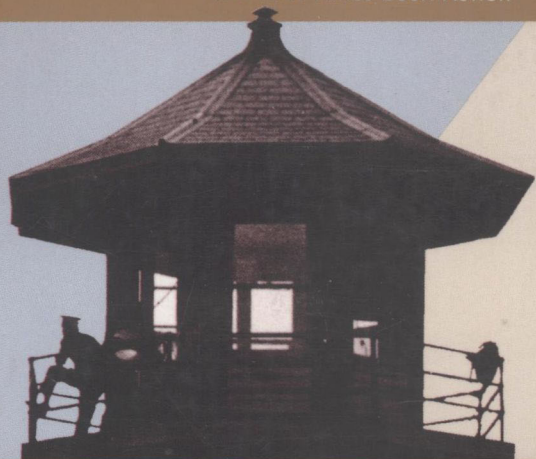
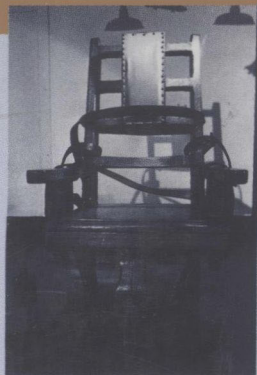
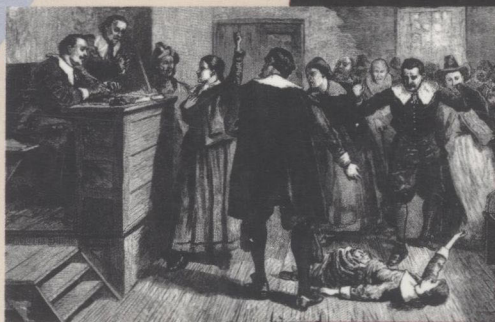


"An impressive panoramic history of the American criminal justice system."
—New York Times Book Review



C RIME AND PUNISHMENT IN AMERICAN HISTORY



LAWRENCE M. FRIEDMAN

CRIME AND
PUNISHMENT
IN AMERICAN
HISTORY

LAWRENCE M. FRIEDMAN

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**CRIME AND PUNISHMENT IN
AMERICAN HISTORY**

For Leah, Jane, Amy, Paul, and Sarah

PREFACE

THE BOOK THAT FOLLOWS IS A GENERAL HISTORY OF AMERICAN CRIMINAL JUSTICE, from its beginnings in the seventeenth century to the present time. This is a vast subject, one that, frankly, has to be approached with a certain amount of fear and trembling. There is more to know about crime and punishment in this society than any human being can possibly know. The research on the subject, up to now, has been both thick and thin: so thick in some parts of the subject that no one can cope with it, certainly not I; in others so thin and wan that the intrepid storyteller is reduced to guesswork, weaving great swatches of narrative from little rags of data. Moreover, there is no way to tell it all, no way to make the story complete. The author is forced to make choices, to throw the spotlight on some parts of the subject while others are left in the shadows. In this day and age, this is bound to leave some readers frustrated or disappointed.

For many of the people who read this book, in a library or in the comfort of their homes, the world of crime and punishment may be something of a foreign country, one with strange customs, language, and manners; they stumble about like tourists clutching a phrase book. It is hard for the comfortable, the respectable, the solid middle class to imagine themselves in the shoes of the people on either side of the equation—those accused of crime, on the one hand; and the police, judges, wardens, and prosecutors, who do the accusing and the judging and the punishing, on the other.

I cannot pretend to be much better off myself, at least as far as the *present* is concerned. When I write about the past, I can make an honest attempt to bridge the chasm between what happened, and the reader's own experience; I can try to bring to life the dead and buried dramas that I find, pinned like dead butterflies, in the texts of old records. The beginnings of this story took place more than three centuries ago. The end of it—if it has an end—is only yesterday. This last is the delicate, dangerous part. As we get closer to our own times, the material swells obscenely in bulk. And the bodies are not all dead and buried. There are human witnesses, people who have been through it, or are going through it, people who experience the system in a way I can only guess at.

I have no real idea, no authentic gut feeling, about life in blasted, weed-choked vacant lots between crack houses, or in dark streets desecrated with graffiti; or what it is like to be behind the wheel of a patrol car, slowly penetrating "hostile territory," eyes groping to interpret shapes in an unfriendly darkness; or what it is like to sit on death row, or spend the night in a county jail, in a misery of moaning and vomit; or, for that matter, what it is like to be on trial as an inside trader or embezzler, or as a dumper of toxic wastes. Nor do I know the feelings that go through the mind of a public defender staggering under a stack of files, or a criminal lawyer picking a jury, or a judge in police court, or a juror trapped in a four-month murder case. Some of these experiences I can only guess at—and hope I guess right. Other parts of the story I am forced to omit, or leave for somebody else to do.

