN, THE PROSTITUTE, AND THE NORMAL WOMAN (Nicole Hahn Rafter & Mary Gibson trans., 2004).

implications of Lombroso's project for American crime policy and criminal jurisprudence at the beginning of the twenty-first century. Most generally put, Lombroso's project provides a template, an assembly, and a machine in which new sources of "political" knowledge—then beginning to become available in the late nineteenth century—were related to the carceral institutions that had been created across Europe and North America since the early modern period.<sup>42</sup> Historians have called this the "great confinement."<sup>43</sup> The two were combined in a new relationship with the ever-growing administrative state.

This template remains a central element in American criminal justice. The late-nineteenth century mix of anthropology, psychology, biology, political science, and sociology remains the predominant source of official crime knowledge, although much changed by the rise of sophisticated actuarial and computational technologies. The carceral system remains as well, much expanded and more tilted in favor of penal rather than medical institutions.<sup>44</sup> While American crime control remains much more in the control of law, courts, and lawyers than some of Lombroso's anti-juridical rhetoric would have predicted, it is largely because American law, courts, and lawyers embraced the central tenets of the Lombrosan project.<sup>45</sup>

After using a number of Lombroso's writings to bring out the essential elements of this template, the remainder of the Article will focus on the ways in which these elements continue to operate in American crime control, particularly during America's "severity revolution"<sup>46</sup> of the 1980s and 1990s and in the practice of "mass imprisonment"<sup>47</sup> that has emerged as a result. Although couched in retributive terms, these harsh new laws reflected a re-dedication of American government to the Lombrosan project of effectively suppressing crime through long-term imprisonment while rejecting or ignoring positivism's scientific aspirations and instead elaborating its populist appeal. Today, as some of the anchors of retributivism are weakening, there

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41. See, e.g., GIBSON, *supra* note 8; DAVID G. HORN, *THE CRIMINAL BODY: LOMBROSO AND THE ANATOMY OF DEVIANCE* (2003); NICOLE H. RAFTER, *CREATING BORN CRIMINALS* (1997); Rafter & Gibson, *Introduction to LOMBROSO & FERRERO*, *supra* note 40, at 3.

42. See generally MICHEL FOUCAULT, *MADNESS AND CIVILIZATION* 38–64 (Richard Howard trans., Vintage Books 1973) (1961) (discussing the establishment of the Hôpital Général in 1656 and the subsequent imprisonment of the poor, unemployed, and insane).

43. *Id.*

44. See Bernard Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEXAS L. REV. 1751 (2006) (suggesting that deinstitutionalization in the latter half of the twentieth century is correlated with the exponential rise in prison rates).

45. See GIBSON, *supra* note 8, at 249 (stating that the United States was much more receptive to Lombroso).

46. For the concept of "severity revolution" see Kennedy, *supra* note 1.

47. See David Garland, *The Meaning of Mass Imprisonment*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1, 2 (David Garland ed., 2001) (discussing the "converging series of policies and decisions" that led to "mass imprisonment" in America).

are signs that a renewed positivism in penalty is emerging to sustain, and perhaps further enlarge, the corpus of crime control.

## II. Lombroso and American Penalty

Cesare Lombroso was born into an assimilated Jewish family in northern Italy in 1835.<sup>48</sup> A supporter of the Italian unification campaign and its liberal values, Lombroso volunteered for service in the Revolutionary (pro-unification) Army during the civil war that raged in Italy at the very same time as the American Civil War.<sup>49</sup> Trained in medicine, Lombroso served with army units.<sup>50</sup> It was in the field and at military hospitals that his life-long fascination with anthropometry, i.e., the measurement of human beings, first became a practice by measuring thousands of soldiers he examined in Calabria where he was stationed until 1863.<sup>51</sup> After the war, in the period paralleling our own Reconstruction, Lombroso served as a physician-administrator in a variety of asylum institutions where he continued his practice of measuring.<sup>52</sup> It was from there that he would launch the project we know as positivist criminology, but which he knew as "criminal anthropology."<sup>53</sup>

From the perspective of post-World War II American crime policy and criminal jurisprudence, Lombroso, often celebrated as the "father of criminology,"<sup>54</sup> represented a problematic ancestor but also represented a proponent of palpably silly efforts at producing science, and more disturbingly, scientific racism, which helped pave the way for Europe's twentieth-century descent into state racism and genocide.<sup>55</sup> In penology, the dominant strain of post-World War II discourse emphasized rehabilitation through psychological treatment and social intervention and not the preventive isolation of natural born criminals.<sup>56</sup> In the decades before the war,

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48. GIBSON, *supra* note 8, at 19.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 19-20.

53. *Id.* at 20.

54. See T. Marcus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 895 (1996) ("This stress on individual volition was first challenged by the positivist school headed by Italian doctor and 'father of modern criminology,' Cesare Lombroso.").

55. See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 122-42 (1981) (chronicling some of Lombroso's work and discussing its influence on society). Nicole Rafter and Mary Gibson argue that Gould misses some of the complexity of Lombroso's positions and the degree to which his misconceptions were widely held by the biologists of his time. See Rafter & Gibson, *supra* note 41, at 5-7. Lombroso, who died in 1909, was a member of the Italian Socialist Party, but some of his disciples warmly embraced Mussolini and Italian Fascism and the regime reciprocated, incorporating many positivist ideas in its security apparatus. GIBSON, *supra* note 8, at 6-7.

56. See FRANCIS T. CULLEN & KAREN E. GILBERT, *REAFFIRMING REHABILITATION* 81-83 (1982) (discussing the rise of rehabilitation); *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE*



however, Lombroso was a highly celebrated and influential figure among social scientists and lawyers.<sup>57</sup>

Figure 1: Criminologists mentioned in HeinOnline<sup>58</sup> database, 1891–1990

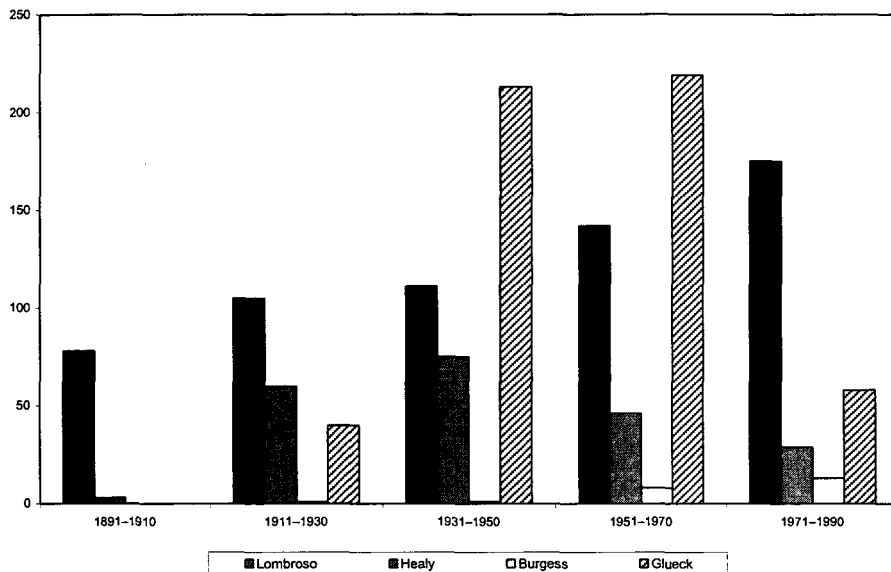


Figure 1 provides some quantitative evidence of Lombroso's prominence in American legal thought. Using HeinOnline's database of law and law-related periodicals dating back to the nineteenth century, I searched for citations to Lombroso as well as three prominent early twentieth-century American criminologists. William Healy was a psychiatrist whose book, *The Individual Delinquent*,<sup>59</sup> was perhaps the best known work of criminology by an American during the pre-World War II period.<sup>60</sup> Healy emphasized the role of complex psychological and sociological causation in crime, in

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OF PUNISHMENTS IN WESTERN SOCIETY 189 (Norval Morris & David J. Rothman eds., 1995) (detailing the "rehabilitative thrust" permeating the penological arena following World War II).

57. See GIBSON, *supra* note 8, at 3–4 (detailing Lombroso's influence).

58. The numbers in Figure 1 and the subsequent paragraphs were arrived at by dividing the time period between 1891 and 1990 into 19 year increments and then searching the entire journal library of Hein Online, <http://heinonline.org>, for the key word "Lombroso," (as well as keywords based on the names of the other criminologists), for the periods 1891-1910, etc. Then each citation was checked to confirm that it referenced the particular criminologist. The term "Lombroso" (as well as corresponding terms for the other criminologists) was also searched across the entire time period in order to count the number of references in specific journals.

59. WILLIAM HEALY, *THE INDIVIDUAL DELINQUENT: A TEXT-BOOK OF DIAGNOSIS AND PROGNOSIS FOR ALL CONCERNED IN UNDERSTANDING OFFENDERS* (1915).

60. For commentary on Healy's influence see ROTHMAN, *supra* note 13, at 54–56.

contrast to Lombroso's biological reductionism.<sup>61</sup> Healy was also associated with the rise of the juvenile court as the director of the first psychological clinic attached to a juvenile court in Chicago around 1910.<sup>62</sup> Ernest Burgess was a member of the sociology department of the University of Chicago where he led highly original and influential studies of crime and social disorder that became a hallmark of the famous Chicago School of Sociology, starting in 1916.<sup>63</sup> Burgess and his students were closely involved with tracking criminal patterns in Chicago neighborhoods and shaping parole techniques to identify likely recidivists.<sup>64</sup> Sheldon Glueck was a criminologist appointed to the faculty of the Harvard Law School in the 1920s by Dean Roscoe Pound.<sup>65</sup> Glueck's actuarial studies of the distribution of crime among juvenile boys and girls was an advance over Lombroso's crude use of statistics.<sup>66</sup>

The HeinOnline citations show that Lombroso had far more citations for most of the years surveyed than Healy and Burgess.<sup>67</sup> Glueck led only from the 1930s through the 1950s.<sup>68</sup> Not only was Lombroso's influence more sustained than the others, it reached beyond criminological journals in the index to periodicals aimed at lawyers and lay people.<sup>69</sup> Between 1900 and 1913, for example, the *American Lawyer* published eight articles discussing Lombroso's ideas.<sup>70</sup> Lombroso also published articles of his own in periodicals like *Popular Science Monthly* and *Everybody's Magazine*.<sup>71</sup>

While European jurists fumed at the positivists' biological determinism and their rejection of responsibility, American lawyers expressed almost unreserved enthusiasm.<sup>72</sup> A good example is a reverential article by a

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61. *Id.* at 54–55.

