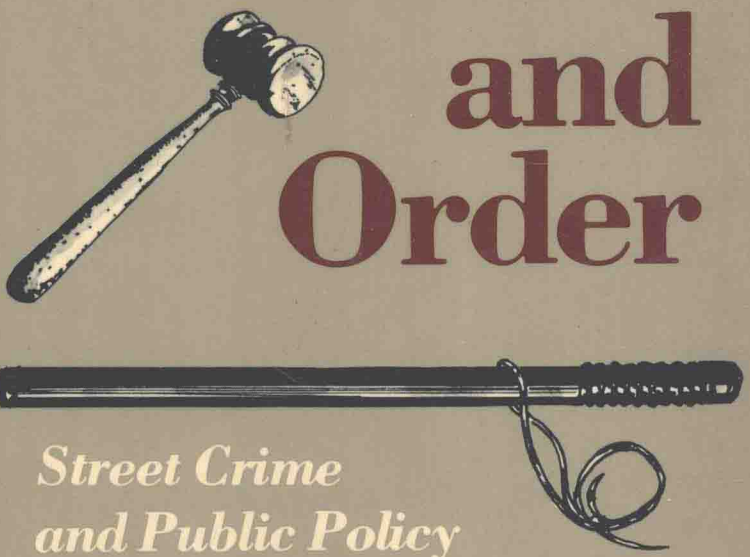
The Politics of Law and Order



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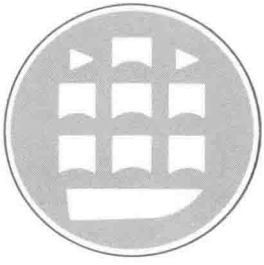

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THIS BOOK IS FOR LEE

I can only hope
that it is worthy of her

Foreword

In 1974, Stuart Scheingold published *The Politics of Rights,* a book which explored the nature and impact of public interest litigation on the political process in the United States. The thesis of that book was that law has two lives whose impact is experienced and must be understood on two quite different levels. There is, Scheingold wrote, "the concrete institutional existence of the law" which is familiar to us. But, he continued, law "also has a symbolic life; it resides in the minds of Americans." He then went on to explore the significance of the symbolic form of law, demonstrating how law conditions perceptions, establishes expectations and develops standards for legitimacy of policies, in short how it affects the context in which politics is conducted in the United States.

In *The Politics of Law and Order,* Scheingold builds on and extends this earlier work, merging his cultural-symbolic perspective with conflict theory in criminology. The result is a penetrating examination of crime and crime policy in North America. He begins by examining the appeals and shortcomings of both mainstream and radical commentators on criminal justice, showing how their common-sense assumptions are oversimplified and their policy prescriptions flawed. Most of these discussions of crime policy, he argues, suffer because they do not take into account the symbolic nature and consequences of crime policy and because they fail to recognize the complexity of the phenomena of crime. In contrast he maintains that his perspective provides a richer and more insightful means for understanding the criminal process and for developing policies about crime.

Having presented this framework and distinguished it from others' views, Scheingold then employs it in his examination of the criminal justice

issues confronting the public, the police, prosecutors, and judges. The results of this examination are illuminating and often fly in the face of conventional wisdom. For instance, while liberal observers of the criminal process are nearly united in their desire to restrict, structure and limit official discretion, Scheingold unabashedly embraces policies that would significantly expand it.

This book should appeal to a wide and diverse audience. Social theorists will be fascinated by Scheingold's effort to merge cultural-symbolic analysis with conflict theory. Criminal justice policy analysts will find many of their cherished notions challenged and be forced to reconsider their most comfortable assumptions as they confront Scheingold's novel new ideas. Students seeking an overview of the criminal justice system, will find a lucid critique of major perspectives on crime, and an incisive and original discussion of the central problems of the criminal process. Ultimately, whether or not one agrees with Scheingold's central thesis, *The Politics of Law and Order* will force all its serious readers to rethink many of their long-held views on crime and the nature of the criminal process.

Malcolm M. Feeley
PROFESSOR
MADISON, WISCONSIN

Preface

Beginning in the mid-1960s, crime, especially street crime, became a political issue of considerable importance at both the local and the national levels. How are we to explain the sudden emergence of crime as a political issue? What consequences have followed from this politicization of crime?

At first glance, the answers to these questions seem obvious enough. Crime became a political issue because of popular dissatisfaction with a rising crime rate. Certainly crime began increasing at an alarming rate at roughly the same time that the fear of crime began to spread through the society. The results of politicization also seem obvious: the government declared war on crime, federal monies were channeled through the states to local law enforcement agencies, and by about 1973 the crime rate had leveled off. Read in this way, the last two decades can be interpreted as a textbook example of responsive government.