At times, working on this book, I found myself somewhat discouraged. The subject is fascinating—but also baffling and immense, fragmented into a thousand pieces, unwieldy, stubborn, hidden in dark places and inaccessible corners. It was easy to feel out of my depth.

But the sheer importance of crime and punishment, and their lurid attraction, won out at the end. Crime, in our decade, is a major political issue. Of course, people have always been concerned about crime. But there is reason to believe people are more upset about crime today than ever before—more worried, more fearful. They are most afraid of sudden violence or theft by strangers; they feel the cities are jungles; they are afraid to walk the streets at night. Millions of parents are afraid their children will turn into junkies. Millions see some sort of rot, some sort of decay infecting society, and crime is the pus oozing out from the wound.

These are not completely idle notions. Serious crime *has* skyrocketed in the second half of the twentieth century. We seem to be in the midst of a horrendous crime storm—a hurricane of crime. The homicide rate in American cities is simply appalling. It takes months or even years for

Helsinki or Tokyo to equal the *daily* harvest of rape, pillage, looting, and death in New York City. Why is this happening to us?

A history of criminal justice can, I think, help illuminate this question. It can tell us where we were, and why, and more or less where we are going. At least it can try. History does not give us *answers*; but it does sometimes dispel myths, and it can be like a flashlight shining in dark and deserted corners. Hence I felt the story needs to be told.

No author works completely alone. I have to take responsibility for shortcomings, but I also need to thank at least some of the people who helped me. There are, first of all, the scholars who made my job easier because of their own work in the field. There are too many to name, but I want to express admiration and gratitude for the historical work of Edward L. Ayers, Michael Hindus, Roger Lane, Erik Monkkonen, Mary Odem, and Samuel Walker, among others. I also want to acknowledge the help of John Bogart, Sarah Friedman, Joanna Grossman, Chris Guthrie, David Himelfarb, Leslye Obiora, Thomas Russell, Reid Schar, and Paul Tabor. Lynne Henderson made detailed comments on an earlier draft, which were enormously helpful. I also benefited from comments by Barbara A. Babcock and Robert Weisberg. Joy St. John, as usual, helped me greatly with the manuscript at various points; and I owe a debt, too, to the staff of the Stanford Law Library for their patience and cooperation in running down the odd sources I demanded from time to time.

Stanford, California
February 1993

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INTRODUCTION

ABOUT THREE AND A HALF CENTURIES AGO, THERE WAS A STIR IN THE COLONY of New Haven, Connecticut. A sow had given birth to a “monstrous” piglet. In the minds of the colonists, this was no accident. Surely the misbirth was some sort of omen. Specifically, it had to be a sign of sin, a sign of a revolting, deadly crime: carnal intercourse with the mother pig.

Who could have done this horrendous act? The finger of suspicion pointed to Thomas Hogg (unfortunate name). Hogg insisted he was innocent. Was he telling the truth? The magistrates put him to the test: they took him to a pigsty, and forced him to scratch at two sows in the enclosure. One sow, the mother of the monster-piglet, reacted with a show of “lust” when Hogg touched her. The other sow made no reaction at all. Hogg’s guilt was now crystal clear.¹

Another scene: it is New York City, spring 1989. A group of young males in their teens, mostly black, sweep through the darkness of Central Park, in a mood of wild exuberance. First they chase a man on a bicycle. When he gives them the slip, they find and attack a young woman who, somewhat recklessly, has been jogging in the park. The woman fights back, but she is all alone; there are many of them, and they are much too strong for her. They rape her, beat her savagely, and leave her bleeding body in the bushes. The woman, who is white and works for a brokerage house, comes within an inch of death, yet somehow survives. The police find and arrest the young men who attacked her, and they go on trial in a blaze of publicity.