62. *Id.* at 215, 245.

63. Donald J. Bogue, *Introduction to THE BASIC WRITINGS OF ERNEST W. BURGESS*, at xiv–xvii (Donald J. Bogue ed., 1974).

64. Burgess considered himself a positivist but not a Lombrosan, believing that criminals were both human actors with social roles as well as abnormal subjects. *See id.* at xxiv (pointing out that while Burgess considered himself a positivist, he was also associated with the effort to “jar sociologists out of the ‘social organism,’ ‘culture,’ or ‘institution’ orientation to an appreciation of the need to understand *individual* human beings” (emphasis added)).

65. Thomas A. Green, *Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice*, 93 MICH. L. REV. 1915, 2019 n.345 (1995).

66. *See* William M. McCord, Book Review, 13 STAN. L. REV. 210, 211–12 (1960) (reviewing SHELDON GLUECK & ELEANOR GLUECK, *PREDICTING DELINQUENCY AND CRIME* (1959) and praising the Gluecks' research methods).

67. *See supra* note 58.

68. *See supra* note 58. Since Glueck was one of the only criminologists of the period actually located at a law school, it is not surprising that he published in and was cited in law review literature.

69. *See supra* note 58.

70. *See supra* note 58.

71. *See supra* note 58.

72. *See* GIBSON, *supra* note 8, at 247–50 (detailing reactions to Lombroso in both Europe and the United States).

German-born American female writer, Helen Zimmern,<sup>73</sup> that first appeared in *Popular Science Monthly* and then was reprinted in *The Green Bag*, a journal patronized by the Legal Realists:

It is to the glory of Italy, the land where Roman law, the foundation of modern law, was born, that it has again put into the crucible this problem of criminality, and that it has proceeded to the study of this problem by the only truly scientific method—namely, that of studying the psychology of criminals and their pathological abnormalities.<sup>74</sup>

Typical of the American response, Zimmern recognized Lombroso's methodological shortcomings, but could not help but praise it as a project:

His work is by no means perfect: he is apt to jump too rapidly at conclusions, to accept data too lightly; thus he was led at the beginning to overestimate the atavistic element in the criminal, and at a later date he has pressed too strongly the epileptic affinities of crime. Still, when all is said and done, his work is undoubtedly epoch-making, and has opened up valuable new lines of investigation and suggested others.<sup>75</sup>

Lombroso's international reputation began with the 1876 publication of *L'Uomo Delinquente*, a frequently revised text that began as a manifesto of the positivist movement and became an increasingly large and unwieldy compilation of findings, theories, and defenses against critics.<sup>76</sup>

Lombroso was most famous for the idea that many criminals were destined for a life of crime by their biological inheritance; in short, "born criminals."<sup>77</sup> Like other early expounders of Charles Darwin's evolutionary biology, Lombroso believed that contemporary humans carried the trail of their evolutionary descent in their biology and that earlier and superseded traits remained in a latent state, capable of being reasserted freakishly in anomalous cases.<sup>78</sup> Criminals in this perspective were, in at least some cases, "atavistic" throwbacks to earlier stages of evolution.

Ever seeking to broaden the category of biological explanation, Lombroso soon added the concept of "degeneration" by which in utero damage to the fetus results in the emergence of atavistic traits not otherwise present in the inherited traits of the subject.<sup>79</sup> Positivist criminology, or

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73. Zimmern was one of the first translators of Nietzsche's works into English.

74. Zimmern, *supra* note 12, at 342.

75. *Id.* at 348.

76. See GIBSON, *supra* note 8, at 22 (explaining the evolution of the work).

77. *Id.* at 2.

78. See *id.* at 20–21 (remarking on Lombroso's belief that pathology could cause degeneration in otherwise "normal" people).

79. *Id.* at 25. Other criminologists entertained even broader notions of degeneration that included the influence of bad behavior back onto biology. See Nicole Hahn Rafter, *Criminal Anthropology: Its Reception in the United States and the Nature of Its Appeal*, in CRIMINALS AND THEIR SCIENTISTS: THE HISTORY OF CRIMINOLOGY IN INTERNATIONAL PERSPECTIVE 159, 161 (Peter Becker & Richard F. Wetzell eds., 2006) (describing degeneration theory).

criminal anthropology as Lombroso called it, was the enterprise of identifying signs of such degeneration.<sup>80</sup> Atavism also went along with epilepsy, insanity, and poor physical health, all of which were also associated with criminality.<sup>81</sup> In time, Lombroso eagerly added on psychological and sociological explanations for crime, but he remained personally enthusiastic as a researcher of biological vectors.<sup>82</sup> Originally, Lombroso expected careful measurements of the body (anthropometry) to yield the most important insights, but he came to see a looser observation of anomalous biological traits as well as bodily-associated signs such as tattooing of the body or handwriting as also important.<sup>83</sup>

In time Lombroso backed off his earlier claims that most crime was committed by such "born criminals," acknowledging that many crimes were committed by what he called "occasional" criminals motivated by deprivation and emotional stress.<sup>84</sup> Born criminals might, in fact, be a minority of criminals.<sup>85</sup> While maintaining that such born criminals did exist, Lombroso widened the positivist project to include sociological and psychological theories of criminal etiology.<sup>86</sup> Still, the project of identifying such criminal types remained crucial to crime control.<sup>87</sup> Since born criminals were considered unchangeable, their identification would lead to harsh treatment, including permanent preventive detention and execution.<sup>88</sup> Occasional criminals, in contrast, were amenable to efforts at individual treatment and thus would be handled with softer penal practices like probation or custody in a reformatory.<sup>89</sup>

The appeal and influence of Lombroso's writings on the American penal imagination are better discerned by looking more closely at some of the specific subjects raised by his English publications: "criminal woman," American homicide rates (versus European), and the nature of anarchist violence.

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80. See GIBSON, *supra* note 8, at 25 (discussing how the adoption of degeneracy theory broadened the scope of criminal anthropology).

81. *Id.* at 25-26.

82. See *id.* at 22-26 (contrasting the five editions of *Criminal Man* and tracking the transformations of Lombroso's theory).

83. *Id.*

84. *Id.* at 24.

85. *Id.*

86. *Id.*

87. See *id.* at 26-27 (discussing Lombroso's thoughts on punishment).

88. *Id.*

89. *Id.*

A. "Criminal Woman"

The study of women has been a secondary theme in criminology from the very beginning,<sup>90</sup> so it may seem peculiar to begin with Lombroso's ideas about female criminality. Yet Lombroso's study of female criminals, prostitutes, and "normal" women, co-authored with Ferrero, was translated in an abridged form and published in 1895, sixteen years before an abridged edition of *L'Uomo Delinquente* appeared in English as *Criminal Man*.<sup>91</sup> It was through his work on women that many American lawyers and social scientists first learned of Lombroso's ideas generally.

Like *L'Uomo Delinquente*, the book on women and crime, *La Donna Delinquente*, was a sprawling aggregation of empirical data, anecdotal examples, and pages of photographic and illustrative exhibits.<sup>92</sup> As with men, Lombroso was particularly interested in atavistic subjects destined to crime by virtue of their degenerative biology.<sup>93</sup> According to Lombroso, this was a small but especially alarming group of subjects.<sup>94</sup> The analysis was complicated by the fact that, as a group, women were, in Lombroso's view, less evolved than men and thus more prone to being atavistic.<sup>95</sup> This should have made them more crime prone since criminality was associated with atavism, but Lombroso recognized that in official crime statistics women were in fact significantly underrepresented.<sup>96</sup> Lombroso explained this paradox by citing the inherent dependency and passivity of normal women, as well as the maternal instincts triggered by child bearing, all of which in his view tended toward repressing a natural criminal inclination.<sup>97</sup>

Lombroso was particularly interested in the subject of prostitution. While prostitutes were in a gray zone of legality in late nineteenth-century Italy, they were strongly associated with criminal subcultures.<sup>98</sup> Moreover, Lombroso was deeply interested in the relationship between sexuality and criminality, believing that more sexually motivated women were also more criminally inclined.<sup>99</sup> Applying his evolutionary perspective, Lombroso speculated that prostitution was in fact the typical path of degeneration for

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90. See *id.* at 55–61 (describing the social context leading up to the publication of *The Female Offender* and the expansion of interest in research on women during the 1890s).

91. GINA LOMBROSO FERRERO, *CRIMINAL MAN: ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO* (Edward L. Thorndike & F.E. Breddard eds., G.P. Putnam's Sons 1911) (1895); Rafter & Gibson, *supra* note 41, at 4.

92. Rafter & Gibson, *supra* note 41, at 3–7.

93. *Id.* at 7.

94. See *id.* at 7–8 (recounting Lombroso's concept of the female born criminal and how they compare to male born criminals).

95. See *id.* at 9 (declaring that Lombroso was "deeply committed [to] the inferiority of women to men").

96. *Id.* at 8–9.

97. *Id.* at 9.

98. *Id.* at 10.

99. LOMBROSO & FERRERO, *supra* note 40, at 171, 185.

women.<sup>100</sup> A primitive woman, according to Lombroso, traded her sexual attractiveness to men for help in survival.<sup>101</sup> Thus degeneration of civilized females generally took the path of returning to prostitution.<sup>102</sup>

The psychological and anatomical similarity of the male criminal and the born prostitute could not be more complete: Both resemble the moral lunatic, and therefore all three are identical, according to logic. . . . Prostitution is nothing more than the female form of criminality.<sup>103</sup>

Born criminals were rare among women but an exceptional problem.

[T]he female born criminal is, so to speak, doubly exceptional, first as a woman and then as a criminal. This is because criminals are exceptions among civilized people, and women are exceptions among criminals, women's natural form of regression being prostitution, not crime. Primitive woman was a prostitute rather than a criminal. As a double exception, then, the criminal woman is a true monster.<sup>104</sup>

For our analysis of Lombroso's influence on the American imagination of crime control, several aspects of his study of women offenders are particularly relevant.