On closer inspection, the politicization of crime turns out to be a much more complicated story. It is true that the fear of crime was rising along with the crime rate during the late 1960s and early 1970s, but the calls for law and order which symbolized the public's reaction to crime reflected concerns transcending crime as such. During that period, the country was also convulsed by protests against racial injustice, poverty, and the war in Vietnam. Particularly as these protests spilled over into the streets, public anxieties about social order began to increase. Calls for law and order were, then, integrally linked to an unsettling sense of rapid and unwelcome social change as well as to the crime rate.

The story of politicization is further complicated by the fact that politicization and the crime rate have not really moved in parallel paths. To

take just one example, one would have never known as the 1982 elections approached that crime had leveled off in the mid-1970s—much less that there were signs after 1980 of an actual decrease in crime. Tom Wicker, hardly one to play up the public's anxiety about crime, interpreted the opinion data in the summer of 1982 as revealing "a picture of a nation in fear."[1] And politicians on both the right and left were inclined to see crime as a promising issue—"the issue" according to Rep. Geraldine Ferraro.[2]

Finally, there is little or no reason to believe that the crime picture has improved because of the additional resources made available to law enforcement officials or because of get-tough policies which are associated with the calls for law and order.[3] If the crime wave is actually receding, it probably has more to do with demographic changes than with policy changes.

> The fact of the matter is that crime often increases or decreases for wholly mysterious or uncontrollable reasons—like the number of male youths in the population. The number of murders in New York recently fell 14.4 percent, for instance, but no one knows exactly why. And it is to the everlasting credit of the police chief there, Robert J. McGuire, that when asked to account for the wonderful new numbers, he simply said he could not.[4]

This view, expressed by columnist Richard Cohen, tends to be shared by criminologists and by many police executives in addition to Chief McGuire.

The essential point is that the "politics of law and order," the subject of this book, turn out to be a good deal more puzzling on careful analysis than seems to be the case on first glance. The key to the puzzle, as I see it, is the realization that crime control, the ostensible objective of the politics of law and order, frequently takes a back seat to the scramble for power and position among politicians and among participants in criminal process as well. Politicians in search of an issue have good reason to believe that campaigning on crime is good politics—at least if one takes a get-tough stand. Law enforcement officials are also well served by the fear of crime, since the result is frequently that more resources are directed to the agencies of criminal process.

This more complex view of the politics of law and order leads us back to slightly different versions of the two questions posed initially. We are led to wonder, in the first place, just how, when, and why the public is so easily aroused and so punitively inclined on the crime issue? Politicians who choose to campaign on crime may find that they have a tiger by the tail. "If you are a politician," columnist Cohen tells us, "there is nothing quite as bad as being called 'soft on crime.' "[5] We are, in the second place, led to wonder whether politicization has much of an impact on operative policy. Crime control is, after all, only the ostensible objective of the politics of law and order, and nobody really knows how to control

crime anyway. Consequently, there is reason to suspect that, for better or worse, get-tough political promises may not actually be kept.

These two questions are the primary foci of this book. My point of departure is, briefly put, that the politics of law and order has a life of its own which is quite independent of crime and criminal victimization. The case which I can make for this controversial point of view is incomplete and circumstantial, because there is a shortage of directly relevant empirical research. Still, in systematically calling attention to the symbolic dimensions of the politics of law and order, I am doing no more than applying to criminal process a perspective which has proven useful for analyzing other political problems. It, of course, remains to be seen whether my interpretation will stand up to empirical inquiry and, indeed, I have already undertaken such research myself. If this book does no more than prompt further research, it will have served an important purpose. I also hope, however, that the book will make a contribution of its own by providing a plausible and coherent account of the politics of criminal process.

This book has been a very long time in the making and I fear that I shall not be able to recall all of the people who have helped me along the way. To anyone who has contributed and whom I fail to mention, I offer my profound apologies and the consolation of not being associated with this rather unorthodox look at crime and criminal process. Of course, those who are mentioned do not share in the responsibility for my sins. All too often, I have failed to heed their advice.