Still another image: it is a few years before the Central Park beating. Two wheeler-dealers issue stock to themselves in corporations that had, in fact, no assets at all. They sell this stock, unregistered, to suckers among the general public. They brag and boast about the company to brokers and investors; business is flourishing, the future is exceedingly bright. Everything they say is a lie. They sell more than two million shares and put millions of dollars in their pockets, before they run afoul of the Securities and Exchange Commission.²

And yet another vignette: in September 1900, George W. Howard married Helen Hawkes, age seventeen, daughter of a "rich Democratic politician of Brooklyn." The couple had first met at a dance. George was a civil engineer who hailed from Boston. After the marriage, George began to behave in a peculiar way. He kept returning to Boston on this or that excuse; so often, in fact, that Helen's brother became suspicious and hired a private detective to find out what was what. The truth was devastating. George was leading a double life. He had another wife in Boston—Anna Kay, the daughter of an Episcopalian clergyman—and a nine-year-old son to boot. George was put under arrest and charged with bigamy. In court, the prosecution piled on the evidence: twenty-eight witnesses and numerous exhibits, including a "piece of the wedding cake" from the Boston marriage. George was convicted of the crime.³

These four somewhat exotic or notorious or outrageous examples of criminal behavior are by no means unique. They were drawn from the past and (near) present. In every period of our national experience, thousands upon thousands of other crimes have been committed; countless numbers of crimes. A fair number have been lurid, gripping, unusual, emblematic. Most of them have not. Most have been ordinary crimes, dull crimes, crimes of deadly familiarity: shoplifting, wife-beatings, assaults, barroom brawls, drug offenses, forged checks, drunk driving, vagrancy, petty theft.

There are recurrent patterns. Among serious crimes, the overwhelming majority can be classified as one or more of the many forms of stealing—larceny, theft, burglary, embezzlement, and on and on. For much of our history, drunkenness was the single most frequently punished crime—the plankton of the criminal sea. Thousands of arrests and court appearances came out of the fighting and biting that drunkenness produces. In the colonial period, in some colonies, fornication, adultery, idleness, and lewd behavior filled the courtroom with sinners. However we measure and count, the historical record yields a rich, and somewhat depressing, harvest of crime.

This book is about the American experience of crime; more accurately, it is about the *social reaction* to crime. It is an attempt to sketch

out the history of the criminal justice system in the United States, from its colonial beginnings right up to the present day. In this introduction, I put forward a few basic concepts and introduce some themes, which we will follow as they zig and zag through the centuries.

We begin, however, with a few attempts at definition. We have talked about *crime* and about *criminal justice*. But what do we mean by these terms?

CRIME

There is no real answer to the question, What is crime? There are popular ideas about crime: crime is bad behavior, antisocial behavior, blameworthy acts, and the like. But in a very basic sense, crime is a *legal* concept: what makes some conduct criminal, and other conduct not, is the fact that some, but not others, are "against the law."⁴

Crimes, then, are forbidden acts. But they are forbidden in a special way. We are not supposed to break contracts, drive carelessly, slander people, or infringe copyrights; but these are not (usually) criminal acts. The distinction between a *civil* and a *criminal* case is fundamental in our legal system. A civil case has a life cycle entirely different from that of a criminal case. If I slander somebody, I might be dragged into court, and I might have to open my checkbook and pay damages; but I cannot be put in prison or executed, and if I lose the case, I do not get a criminal "record." Also, in a slander case (or a negligence case, or a copyright-infringement case), the injured party pays for, runs, and manages the case herself. He or she makes the decisions and hires the lawyers. The case is entirely voluntary. Nobody forces anybody to sue. I can have a good claim, a valid claim, and simply forget it, if I want.

In a criminal case, in theory at least, society is the victim, along with the "real" victim—the person robbed or assaulted or cheated. The crime may be punished without the victim's approval (though, practically speaking, the complaining witness often has a crucial role to play). In "victimless crimes" (gambling, drug dealing, certain sex offenses), there is nobody to complain; both parties are equally guilty (or innocent). Here the machine most definitely has a mind of its own. In criminal cases, moreover, the state pays the bills.*

All sorts of nasty acts and evil deeds are not against the law, and thus not crimes. These include most of the daily events that anger or irritate

* It should be pointed out, however, that the further back in history one goes, the more this pat distinction between "civil" and "criminal" tends to blur. In some older cultures, the line between private vengeance and public prosecution was indistinct or completely absent. Even in our own history, we shall see some evidence that the cleavage between "public" and "private" enforcement was not always deep and pervasive: see, for example, the discussion of the vigilante movements of the Old West in chapter 8.

us, even those we might consider totally outrageous. Ordinary lying is not a crime; cheating on a wife or husband is not a crime in most states (at one time it was, almost everywhere); charging a huge markup at a restaurant or store is not, in general, a crime; psychological abuse is (mostly) not a crime.