The first is the priority given to signs, especially physical signs, that could identify those prone toward crime.<sup>105</sup> Lombroso advanced far beyond where criminology would be for a long time by prioritizing the study of normal women.<sup>106</sup> Instead of focusing exclusively on women identified as criminal and then cataloging their features, Lombroso sought to develop a comparative analysis between normal and criminal women which would yield measures for identifying the latter.

Table 1: Differences from features of normal women<sup>107</sup>

Trait	Criminal Type
Height	Shorter
Weight	Heavier
Thighs	Bigger
Cranial Capacity	Smaller
Hair	Darker/Earlier Grey

100. *Id.* at 185.

101. *See id.* at 172 ("Prostitution, previously a mere diversion, becomes a means of self-support from which they profit without joy in the pleasure they formerly badly abused.").

102. *Id.* at 185.

103. *Id.* at 221.

104. *Id.* at 184-85.

105. *Id.* at 107-22.

106. *See id.* at 41 (noting that it is "impossible" to study the criminal woman without first studying the normal woman).

107. *Id.* at 121-23.

Illustrative is Lombroso's account of one woman convicted of killing her abusive husband:

The third, aged twenty-one, was married against her will and mistreated by her husband until, after a nighttime fight, she killed him with a hatchet while he slept. In her we find only a demitype. Her ears stand out, she has big jaws and cheekbones, and her hair is very black. In addition, there are other anomalies which do not appear in the photograph, such as gigantic canine teeth and dwarf incisors.<sup>108</sup>

The behavior of women in ordinary life could also signal degeneration and thus criminality. Motherhood and sexuality were two crucial indicators. Criminal women lacked a maternal instinct and expressed an exaggerated sexuality.

One strong proof of degeneration in many born criminals is their lack of maternal affection. . . .

. . . .

This lack of maternal feeling becomes comprehensible if we keep in mind the female criminal's masculine qualities, which prevent her from being more than half a woman, and her love of dissipation, which prevents her from carrying out her maternal duties. . . . Her exaggerated sexuality alone would be enough to render her a bad mother; it makes her egotistical and redirects her energies toward satisfying her pressing and multiple sexual needs.<sup>109</sup>

Second, the key contribution of positivist criminology to crime policy was the creation of a bi-modal penal regime with harsh punishment for born criminals and soft, treatment-oriented punishment for occasional criminals.<sup>110</sup> Because of women's natural passivity and dependency on men, their criminality was mostly the result of the latter's influence:

In many cases, the occasional offender is led into crime reluctantly, through the suggestion of a lover or, less frequently, her father or a brother. As a prison nun once observed to us, pointing to her charges, "These are not like men. They do not commit crimes out of evil passions but to please their lovers. They steal or compromise themselves for men's sakes, sometimes without having any direct interest in the crime."<sup>111</sup>

Such offenders could be managed with soft-end punishments or even social reforms aimed at helping women avoid and escape from abusive relationships—not so for the born criminals.

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108. *Id.* at 139.

109. *Id.* at 185.

110. GIBSON, *supra* note 8, at 27.

111. LOMBROSO & FERRERO, *supra* note 40, at 194.

[W]hile the majority of female criminals are merely led into crime by someone else or by irresistible temptation, there is a small subgroup whose criminal propensities are more intense and perverse than even those of their male counterparts. These are female born criminals, whose evil is inversely proportionate to their numbers.<sup>112</sup>

While representing a relatively small segment of the population (especially of the female population), born criminals were especially problematic for two reasons. First, their potential for violence was largely independent of external pressures.<sup>113</sup> While Lombroso believed that many occasional criminals turn to crime only in response to social conditions, and thus could be diminished through better social and economic policies (Lombroso moved from a liberal to a socialist party), born criminals posed a threat unreachable by such policies.<sup>114</sup> "A passion for evil for evil's sake is a characteristic of born criminals, epileptics and hysterics. It is an automatic hatred, one that springs from no external cause such as an insult or offense . . . ."<sup>115</sup>

Second, such born criminals were not changeable by penal treatment.<sup>116</sup> They must be permanently separated from society.<sup>117</sup> Thus true born criminals among women posed a serious risk to the stability of the state.<sup>118</sup> Lombroso cited the example of a Texas outlaw of the late nineteenth century known as Bell-Star.<sup>119</sup> According to Lombroso, Bell-Star dressed as a man and ran her own outlaw gang through "superior intelligence, partly through courage, and to some extent through womanly charm."<sup>120</sup> In addition, Lombroso commented that "when muscular strength and intellectual power come together in the same individual, we have a female criminal of an indeed terrible type."<sup>121</sup>

In their introduction to a new translation of *La Donna Delinquente*, Nicole Hahn Rafter and Mary Gibson argue that notwithstanding the general repudiation of most of Lombroso's corpus of theories, his work on women offenders has continued to influence the contemporary study of women and crime.<sup>122</sup> They point to an essentialist view of women criminals that Lombroso built on and that has survived the decline of his general influence:

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112. *Id.* at 182.

113. *Id.* at 186-87.

114. *Id.*

115. *Id.*

116. See GIBSON, *supra* note 8, at 27 (claiming that Lombroso advocated either the death penalty or perpetual incarceration for born criminals).

117. *Id.*

118. See *id.* at 70, 76 (detailing Lombroso's belief that born female criminals were "doubly monstrous," making incarceration the only solution for preventing more damage to society).

119. LOMBROSO & FERRERO, *supra* note 40, at 189.

120. *Id.* at 192.

121. *Id.*

122. Rafter & Gibson, *supra* note 41, at 1-2.



[T]he fundamental reason behind the continuing influence of Lombroso's work lay with the way it built on age-old myths about women's nature. The equation of woman with nature, man with society; the tendency to dismiss the "natural" as unproblematic and beyond the reach of social analysis; and the ancient conflation of female deviance and sexuality—these deeply ingrained ideas were not born with Lombroso, nor did they die with him.<sup>123</sup>

Rafter and Gibson point to four legacies of Lombroso to the understanding of female criminality.<sup>124</sup>

1. *Biological origins*.—Lombroso pioneered the scientific study of both criminal and sexual behavior. Decades before Kinsey's *Sexual Behavior in the Human Female*,<sup>125</sup> Lombroso and Ferrero compiled a broad array of data about the sexual behavior and sexual anatomy of women, including "normal" and "criminal" women, as well as prostitutes.<sup>126</sup> Lombroso saw women's sexuality as linked to their criminality.<sup>127</sup> Since Lombroso and Ferrero viewed women's atavistic tendency toward criminality as held in check by their subjection to the responsibilities of motherhood and their submissiveness toward men, both sexually assertive heterosexual women and all lesbians represented a threat of criminal break-out.<sup>128</sup>

The problematization of women's sexuality and power relations with men continue to inform ideas about women and crime.

2. *Primitive*.—Lombroso believed that women generally were less evolved than men and criminal women less evolved than honest women.<sup>129</sup> The former belief continues to have a respectable pedigree in evolutionary biology (consider Harvard President Lawrence Summers's comments about the lack of women in the hard sciences).<sup>130</sup> While few contemporary criminologists believe in anything like Lombroso's theories of atavism and degeneration, the belief that criminality is rooted in the measurable differences found between criminal and normal women remains central to the study of women and crime.<sup>131</sup>

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123. *Id.* at 27.

124. *Id.* at 28.

125. ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).

126. See LOMBROSO & FERRERO, *supra* note 40, at 59–61 (describing sexual sensitivity in the normal woman); *id.* at 161 (claiming that 29% of female thieves had intercourse before the age of fifteen, while prostitutes had an "even higher rate of precocious intercourse").

127. See *id.* at 160–61 (comparing the sexual precocity of criminal and normal women).

128. *Id.* at 171–76, 204.

129. Rafter & Gibson, *supra* note 41, at 28.

130. Marcella Bombardieri, *Summers' Remarks on Women Draw Fire*, BOSTON GLOBE, Jan. 17, 2005, at A1.

131. Rafter & Gibson, *supra* note 41, at 28.

3. *Pathological Normality*.—Lombroso believed that even normal women were pathological in comparison to men.<sup>132</sup> This does not always take the form of direct criminality but often arises in a criminal influence on children.<sup>133</sup> Indeed, the pernicious effects of women's pathologies on their children is among the most robust themes of modern criminology.<sup>134</sup>

4. *Female Criminals as Monsters*.—By defining crime not in contrast to law but in contrast to normality, Lombroso fundamentally recast the task of expert knowledge and social policy.<sup>135</sup> There is something constitutionally distinct and pathological about many criminals that differentiates them from normal people apart from the fact of legal conviction. This is perhaps the most intractable idea of all in criminology and one with a particular grip on the American imagination of crime control. The nature of the abnormal, however, is itself variable, from the marginally different to those whose extreme anomalies make them truly monstrous.

While positivist criminology promised to replace cultural "myths" with empirical knowledge about crime and criminals, it has also reinforced the cultural investment in the category of the monstrous by defining myriad forms of the abnormal as portentous of feared violence. While this focus on criminals as monsters has most frequently involved male criminals and subgroups (like young black men), the woman criminal, especially the woman criminal who directly attacks her gender role by assaults on children or men, has been perceived as a monster with a special kind of horror.<sup>136</sup>

A contemporary example of this in the United States is the small but demonized group of women who have been executed since the resumption of executions in 1977. In particular, Ailene Wuornos was a prostitute who was convicted of murdering a series of men she had picked up as customers.<sup>137</sup> The fact that Wuornos was also a lesbian helped fuel the drive to execute her

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132. *Id.* at 29.

133. See GIBSON, *supra* note 8, at 182.

134. See, e.g., Greg Pogarsky et al., *The Delinquency of Children Born to Young Mothers: Results from the Rochester Youth Development Study*, 41 CRIMINOLOGY 1249 (2003) (detailing the effects young mothers have on child delinquency).

135. See GIBSON, *supra* note 8, at 19 (describing Lombroso's adoption of the phrase "neologism of criminology" as signaling a new approach to analyzing crime "independent of traditional study of law").

136. See LOMBROSO & FERRERO, *supra* note 40, at 185 ("As a double exception, then [to her gender and to criminality], the criminal woman is a true monster."); Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 92 (1994) ("[B]ecause society places stricter cultural constraints on female behavior, females who become delinquent or violent appear to deviate more significantly from the norm—biologically, psychologically, or sociologically—than their male counterparts.").