Since the empirical follow-up which I have already begun is so inextricably linked to this book, I must first acknowledge my debt to the Law and Social Science Program of the National Science Foundation for financial assistance and to its estimable director, Dr. Felice Levine, for the encouragement that has made it so much easier to push ahead. Several of my colleagues at the University of Washington and elsewhere have read major portions of this manuscript and commented in great detail including Dan Lev, Lance Bennett, Malcolm Feeley, David Olson, Sandy Muir, Erza Stotland, and Marvin Zetterbaum. Others who have provided helpful critiques of one or another portions of the manuscript are Craig Carr, Lief Carter, Bob Erwin, Erika Fairchild, Herman Goldstein, Ed Greenberg, Bill Haltom, Greg Hill, Herb Jacob, Hubert Locke, David Neubauer, Jon Pool, Charles Silberman, and Marlie Wasserman. Nor should I forget the Thursday cabal and especially Malcolm Griffith with whom I developed my ideas for the use of popular fiction. As usual, my students had to persevere through all the stages of this project and they contributed more than they will ever realize. Working with Longman Inc. has turned out to be a real pleasure thanks to cooperative and efficient people like David Estrin, Joan Matthews, and most of all, Irv Rockwood, who has been patient, gracious, and sensible through waves of delay and

equivocation on my part. I have dedicated this book to the most important person in my life. She has born the heaviest burdens of this project and she alone has made it all worthwhile.

S.A.S

NOTES

1. *The New York Times,* 9 July 1982
2. *Ibid.,* 16 March 1982
3. Elliott Currie, "Fighting Crime," *Working Papers Magazine* 9, no. 4 (July/August 1982): 16–25.
4. *The Washington Post,* 11 July 1982
5. *Loc. cit.*

Contents

Part I

Crime

1

Perspectives on Crime

CRIME AND COMMON SENSE

Among the most vexing aspects of crime in America is its capacity to survive all the policy assaults mounted against it. Why is it that we cannot keep crime within manageable limits? Street crime, which is the principal concern of this book, is a crude and reprehensible activity conducted by people who, for the most part, are without talent or training. Arrayed against these outcasts is a veritable army of trained professionals backed by committed political leaders and an aroused public. Common sense tells us that it should be no contest, and so when crime continues to flourish we become frustrated and angry.

The objective of this book is not to provide a solution to the problem of crime but to demonstrate how misleading our common-sense understandings are. Lurking beneath the surface is a complexity that makes crime an intractable problem. Once we understand the full extent of the problem, we shall be less beguiled by the easy answers offered by politicians, journalists, and some criminal justice professionals. Our preoccupation with easy answers leads us toward scapegoats and allows us to fall prey to demagogic politicians. While there may be no solutions to the crime problem, there are better and worse ways of responding to it. We shall be able to make the better choices only when we are able to transcend the cops-and-robbers images that tend to dominate our thinking about crime.

Common sense suggests that society has established rules that must be followed if we are to live together in reasonable harmony. Some of these rules are merely conventions. For example, it is not important whether

people drive on the right or the left side of the road—only that a choice be made and that we abide by it. Other rules are important in their own right because they prohibit behavior that we deem intrinsically wrong, such as rape or murder or robbery. But whether rules are rooted in moral imperatives or are designed simply to promote predictable social interaction, violations call for condemnation. Society cannot function if it is constantly jeopardized by behavior that puts lives, safety, or property at risk.

Mainstream American responses to crime are drawn from this common-sense perspective. The focus is on criminals and on preventing them from committing crimes. There are, however, rather sharp differences between liberals and conservatives on how this can best be done. Liberals are inclined to trace criminal behavior to social causes, such as poverty and racism. As a result, liberals look to policies that will reduce social inequities and increase opportunities. Conservatives think that there are fundamental differences between criminals and the rest of us. That is, criminals suffer from some basic character defect and must be segregated from society or at least dealt with in a restrictive fashion. Society must, in short, make it difficult and costly to commit crimes in order to compensate for the criminal's lack of social conscience, self-control or both. Whereas liberals favor the carrot, conservatives prefer the stick.

But we should not exaggerate the differences between conservatives and liberals. In actual practice, society tends to pursue liberal and conservative policies simultaneously—albeit with discernible drifts in one direction or the other. These days, conservative forces seem to be in control; fifteen to twenty years ago, liberal programs predominated.

One reason why the society can accommodate to these shifts and even to a continuing mélange of liberal and conservative policies is that the differences between liberal and conservative thinking are not nearly so great as appears at first glance. Both views share a belief in the legitimacy of basic rules. Both liberals and conservatives agree that whether criminals are seen as victims of circumstances or deficient human beings, they have violated the social contract and must either be brought into the mainstream or excluded from it. Neither liberals nor conservatives raise fundamental questions about the viability or desirability of mainstream American life.

Nevertheless, radically different understandings of crime in America exist. Marxism provides the most coherent and theoretically sound alternative to the mainstream view. According to Marxists, capitalism is criminogenic, and the real criminals are the capitalists. Crime is a by-product of capitalism, and the only effective way of ridding society of crime is to do away with capitalism and embrace socialism. Mainstream and Marxist views are, in a sense, mirror images. "One group would resocialize, or even liquidate, the poor, while the other would resocialize, or even liquidate, the rich."[1]