137. SUE RUSSELL, *LETHAL INTENT* 463–64 (2002).

despite evidence of severe mental illness and abuse by at least some of her victims.<sup>138</sup> A popular movie based on her story was titled *Monster*.<sup>139</sup>

### B. American Homicide Rates

"The statistics of homicide are a sure guide to a people's state of culture."<sup>140</sup>

In a two-part article published in the *North American Review*<sup>141</sup> in 1897–1898, Lombroso raised a series of questions that could as easily have been asked in a late twentieth-century issue of the *Atlantic Monthly* or *The New Yorker*. Lombroso explored why American homicide rates were high compared to Europe and also why they appeared to be heading higher while the well-documented European trend was lower.<sup>142</sup>

Lombroso's answer was anything but simple. He started with the paradox that declining homicide rates in Europe appeared to be driven by the advance of civilization economically, politically, and socially,<sup>143</sup> while the most technologically and economically advanced society at the end of the nineteenth century, the United States, was experiencing rising homicide rates.<sup>144</sup>

Inasmuch, however, as America prides itself upon being at the head of civilization, representing to-day what Europe will be in the course of a hundred years, the fact that the crime of homicide should be so much

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138. See, e.g., Renée Heberle, *Disciplining Gender; Or, Are Women Getting Away with Murder?*, 24 J. WOMEN CULTURE & SOC'Y 1103, 1109–11 (1999) (asserting that the Wuornos trial court did not allow her to fully present a defense based on her background as a lesbian and victim of abuse due to irrational fears and misunderstanding).

139. *MONSTER* (Sony Pictures 2003).

140. Cesare Lombroso, *Why Homicide Has Increased in the United States*, 165 N. AM. REV. 641 (1897), reprinted in Horton & Rich, *THE CRIMINAL WRITINGS*, *supra* note 39, at 195 [hereinafter Lombroso, *Homicide 1897*].

141. Cesare Lombroso, *Why Homicide Has Increased in the United States*, 166 N. AM. REV. 1 (1898), reprinted in Horton & Rich, *THE CRIMINAL WRITINGS*, *supra* note 39, at 204 [hereinafter Lombroso, *Homicide 1898*]; Lombroso, *Homicide 1897*, *supra* note 140.

142. Lombroso, *Homicide 1897*, *supra* note 140, at 195–96.

143. In this respect Lombroso anticipated the views of twentieth-century social theorists and historians of European violence. See NORBERT ELIAS, 1 *THE HISTORY OF MANNERS: THE CIVILIZING PROCESS* 191–205 (Edmund Jephcott trans., Pantheon Books 1982) (1939) (explaining the gradual change in social structure that began rewarding civilized and refined male behavior over violent and aggressive male behavior); Martin J. Wiener, *The Victorian Criminalization of Men*, in *MEN AND VIOLENCE: GENDER, HONOR, AND RITUALS IN MODERN EUROPE AND AMERICA* 197, 197–210 (Pieter Spierenburg ed., 1998) (describing how social change, especially the "domestication" of men, decreased homicide rates in the late eighteenth and nineteenth centuries).

144. Lombroso, *Homicide 1897*, *supra* note 140, at 196–98; see also ROGER LANE, *MURDER IN AMERICA: A HISTORY 180–84* (1997) (compiling data on nineteenth-century murder statistics in the United States); ERIC H. MONKKONEN, *MURDER IN NEW YORK CITY 10* (2001) (stating that around 1850, New York City's murder rate was more than ten times higher than London's).

more general there than in Great Britain and Germany . . . [makes it] interesting to ascertain what are the causes of this apparent paradox.<sup>145</sup>

To Lombroso, the paradox disappeared in relation to three distinctive aspects of American society: its highly differentiated condition in terms of civilization; immigration from the parts of Europe least pacified by the civilizing process; and the presence of large numbers of "Negroes" who he assumed had more primitive orientation toward crime and had further suffered due to the negative consequences of slavery.<sup>146</sup>

Lombroso also noted the importance of regional differences in homicide in the United States, especially with respect to those homicides he assumed to be most representative of "primitive" society such as those arising from affronts to personal honor and the demands of honor-based vengeance-taking.<sup>147</sup> Thus, in describing the residue of violent crime in Europe, Lombroso noted:

[W]hen we read of any singularly atrocious crime in Europe we almost unconsciously attribute it to some community which still remains in barbarism, though in close contact with civilization, such, for instance, as Corsica as opposed to France, or the island of Sardinia as opposed to Italy.<sup>148</sup>

But he describes this as a more or less constant source of homicide in all societies and not a major source of American penal distinctiveness.<sup>149</sup> Those American states "which are the most highly civilized, which possess a pure judiciary, and which furnish us with reliable statistical information" enjoyed homicide rates at or lower than those of the "most enlightened countries of Europe."<sup>150</sup>

His comments on "Negroes" and homicide reflect the thinking of liberal, progressive, and even socialist European thinkers of his era who simultaneously considered those of African ancestry to be biologically inferior to Europeans and sympathized with the plight of Americans of African descent only a generation or two after slavery and after the collapse

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145. Lombroso, *Homicide 1897*, *supra* note 140, at 197.

146. *Id.* at 199–202. Lombroso was undoubtedly a close foreign observer of the American Civil War and Reconstruction. As discussed in Part III, he was very interested in the parallels between efforts at constitutional change and nation building in Italy and the United States. See Lombroso, *Homicide 1898*, *supra* note 141, at 205–07.

147. See Lombroso, *Homicide 1897*, *supra* note 140, at 197–202 (citing higher murder rates in Texas and the West than in the states of New England and attributing them to the greater degree of "civilization" in the northeast).

148. *Id.* at 195.

149. *Id.* at 195–97.

150. *Id.* at 197.

of Reconstruction in the South.<sup>151</sup> In the first regard Lombroso exemplified “scientific racism.”<sup>152</sup>

[T]he greatest obstacle to the Negro’s progress is the fact that there remain latent within him the primitive instincts of the savage; for notwithstanding that the garb and the habits of the white man may have given him a veneer of modern civilization, he is still too often indifferent to and careless of the lives of others, and he betrays that lack of the sentiment of pity, commonly observed among savage races, which causes them to regard homicide as a mere incident, and as glorious, especially in case where it is the outcome of revenge.<sup>153</sup>

No doubt part of Lombroso’s appeal in the United States was how well this scientific racism fit with the new Jim Crow governance strategy of the post-Reconstruction South and the acceptance of that new arrangement by the centers of elite opinion in the North who had backed the Civil War and Reconstruction. However, readers of the *North American Review* in that era could not have missed the critical points in Lombroso’s discourse. His suggestion that the “Negro’s tendency to crime” might well be explained by “the fact that he is still practically in servitude,” and that while “the law has emancipated him, it cannot be denied that the law in this respect is to a great extent a dead letter.”<sup>154</sup> Few, if any, contemporary criminologists share Lombroso’s views on the biology of race, but Lombroso’s focus on the lives of African Americans as a key ingredient in understanding American homicide is thoroughly contemporary.<sup>155</sup>

Lombroso also viewed the European advantage in homicide as a result of the great waves of immigration to the United States at the end of the nineteenth century.<sup>156</sup> Lombroso noted that immigrants to the United States tended to come from the least advanced parts of Europe and that homicide rates for recent immigrants to the United States would approximate the homicide rate in their native lands.<sup>157</sup> But this “atavistic” source of crime represented only a portion of the homicide problem. The American difference, in Lombroso’s view, resulted from both an excess of the primitive

151. See, e.g., 2 ARTHUR SCHOPENHAUER, *PARERGA AND PARALIPOMENA: SHORT PHILOSOPHICAL ESSAYS* § 92, at 155–60 (E.F.J. Payne trans., 2000) (1851) (exemplifying “cultured” scientific racism).

152. For the concept of scientific racism, see Seymour Drescher, *The Ending of the Slave Trade and the Evolution of European Scientific Racism*, 14 SOC. SCI. HIST. 415 (1990) (exploring the “scientific” rationale in Europe before, during, and after the termination of the Atlantic slave trade for the inferior treatment of blacks by the majority).

153. Lombroso, *Homicide 1897*, *supra* note 140, at 203.

154. *Id.*

155. See, e.g., Alfred Blumstein & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. CRIM. L. & CRIMINOLOGY 1175, 1177 (1998) (discussing African Americans in analyzing the decrease in New York City crime rates during the late 1990s).

156. Lombroso, *Homicide 1897*, *supra* note 140, at 199.

157. *Id.* at 200.

sources of violence (race and immigration) and from what he termed the "excessive culture" produced by advanced civilization itself.<sup>158</sup>

Lombroso cited a list of factors linking civilization with high homicide levels.<sup>159</sup> His list of factors blends causal deterministic factors like social distance and anonymity with institutional factors like incentives and opportunities for crime.<sup>160</sup> Such "civilized" sources of crime included insurance, which invited homicides to collect life insurance and social benefits.<sup>161</sup> "[C]onsider the rascal Armand, who had conceived the crime of feigning to have been bound and nearly strangled by his employer, from whom he would subsequently demand hush-money."<sup>162</sup>

Lombroso also cited stimulating drugs and the high level of casualties from railroad accidents.<sup>163</sup> In all these respects America's highly advanced technology and economy helped generate high levels of interpersonal violence.<sup>164</sup>

From the early twenty-first century, this article, written at the turn of the twentieth century, seems remarkably contemporary. Lombroso seemed little interested in essentialist questions about homicide and how to define its boundaries. Instead he wanted to know why the relative amount of homicide was increasing and what could be done about it. His concern with homicide rates, as opposed to crime generally, was quite contemporary, as was his attention to the problem of explaining American "peculiarity."<sup>165</sup>

These problems were all exacerbated in Lombroso's view by the heavy dominance of politics over law and law over crime control.<sup>166</sup> "[A]s the action of the law and the police is confined within the limits of the state, it would seem that there must be a tendency toward insufficiency and tardiness in the repression of crime."<sup>167</sup>

His prescriptions include strategies consistent with strands of twentieth-century social policy, including better screening and guidance of immigrants,<sup>168</sup> social programs for crime-prone groups like "Negroes" (as well as encouraged emigration);<sup>169</sup> legal restrictions on alcohol;<sup>170</sup> institutions to incapacitate "habitual criminals" (those produced by nature or deeply

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158. Lombroso, *Homicide 1898*, *supra* note 141, at 206.

159. Lombroso, *Homicide 1897*, *supra* note 140, at 198–204.

160. *Id.* at 201–02.

161. Lombroso, *Homicide 1898*, *supra* note 141, at 208.

162. *Id.* at 206.

163. *Id.* at 208–10.

164. *Id.* at 208.

165. Lombroso, *Homicide 1897*, *supra* note 140, at 196.

166. Lombroso, *Homicide 1898*, *supra* note 141, at 209.

167. *Id.*

168. *Id.* at 214.

169. *Id.* at 214–15.

170. *Id.* at 215.

entrenched habit);<sup>171</sup> and the use of advanced techniques to reform those "occasional" criminals amenable to transformation who end up incarcerated.<sup>172</sup>

Lombroso was not inevitably the proponent of harsh punishments that are often popularly associated with his notion of born criminals. His unease with the death penalty is exemplary. Although a proponent of custody for eugenic as well as direct crime-repressing purposes, Lombroso was uneasy about capital punishment, seeing in it both crime-repressive and crime-stimulating aspects.<sup>173</sup> On the one hand he noted that public executions might be justified as a way of directly engaging the population in the message of deterrence, "a counterpoise to judicial subtlety and the insufficiency of the police."<sup>174</sup> But he also asserted one of the standard assumptions of enlightenment abolitionism—that executions "are often the cause of a new kind of homicide perhaps graver in its effects, since it accustoms the most civilized and humane people in the world to scenes of violence."<sup>175</sup> He went on to pointedly dismiss the gesture that many American states had lately followed of making executions closed to the public, asking "what do these rare cases of humane precaution avail, when impunity is accorded to the parties engaged in those numerous public executions which are the result of lynch law."<sup>176</sup>

### C. *Anarchists*

My final example concerns a number of articles that Lombroso published in English on the topic of "anarchists" and violent crimes committed by radical political extremists that he included under this label in both Europe and the United States between 1898 and 1902.<sup>177</sup> Lombroso's interest in the topic reminds us that criminology has always sought the status of a general political science of security, useful for guiding the state in facing a variety of domestic and foreign threats. Lombroso placed a high premium on producing knowledge of use to the governance of the nation as a nation.

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171. *Id.* at 212–15.

172. *Id.* at 215.

173. *Id.* at 209.

174. *Id.*

175. *Id.*

176. *Id.*

177. See Cesare Lombroso, *Anarchistic Crimes and Their Causes*, 50 INDEPENDENT 1670 (1898), reprinted in Horton & Rich, THE CRIMINAL WRITINGS, *supra* note 39, at 233 [hereinafter Lombroso, *Anarchistic Crimes*] (arguing that anarchists are of a distinct criminal type); Cesare Lombroso, *A Paradoxical Anarchist*, 56 POPULAR SCI. MONTHLY 312 (1901), reprinted in Horton & Rich, THE CRIMINAL WRITINGS, *supra* note 39, at 287 (developing the profile of an anarchist arrested in Italy); Cesare Lombroso, *The Status of Anarchism To-Day in Europe and the United States*, 6 EVERYBODY'S MAG. 165 (1902), reprinted in Horton & Rich, THE CRIMINAL WRITINGS, *supra* note 39, at 299 [hereinafter Lombroso, *The Status of Anarchism*] (discussing the traits which indicate a strong inclination toward anarchistic behavior).

Acts of terrorist violence by politically motivated subjects, labeled anarchists by many of their critics both liberal and socialist, provided Lombroso with an ideal target at the boundary between crime control and civil war.

Lombroso's analysis of anarchist criminals tracks his general theory. Anarchists occupied a kind of netherworld between criminals and normal subjects:

When I say that the anarchists of Turin and of Chicago are frequently of the criminal type, I do not mean that political criminals, even the most violent anarchists, are true criminals; but that they possess the degenerative characteristics common to criminals and to the insane, being anomalies and possessing these traits by heredity . . .<sup>178</sup>

Their violence reflects criminal sentiments rooted in atavism.<sup>179</sup> Their political idealism links them to the best attributes of normal subjects (Lombroso himself participated in the struggle for Italian unification, sometimes itself a bloody struggle).<sup>180</sup> "His place, therefore, is somewhat between the normal and the criminal man, from whom he distinguishes himself by a degree of altruism and by a hyperaesthesia for the political and economic conditions of his country."<sup>181</sup>

Thus Lombroso's description of Italian American Gaetano Bresci who immigrated to the United States and then returned to Italy in 1900 where he assassinated King Umberto in revenge for deaths of workers during a police repression of protests on the King's orders:<sup>182</sup> "[Bresci's] hyperesthesy could not but develop itself in the fanatical centre of Patterson, New Jersey, especially after the sanguinary political reactions of Sicily and of Milan, which inflicted sorrow and suffering on millions of people, without, however, prompting them to plans of vengeance."<sup>183</sup>

As with crime generally, Lombroso believed that roots of violent anarchy led back to atavistic biological anomalies: "I myself found typical criminal characteristics in thirty-four out of one hundred Italian anarchists, and in forty percent among fifty North American Anarchists."<sup>184</sup> In

178. Cesare Lombroso, *Illustrative Studies in Criminal Anthropology: III. The Physiognomy of the Anarchists*, 1 *MONIST* 336 (1890), reprinted in Horton & Rich, *THE CRIMINAL WRITINGS*, *supra* note 39, at 28.

179. Cesare Lombroso, *Criminal Anthropology: Its Origins and Application*, 20 *FORUM* 33 (1895), reprinted in Horton & Rich, *THE CRIMINAL WRITINGS*, *supra* note 39, at 63 (accounting the development of the positivist school, including the history of the connection between atavism and the criminal).

180. See *supra* text accompanying notes 48–53.

181. Cesare Lombroso, *Some Aspects of Crime*, 19 *HUMANITARIAN* 316 (1901), reprinted in Horton & Rich, *THE CRIMINAL WRITINGS*, *supra* note 39, at 297.

182. *Id.* at 296–97.

183. *Id.* at 297.

184. Lombroso, *The Status of Anarchism*, *supra* note 177, at 301.



describing the famous anarchist Emma Goldman, Lombroso described her as:

[T]he true type of the American anarchist. Of foreign extraction, and descended from a doubly unfortunate race, resident in America for ten years, after changing among several lovers as fanatical as herself . . . she preached that the day was dawning when women would cook dynamite instead of coffee.<sup>185</sup>

At the same time he felt that in most anarchists (as opposed to ordinary born criminals) this atavistic violent potential is only unleashed in the face of extreme social deprivation: "Here, however, circumstance outweighed organic conditions. The circumstance lay in the wretched political conditions of our country, the corrupt government, the tardy administration of justice, the loose military system, anti-national alliances, the system of protection in our finances, and forced emigration."<sup>186</sup>

Yet to his credit, Lombroso resisted even simple combinations of social and biological explanations. While it afflicted both Europe and North America, Lombroso saw anarchism in the two as reflecting very different political dynamics. Anarchism in Europe, according to Lombroso, was a response to oppression, whereas in North America it was a response to liberty and the fanaticism of parties.<sup>187</sup>

When it came to prescriptions, Lombroso, a socialist, emphasized the need to tame capitalism.<sup>188</sup> Even though somewhat abnormal, most anarchists would not readily be identifiable as criminal types in a way that would permit preventive incapacitation.<sup>189</sup> Lombroso believed that these actors were simply more sensitive to the criminogenic pressure being exerted across the poorer classes by the conditions of industrial capitalism.<sup>190</sup>

Whenever the excess of the capitalistic idea and of protection makes the poor population of a country fairly starving and at the same time opposes their obtaining the best products of the land, it is to this great first cause that those who can meet the difficulty and are capable of disinfecting measures should turn themselves; measures not found in slaughter nor in soldiery. Instead the course must be completely changed to which modern races of men have committed themselves, America included, with its excessive concentration of capital and with

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185. *Id.* at 304.

186. Lombroso, *supra* note 181, at 297.

187. Lombroso, *The Status of Anarchism*, *supra* note 177, at 305–07.

188. Lombroso, *Anarchistic Crimes*, *supra* note 177, at 239–42.

189. *See id.* at 233–42 (describing the characteristics and motives of anarchists as distinct from other criminals and concluding that fixing the problems of capitalistic society would deter anarchism).

190. *See id.* at 237–38 ("There is in all these [anarchists] a strong conviction of the usefulness of their acts.").

that justice toward particular classes which ends up in being a great injustice.<sup>191</sup>

Even more than capitalism, Lombroso blamed ineffective instruments of government:

There is reason, of course, for the prevalence of anarchy, and for its flourishing condition, in countries where there are no means of obtaining justice, and where the government is so bad that anything seems preferable to submission to it, and where, too, nominally at least, it is vested in one man.<sup>192</sup>

According to Lombroso, the United States—which he consistently rated as advanced over Europe in its methods of governance—did not fit this profile.<sup>193</sup> Instead, Lombroso attributed the frequent assassinations of Presidents as less suggestive of anarchy than of the general accessibility provided by the norms of a free society.<sup>194</sup>

### III. Positivism as a Project

In invoking the term “project” I want to examine Lombroso’s work beyond the context of the empirical science of criminal behavior to which he laid claim.<sup>195</sup> Like most founders, Lombroso’s work is most influential as a model of how to do work rather than as a surviving set of scientific propositions. The work, however, is not just scientific work (perhaps science never is). In Lombroso’s case, it is always and already the work of power and of governance.

Science, to be sure, requires its own apparatus of power, such as laboratories that allow “nature” to be subjected to the inquisition of experiment, institutions that sustain and fill laboratories, and so forth. When the sciences are human, this requires institutions wielding power over human subjects. Lombroso, who came to the project of positivism through his work as a clinical physician in insane asylums, army corps, and prisons, understood this well.<sup>196</sup> Scientific entrepreneurs also require institutions through which to propagate their research: journals, graduate schools, and laboratories.

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191. *Id.* at 241.

192. Lombroso, *The Status of Anarchism*, *supra* note 177, at 305.

193. *Id.* at 305–06.

194. *Id.* at 305–07.

195. In thinking about Lombroso this way, I am drawing heavily on David Horn’s contextualization of Lombroso’s life work, *L’Uomo Delinquente*, which went through many editions and grew tenfold in length over twenty years, and I am expanding in terms of the fields of knowledge and the political problematics in which it was written and read. See HORN, *supra* note 41, at 4–5. For an analysis of positivism in the context of British criminology and governance, see David Garland, *Of Crimes and Criminals: The Development of Criminology in Britain*, in *THE OXFORD HANDBOOK OF CRIMINOLOGY* 17 (Mike Maguire et al. eds., 1994).

196. See *supra* text accompanying notes 48–53.

This is perhaps the most important legacy of positivism for us. Lombroso created a network that linked sciences both new—Darwinian evolutionary biology—and old—psychology, anthropology, and sociology—to existing institutions of power, such as prisons and asylums.<sup>197</sup> And he created clinics and journals capable of channeling knowledge through both poles in a self-sustaining and indeed expansive cycle.<sup>198</sup>

Consider in this respect the famous and now much doubted narrative that Lombroso wove throughout his career concerning the moment at which the key insight of criminology came to him.<sup>199</sup> Lombroso was conducting an autopsy in a prison where he worked in 1871 on the body of a deceased prisoner named Villella (whose criminal aggressiveness seems to have been inflated over time into a “notorious brigand”).<sup>200</sup> While contemplating Villella’s opened skull, Lombroso noted what he considered an anomalous hollow where the spinal cord and the skull met that he believed resembled the anatomy of some lesser mammals.<sup>201</sup> Lombroso described the following transcendent vision often—this version was published in a posthumous 1911 abridged edition of *L’Uomo Delinquente*:

I seemed to see all at once, standing out clearly illumined as in a vast plain under a flaming sky, the problem of the nature of the criminal, who reproduces in civilised times characteristics, not only of primitive savages, but of still lower types as far back as the carnivores.<sup>202</sup>

The memory, embellished as it may be, remains a potent example of the kind of paradigm-shifting moments that Thomas Kuhn describes in his classic account of scientific revolutions.<sup>203</sup> One wonders, in retrospect, whether Lombroso was not also struck at that moment by an insight about how power and knowledge could be connected in the new nation-state. Asylums and prisons can be and are conceived of as a kind of garbage dump of human misfits who are isolated by society.<sup>204</sup> But in the project of positivism, Lombroso had come upon a way to turn that garbage into critical knowledge for the stabilization of the nation-state.

197. GIBSON, *supra* note 8, at 19–21.

198. *Id.* at 21.

199. HORN, *supra* note 41, at 30–31.

200. See Biko Agozino, *Imperialism, Crime and Criminology: Towards the Decolonisation of Criminology*, 41 CRIME L. & SOC. CHANGE 343, 343 (2004) (referring to Lombroso’s “discovery of the skull of a notorious brigand”); Elio D. Monachesi, *Trends in Criminological Research in Italy*, 1 AM. SOC. REV. 396, 396 (1936) (describing the 1871 discovery).

201. See Monachesi, *supra* note 200, at 396 (noting Lombroso’s discovery of an “occipital depression usually found in anthropoid apes”).

202. GIBSON, *supra* note 8, at 20 (quoting FERRERO, *supra* note 91, at 6–7).

203. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 6 (2d ed. 1970).

204. See Julian V. Roberts, *Directing Traffic at the Crossroads of Criminal Justice and Mental Health: Conditional Sentencing After the Judgment in Knoblauch*, 39 ALTA. L. REV. 788, 806 (2002) (“The purpose of prison is to isolate, punish, and latterly to rehabilitate. In contrast, the purpose of a secure psychiatric institution is to isolate, but also to heal. The isolation is necessary for the protection of the public . . .”).

Through his dissection of Villella and his examination of scores of other inmates, Lombroso demonstrated the latent potential in his power as a physician within the prison or asylum to command the presence of inmates, dead and alive.<sup>205</sup> Through the imposition of technological devices and disciplines for measurement, he produced a new kind of knowledge about crime in the measurements of the criminal.<sup>206</sup>

Prisons and asylums, of course, had not exactly been invented for this task, although their origins are inevitably intertwined with multiple layers of intentionality.<sup>207</sup> When confinement began to emerge as a central form of punishment for crime, it promised to provide a significant deterrent through the fear of its invisible sufferings, while others imagined it as a space of religious penitence.<sup>208</sup> But lodged in this carceral space, charged with medical and administrative powers, Lombroso innovated a new machinery of knowledge and power.

At the heart of this new machinery was the criminal as the new focus of state power. In conceiving of criminality as a constitutional atavism, Lombroso produced an invisible center from which an indefinite series of radial lines emerge on the surface of the body, including anatomical anomalies, tattoos, and a vast range of behaviors.<sup>209</sup> If criminals are deviants from a condition of normality, the signs of that deviation must be discoverable through a sufficiently wide-ranging empiricism linked to coercive institutions of experimentation.<sup>210</sup> Moreover, this new criminal subject was part of a series that included varying degrees of criminality: children, women, lunatics, savages, and the very poor.<sup>211</sup>

205. See Maurice Parmelee, *Introduction to the English Version of CESARE LOMBROSO, CRIME, ITS CAUSES AND REMEDIES*, at xvi, xviii (Henry P. Horton trans., 1912) (noting that Lombroso studied the skulls of 383 criminals and that he and his colleagues examined another 5,907 living inmates).

206. HORN, *supra* note 41, at 33.

207. See FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 80 (Walter Kaufmann & R.J. Hollingdale trans., Vintage Books 1967) (1887) (arguing that "the concept of 'punishment' possesses in fact not one meaning but a whole synthesis of 'meanings'").

208. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 122-23 (Alan Sheridan trans., 1977).

209. See CESARE LOMBROSO, *CRIME, ITS CAUSES AND REMEDIES*, *supra* note 205, at 91-93 (describing the effects of alcoholism on crime); Parmelee, *supra* note 205, at xxx (referring to several physical characteristics that Lombroso believed to be an indication of criminality, including: outstanding ears, a large jaw, and a thin upper lip); *id.* at xix ("[Lombroso] shows that tattooing is quite common in some of the inferior classes of society, but it is most common among criminals.").

210. See GEORGE B. VOLD & THOMAS J. BERNARD, *THEORETICAL CRIMINOLOGY* 51-53 (3d ed. 1986) (noting that "Lombroso had asserted that criminals, compared with the general population, would show anomalies," and that he "utiliz[ed] the method of control group comparisons in the application of statistical methods to his problem").

211. See LOMBROSO, *supra* note 209, at 182 (noting that statistics show that women commit fewer crimes than men); *id.* at 219 (stating that poverty has a "great deal" of importance in determining criminality); Parmelee, *supra* note 205, at xv-xvi (noting that acts that would normally be considered criminal cannot be considered as such when committed by a child or a savage).

Lombroso aspired to an even more direct kind of role with the state. His criminal anthropology was nothing if not an often harsh critique of Italian state institutions. His new positivist machinery could turn the prisons into laboratories for new crime policies; ones anchored in police and administrative structures rather than classic criminal courts. He openly campaigned for positivist ideas to shape Italian legislation and criminal procedure.<sup>212</sup> His frequent appearance in popular American periodicals speaks to his personal interest in intervening in the construction of the American state as well (where he correctly believed that his ideas were receiving a warmer welcome than on the Continent).<sup>213</sup>

Lombroso's empirical claims supported a range of institutional innovations, many of which emerged in the United States, including eugenic sterilization, treatment-oriented reformatories for those not born to crime, indeterminate sentences that permitted those unamenable to treatment to be maintained in custody, a separate juvenile system, and specialized treatment for inebriates and the mentally defective, among others.<sup>214</sup> Indeed, it is difficult to imagine progressive penalty in the United States without Lombroso.

Once criminal anthropology had launched itself as a criminological expression of positivism, it quickly defined itself in opposition to the classical criminology that had always viewed itself as a branch of jurisprudence. The classicists, epitomized by Beccaria's widely read tract, *On Crimes and Punishments*, were concerned with replacing the monarchical tradition of secret, arbitrary, and cruel proceedings with transparent laws and punishments aimed at the mildest deterrent that is effective.<sup>215</sup> Law was, in effect, the key mechanism of classical criminology, and its proponents addressed themselves to drafting legal codes and constructing prisons to provide a humane and easily divisible punishment.<sup>216</sup>

To Lombroso and his young followers, classicism was blind to the social realities of modern nation-states and their often bloody struggles to achieve the unified and coherent state that classicism presupposed.<sup>217</sup> Moreover, classicism's doctrine of fundamental equality of capacity among

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212. See HORN, *supra* note 41, at 33–39 (discussing Lombroso's policy creation efforts).

213. *Id.* at 138–39 (relating that while Lombroso had little confidence that his work would have impact in Italy, he described the United States as having “conscientiously applied scientific knowledge of criminal anthropology to criminal therapeutics”); RAFTER, *supra* note 41, at 114 (noting that Lombroso primarily influenced Americans through his writings in secondary sources).

214. See ROTHMAN, *supra* note 13, at 43–81 (analyzing the development of the concept of individualized justice in America during the Progressive Era).

215. Garland, *supra* note 195, at 31–32.

216. See PIERS BEIRNE & JAMES MESSERSCHMIDT, *CRIMINOLOGY* 66–69 (3d ed. 2000) (describing tenets of classical criminology, which include advocating for punishment legislation that would replace torture and capital punishment with imprisonment and ensure the length of imprisonment is proportionate to the crime).

217. See GIBSON, *supra* note 8, at 12–13 (explaining how pessimism about the state of crime in newly unified Italy helped boost the ideas of criminal anthropology and positivism).

subjects and free will did not fit the reality positivists saw of distinct populations mired in poverty, ignorance, and (in their view) biological deficits.<sup>218</sup>

Lombroso's Darwinism, his empiricism, and his embrace of statistical methods have been widely appreciated by his contemporaries and subsequent historians.<sup>219</sup> The recent scholarship on Lombroso has raised two other background ideas that have been less visible. One is sexuality—particularly with respect to women criminals—which Lombroso believed was a key element.<sup>220</sup> Criminal women were overstimulated by sexual drives.<sup>221</sup> He also devoted extensive discussion in his book on women to the subject of lesbians, whom he treats as a criminal type.<sup>222</sup> Rafter and Gibson argue that Lombroso should be seen as one of the pioneer sexologists (along with Kraft-Ebbing and Havelock-Ellis).<sup>223</sup>

In this respect we can see Lombroso's project as related to the broader family of knowledge and power projects that Foucault described as "bio-power."<sup>224</sup> Lombroso's pull to bring the sexual within his criminological enterprise may reflect his awareness of the emergence of sexuality as the key intersection for the problem of individual health and the well-being of whole populations.

A final theme of great importance to appreciating the import of Lombroso today is his nationalism and role in the 1861 reunification of Italy. As a young physician, Lombroso served as a military doctor during the civil wars that followed and later served the Italian state as a physician in asylums and prisons.<sup>225</sup> Recent scholars argue that Lombroso came to criminology as a way of addressing the crisis of the Italian state caught between its political liberalism and the harsh social differences between the different regions of the country, especially between the productive capitalist north and the highly patronist and backwards south.<sup>226</sup>

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218. Rafter & Gibson, *supra* note 41, at 18–20.

219. GIBSON, *supra* note 8, at 3–5.

220. LOMBROSO & FERRERO, *supra* note 40, at 171–75.

221. *Id.* at 171–72.

222. *Id.* at 176–81.

223. See Rafter & Gibson, *supra* note 41, at 21–22 (noting that Lombroso was a transitional figure between Victorian prudery and modern sexology). Of course the most interesting comparison may be with Freud. Both were Jewish physicians from respectable middle class and assimilated backgrounds, and both were politically liberal and modestly nationalist.

224. MICHEL FOUCAULT, *HEALTH AND MEDICINE* 115–16 (Alan Petersen & Robin Bunton eds., 1997).

225. Rafter & Gibson, *supra* note 41, at 15–16.

226. See GIBSON, *supra* note 8, at 4; Rafter & Gibson, *supra* note 41, at 15. A century later these regional differences have continued to fascinate political scientists, most notably Robert Putnam. ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 180–81 (1993) (concluding that the drastically different social backgrounds of Northern and Southern Italy had a large impact on results of regional government reforms first instituted in the 1970s).

This theme is also crucial for appreciating the striking and reciprocal attraction between Lombroso and the United States. Both Italy and the United States were experiencing the direct aftershocks of major new efforts in nation building and civil wars. Both were dealing with the challenge of integrating regions of vastly different social and economic conditions into a theoretically free market and liberal political system. In both societies, criminal violence was becoming a major focus for moral panics about this governmental crisis. Lombroso saw himself as a patriot coming to the defense of the floundering project of Italy, and he saw criminology as a state project that, broadly conceived, involved a thorough reform of administrative capacities along with a scientific expertise able to identify and isolate the dangerous residues of primitivism within modern society that threatened to wreck its delicate passage to freedom. He saw the United States as similarly situated and perhaps even more ready to heed his ideas.<sup>227</sup> While Italy was generally considered one of the economically weakest European countries at the time and the United States was already considered one of the most powerful in the world, this generality hid massive regional variations within both.

For Lombroso, and I would argue his American promoters, criminology was the quintessential “political science” that could save the liberal state from its own constitutional blindness to the extraordinary variation in conditions in different regions and between different classes in society. This is something related to, but more than and different from, suppressing crime. The true object of criminology, on this account, is nothing less than the construction of the modern nation-state.

#### IV. Ghost in the Disciplinary Machine: Positivism and Contemporary American Crime Control

To what end do we reconsider the work of Lombroso? While American penal policy in the middle decades of the twentieth century took on many of the features that positivists promoted—especially indeterminate sentencing, clinical examination of inmates, and civil commitment for inebriates, drug addicts, and the criminally inclined mentally ill—the last quarter of the century witnessed an apparent turn away from the influence of the positivist project.

The decade between 1975 and 1985 saw two notable swings in American penal law and practice. First, the rate of imprisonment in the United States was at or near its century low in 1975 and for the next ten years

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227. See HORN, *supra* note 41, at 138–39 (noting that in 1895, Lombroso, relying on the “opening of a bureau for degenerates and abnormal people in Washington, and the founding of the Elmira Reformatory,” recognized that the United States, and not Italy, could boast of applying his theories). The New York State Reformatory at Elmira, which opened in 1876, was the “first prison to claim to operate on the assumption that inmates are sick and in need of treatment.” RAFTER, *supra* note 41, at 94–95. Lombroso characterized Elmira as the “oldest and most celebrated of these reformatories.” FERRERO, *supra* note 91, at 192–94.

rose without interruption—a rise that would continue for most of the next twenty years.<sup>228</sup> Second, the steady twentieth-century rise of rehabilitation through expert therapies that had emerged as an official rationality to state punishment came to a complete halt.<sup>229</sup> The first is not necessarily a consequence of the second, but both have been attributed to a turn toward retributivism in state policy and away from the view that penal policy ought to be set by scientific understanding of criminal behavior and its consequences. For a long time, enlightened opinion among legal and political elites had favored an optimism that scientific methods would produce effective and humane penal treatments that would take the place of harsh and useless punishments.<sup>230</sup> Even before this view became, for some time, an official penology, it exerted a substantial resistance to the harshness of criminal sentences.<sup>231</sup> Thus even where states had not embraced retribution fully, they now operated with less pressure against making the laws harsher.

A more granular look demonstrates that this turn was not as complete or coherent as it seemed at the time.<sup>232</sup> The penal logics expressed in sentencing reforms since then have been described as “volatile and contradictory.”<sup>233</sup> Penal practice and theory in the United States remains a hodge-podge of different ideas and practices. Parole, probation, juvenile justice, and even indeterminacy continue to be practiced in many states, albeit retro-fitted with many more punitive elements.<sup>234</sup>

A century after Lombroso's death in 1909,<sup>235</sup> the United States continues to be fertile ground for a Lombrosan vision of crime as a mortal threat to society. More importantly, many of the key elements of Lombroso's positivist project have continued to operate in the administration of justice and in the popular imagination of crime control even as the coherence and prestige of positivist theory has declined. While Lombroso's vision of criminology as producing a comprehensive pathology of human criminality based on the model of medicine is largely defunct, his sense that positive knowledge of crime would become a central kind of “political science” has continued to be accurate. Lombroso felt a special kinship with the United States, and he wrote popular articles for the American readership because he

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228. For a recent description of that build-up and summary of its possible causes see TONRY, *supra* note 2, at 63–84.

229. Malcolm Feeley and Edward Rubin argue that this is inherent in the way a democratic rule of law state approaches prisons. See MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* (1999).

230. ALLEN, *supra* note 5, at 5–8.

231. CULLEN & GILBERT, *supra* note 56, at 261–63.

232. ALLEN, *supra* note 5, at 10.

233. Pat O'Malley, *Volatile and Contradictory Punishment*, 3 *THEORETICAL CRIMINOLOGY* 175, 178 (1999).

234. Reitz, *supra* note 4, at 1797–98.

235. GIBSON, *supra* note 8, at 6–7.



sensed that Americans would embrace his call for a science-based way to repress criminality. Italy, like the United States, fought a civil war and forged a new kind of national government in his lifetime, yet both continued to live with very deep regional differences.

#### A. *Crime Control as Science*

At the heart of Lombroso's project was the link between penal practice and mechanisms of scientific data collection and analysis.<sup>236</sup> Although American crime policy in the last quarter century has accurately been characterized as "populist,"<sup>237</sup> this science project has continued unabated and has become ever more integrated into policing, corrections, and the administration of justice. During the "War on Crime," the federal government has pumped research funding into this science project and, as a result, criminology as a discipline has grown rapidly.<sup>238</sup> Moreover, while crime legislation is often populist and undirected by criminological expertise, the administration of justice has become steadily more technocratic and technological.<sup>239</sup>

There is a paradox here when we compare scientific criminology with its close cousin, criminalistics. At the end of the nineteenth century there were two kinds of scientific expertise emerging around the problem of governing crime: a project of positive criminology, which attempted to identify criminal types and to predict the criminal risk posed by different persons, and a project of criminal identification, or "criminalistics," that aimed at providing reliable methods for identifying persons over time.<sup>240</sup> These new police sciences involved the use of new technologies, including measuring devices and photography, and very clearly served the growing state bureaucracies of criminal justice by expanding the capacity of the state to track those it had convicted of crimes in the past and thereby to render more likely their recapture should they continue to commit crimes. In contrast, Lombroso's positive criminology side-stepped the legal apparatus of criminal conviction

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236. Charles A. Ellwood, *Lombroso's Theory of Crime*, 2 J. AM. INST. CRIM. L. & CRIMINOLOGY 716, 716–18 (1912).

237. GARLAND, *supra* note 1, at 13; FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 201 (2001).

238. See Gresham M. Sykes, *The Rise of Critical Criminology*, 65 J. CRIM. L. & CRIMINOLOGY 206, 206–11 (1974) (analyzing the growth of "critical" criminology, spurred both by the government and in response to it); see also Joachim J. Savelsberg, Lara L. Cleveland & Ryan D. King, *Institutional Environments and Scholarly Work: American Criminology 1951–1993*, 82 SOC. FORCES 1275, 1277–79 (2004) (discussing sources of institutional growth of criminology since the 1960s).

239. See, e.g., Robert F. Meier, *The New Criminology: Continuity in Criminological Theory*, 67 J. CRIM. L. & CRIMINOLOGY 461, 464–67 (1976) (highlighting the increasing specialization and jargon used by "new" criminologists).

240. For Lombroso's relationship to these "police sciences" of measurement and identification see HORN, *supra* note 41, at 16–25.

and instead served the state's capacity to repress crime through a variety of mechanisms—eugenic, medical, educational, and penal.<sup>241</sup>

Fingerprinting emerged as the most promising technology of the criminalistic side of this new power-knowledge formation.<sup>242</sup> As recent scholarship on the history of criminalistics has shown, the field remained highly stunted in its scientific development, rejecting the experimental method and refusing to associate itself with academic science.<sup>243</sup> Instead, it has flourished as a kind of invisible adjunct to the police—until the recent spate of exonerations began to shed light on how poor actual results are. Perversely, the popular television series *CSI*<sup>244</sup> has created an image of criminalistics as highly scientific.

In the meantime, positive criminology has retained and strengthened its ties to academic science. Compared to Lombroso's work, the scientific quality of experimental and statistical methods has improved greatly, especially after World War II. Ironically, this commitment to science probably helped weaken the hold of positivism as a governing ideology in crime control because the optimistic promises of criminology to produce effective treatments for crime were relentlessly crushed by its very scientific method.<sup>245</sup>

### *B. Natural Born Killer: Positivism and Populism*

The part of positivism that has been influential on the public imagination of crime control, however, is not its scientific technique but its popular premise that criminals belong to a distinctive type (or types) and that once identified, significant crime control can be achieved by targeting persons that belong to these high-risk categories. This was the message that Lombroso was so anxious to communicate that he wrote directly for ordinary Americans in popular magazines.

Right through the period of neoclassicism and retributivism in the 1980s and 1990s, the idea that criminals are distinct, that we can find ways to identify them, and that we should remove them from society has continued to maintain its hold. Beyond the rhetoric of retribution and deterrence, the promise that government can ultimately protect “us” from “them” has influenced policing, criminal legislation, and the administration of crime

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241. See *id.* at 133–39 (discussing the negligible impact of Lombroso's theories upon actual court processes, but noting “the opening of a bureau for degenerates and abnormal people in Washington” and similar state-sponsored projects in Italy).

242. See SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL INVESTIGATION 3–5 (2001) (noting that fingerprint identification has become “virtually incontestable”).

243. *Id.* at 259–61.

244. The series began in 2000 with *CSI: Crime Scene Investigation* (CBS television) and has since added *CSI: Miami* (CBS television) and *CSI: New York* (CBS television).

245. JONATHAN SIMON, POOR DISCIPLINE: PAROLE AND THE SOCIAL CONTROL OF THE UNDERCLASS, 1890–1990, at 94–95 (1993).

control. Thus, at the same time retribution and deterrence were being emphasized in raising sentences for crimes in the 1980s, purely incapacitative measures like pretrial detention were also being instituted along with bail being explicitly redefined as involving public safety.<sup>246</sup> During the 1990s, state legislatures and Congress often responded with extraordinary speed to the shifting array of monstrous criminals displayed in sensational media stories involving serial killers, child abductors, foreign drug kingpins, and gangs of super predator youths.<sup>247</sup> These laws, including sex offender registration and notification laws, sex offender civil commitment laws, and expansions of the list of aggravating factors or special circumstances in state capital sentencing laws, may not have a quantitatively large effect on prison populations, but they invest legal authority in the very symbols of fear that help sustain the “us” versus “them” view of crime that is positivism’s populist legacy.<sup>248</sup>

Our long “War on Crime” has succeeded in creating a massive class of prisoners and former prisoners.<sup>249</sup> This class is largely contiguous with the classes that nineteenth-century criminological positivists like Lombroso would have focused on, including the poor, recent immigrants, and minorities.<sup>250</sup> The rapid proliferation over the last quarter century of laws that link long, and typically mandatory, incapacitative sentences to past felony convictions, in combination with otherwise legal activities (like being a felon in possession of a weapon)<sup>251</sup> or relatively minor crimes,<sup>252</sup> gives prosecutors enormous discretion to eliminate individuals from society in large numbers without the usual checks assumed to come from legislative guidance or common law burdens.<sup>253</sup> The incapacitative thrust of these

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246. See *United States v. Salerno*, 481 U.S. 739, 755 (1987) (recognizing an interest in the pretrial detention of arrestees for public safety).

247. Gregory K. Laughlin, *Playing Games with the First Amendment: Are Video Games Speech and May Minors’ Access to Graphically Violent Video Games be Restricted?*, 40 U. RICH. L. REV. 481, 483–86 (2006) (noting the response of many state legislatures to school shootings).

248. For how this operates in the capital sentencing context see Jonathan Simon & Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 81, 82–83 (Austin Sarat ed., 1998) (examining aggravating factors as “portraits of evil” that have widespread recognition among populations).

249. TONRY, *supra* note 2, at 21; Theodore Caplow & Jonathan Simon, *Understanding Prison Policy and Population Trends*, 26 CRIME & JUST. 63, 63 (1999).

250. This is suggested by the discussion above of Lombroso’s analysis of American homicide rates. See *supra* notes 155–76 and accompanying text.

251. See, e.g., CAL. PENAL CODE § 12021.1 (Deering 2006) (making it a crime to be in possession of a firearm if that person has been convicted of certain violent crimes).

252. See, e.g., CAL. PENAL CODE § 667.7 (Deering 2006) (enhancing punishment based upon previous convictions).

253. William Stuntz demonstrates this quite convincingly in public choice terms. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 551–52 (2001) (arguing that broad criminal liability gives prosecutors an extra bargaining chip when dealing with defendants).

recidivist laws is multiplied by a host of other laws and administrative policies adopted during the “War on Crime” that have dramatically increased the likelihood of an initial prison term for members of the same mistrusted populations, including harsh drug laws and zero tolerance policing policies.

In combination, this popular positivism—which believes that dangerous individuals can be identified by scientific methods—along with a criminal justice system that front-loads discretion in the hands of popularly elected prosecutors and the police (which is a closed society with its own even more virulent belief in what I am calling popular positivism) and the creation of a mass population with the legal disabilities of imprisonment has aided and abetted, if not driven, the expanded scale and excessive severity of American crime policy since the 1980s.

While Lombroso railed against jurists and wanted crime control to be taken out of the hands of courts and formal adjudication,<sup>254</sup> Americans, including lawyers, generally reject that message in favor of the view that law could incorporate the insights and objectives of positivism without Americans losing their freedom to an overbearing administrative state. Contemporary American crime control reflects this synthesis in two ways. First, the system of prosecutorial and police discretion has always allowed non-legal judgments of dangerousness to influence the selection of subjects for legal prosecution.<sup>255</sup> Second, new laws allow prosecutors even greater flexibility in pursuing extended removal of criminals deemed especially dangerous. These include extended punishment for felons found to be in possession of a firearm during “any crime of violence or drug trafficking crime,”<sup>256</sup> as well as laws allowing incapacitation to be pursued beyond the prison sentences of some offenders through sexual predator commitment statutes,<sup>257</sup> and mandatory detention and deportation of non-citizens convicted of a wide variety of crimes.<sup>258</sup>

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254. See HORN, *supra* note 41, at 136 (“[T]he authority of science in the courtroom was far from assured: ‘since judges and, even more so, members of the jury are not scientists, and are instead for the most part averse to science, they would become fed up by an excess of subtle scientific analyses and would not be able to follow the witness; they might indeed arrive at a contrary verdict out of spite or boredom.’”).

255. See Wendy Keller, *Disparate Treatment of Spouse Murder Defendants*, 6 S. CAL. REV. L. & WOMEN’S STUD. 255, 261 (1996) (explaining that prosecutorial decisions are based on “non-legal factors such as politics, community pressure, and a variety of prejudices”).

256. 18 U.S.C. § 924(c) (2000). For a discussion of this and other possession laws allowing police and prosecutors greater flexibility, see MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS’ RIGHTS* 32–97 (2002).

257. The most litigated example is Kansas’s Sexually Violent Predator Act, KAN. STAT. ANN. §§ 59-29a01 to a21 (1994), which was upheld in *Kansas v. Hendricks*, 521 U.S. 346 (1997) and *Kansas v. Crane*, 534 U.S. 407 (2002).

258. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.); Uniting and Strengthening America by Providing

In some ways the local nature of both in the United States perfectly achieves the flexibility to deal with regional differences that Lombroso promoted and assumed could not be achieved in the vision of unified liberal state law. Lombroso would have applauded the incapacitative potential of these policies that allow the “dangerous” to be eliminated from society, although he would have been surprised at how Americans have embedded this within their legal system rather than the kind of medico-administrative system he advocated for Italy.

Only Lombroso the scientist might have worried about the subordination of scientific positivism, the testing of dangerousness presumptions against data, and the lack of independent scientific authority in the process. The scientific legacy is also present but is less visible. Two examples on the defense side of the line reflect the scientific side of positivism’s sense of criminals as pathological “others” with clear separation between “us” and “them.” One involves the now familiar “battered woman syndrome” defense in criminal cases.<sup>259</sup> Women accused of killing their domestic partners in circumstances that would not normally support a self-defense theory (e.g., because the victim was asleep), have successfully introduced expert testimony as to the long-term effects domestic violence has on abused women.<sup>260</sup> While Lombroso himself preferred biological explanations, psychological syndromes fit perfectly into the fundamental presumptions that crime is powerfully determined by diagnosable pathologies in the criminal subject.

Another defense example comes from the world of death penalty defense in which neurology, the science of the brain, has become one of the most crucial forms of expertise<sup>261</sup> and figures prominently in the professional conferences of capital defense lawyers. Brain injury or defect, leading to inability to control impulse and aggression, is one of the most common theories offered by the defense in mitigation during the sentencing phase<sup>262</sup> and to governors when seeking clemency.<sup>263</sup>

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Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

259. See LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 7–13 (1984) (giving a general description of the battered woman syndrome).

260. One of the most widely cited is *Ibn-Tamas v. United States*, 455 A.2d 893 (D.C. 1983).

261. See, e.g., Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838 (1986) (detailing the neurological disorders of death row inmates).

262. AM. BAR ASS’N, *GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES*, Guideline 4.1 (rev. ed. 2003), reprinted in 31 HOFSTRA L. REV. 913, 952–57 (2003).

263. See Neal Walker, *Executive Clemency and the Death Penalty*, 22 AM. J. CRIM. L. 266, 267–68 (1994) (“[H]istorically, mental disabilities have been one of the chief reasons governors have commuted death sentences in this country.”).

## V. Conclusion

Lombroso is largely forgotten today among the general public as well as legal and criminological experts, recalled for us now largely thanks to the work of historians and anthropologists. But his project, linking the institutions of incarceration with science-infused cultural assumptions about dangerousness through the resources of an expansive administrative state, remains deeply embedded on all sides of the crime debate in America. If this is right, it will take more than a step back from retributivism to move America away from its current hyper-levels of incarceration, and here we can end on a note of normative hope.

Lombroso's project grew out of his own intuition that fears of criminal dangerousness posed a mortal threat to the modern state and that criminology was a critical tool of liberal governance. This intuition found its most fertile home in the United States. If it remains true that criminology is a fundamental form of political knowledge for American democracy, we then close with questions for another time: What might a post-positivist criminology look like, and how might it influence American crime control?<sup>264</sup>

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264. One intriguing approach is "situational crime prevention" which uses empirical scientific methods to focus preventive strategies not on potential criminals so much as on potential criminal situations by varying design features of the built environment and the organization of routine activities. See generally Paul Ekblom & Nick Tilley, *Going Equipped*, 40 BRIT. J. CRIMINOLOGY 376, 376-77 (2000) (proposing to advance the "situational crime prevention" theory "through a specific focus on offenders' resources for committing crime, cast within a general conceptual framework for the immediate causes of criminal events").