Before some act can be isolated and labeled as a crime, there must be a special, solemn, social and *political* decision. In our society, Congress, a state legislature, or a city government has to pass a law or enact an ordinance adding the behavior to the list of crimes. Then this behavior, like a bottle of poison, carries the proper label and can be turned over to the heavy artillery of law for possible enforcement.

We repeat: crime is a *legal* concept. This point, however, can lead to a misunderstanding. The law, in a sense, "creates" the crimes it punishes; but what creates criminal law? Behind the law, and above it, enveloping it, is society; before the law made the crime a crime, some aspect of social reality transformed the behavior, culturally speaking, into a crime; and it is the social context that gives the act, and the legal responses, their real meaning. Justice is supposed to be blind, which is to say impartial. This may or may not be so, but justice is blind in one fundamental sense: justice is an abstraction. It cannot see or act on its own. It cannot generate its own norms, principles, and rules. Everything depends on society. Behind every *legal* judgment of criminality is a more powerful, more basic *social* judgment, a judgment that this behavior, whatever it is, deserves to be outlawed and punished. We will return to this point.

CRIMINAL JUSTICE

This is, if anything, an even vaguer term. It is not easy to describe or define this system. In fact, there is no single meaning; the criminal justice system is an umbrella label for certain people, roles, and institutions in society. What these have in common is this: they all deal in some significant way with crime—they define crime; or they detect crime; or they prosecute or defend people accused of crime; or they punish crime.

Of course, as we said, in a very real sense it is *society* that makes the decisions about what is and is not crime. "Society" is another abstraction; what we mean is that these are collective decisions. Not everybody is part of the collective that makes the decision. When we say "society" we really mean those who call the tunes and pay the piper; it would be worse than naïve to imagine that everybody's opinion counts the same, even in a country that is supposed to be democratic. To take one obvious example: the criminal law of slavery in the nineteenth-century South was a product of "society," but the slaves themselves had almost

no say in the matter. This must be clearly understood. The rich and powerful, the articulate, the well positioned, have many more "votes" on matters of definition than the poor, the weak, the silent.

In any event, after "society," as it were, makes social judgments, the criminal justice system goes to work. It refines and transforms the list, interprets it according to its own lights, and does whatever is to be done about catching and punishing lawbreakers. Starting with a definition of, say, "armed robbery," the police and others do the dirty work. Enforcement, of course, is *always* selective; for all sorts of reasons, the system does not, cannot, and will not enforce the norms in any total way. Un-enforcement is as vital a part of the story as enforcement.

The people inside the system of criminal justice include, among others, the experts who draft the criminal codes and tinker with the language, and the legislatures that make the codes into laws. But usually we think of a different cast of characters when we think of criminal justice. We think of police, detectives, narcotics agents, judges, juries grand and small, prosecutors and defenders, prison guards and wardens, probation officers, parole board members, and others of this stamp. These people are familiar to us from daily life (everybody has some contact with police), or from the mass media, or from popular (or unpopular) culture. People seem to have an insatiable appetite for reading about crime. They devour books and magazines about true crime; and even more so the imaginary crimes in Sherlock Holmes or Agatha Christie or Raymond Chandler. And where would movies be, or television, without crime and punishment?

Many in the cast of characters just mentioned are professionals, or semiprofessionals, whose lives revolve around matters of crime. Lay people, too, have a role—as jurors, for example. This is also, of course, the story of a much larger cohort of lay men and women: people accused of breaking the law; and their manifold victims. Their story is not, in the main, pleasant or uplifting; the lives caught up in the web are so often ruined, blasted, and wasted lives; through these pages parade example after example of foolishness, vice, self-destruction; selfishness, evil, and greed. It is a story with few, if any, heroes; and few, if any, happy endings. But it is important to the country; and it exerts a weird fascination.

Main Themes

As I have said, the story of American criminal justice is long and extremely complicated. The amount of detail is discouraging; the fifty states, and the three-plus centuries of time, add more complexity. But

there is one grand, general *approach*; and a number of main themes run throughout the book. They do not tie everything together in a few neat packages—that would be a delusion—but they are crucial to the telling of the tale.

As to the approach: this is a *social* history of crime and punishment. The overarching thesis is that judgments about crime, and what to do about it, come out of a specific time and place. This seems so obvious it hardly needs stating. But the consequences are extremely important. This is not a history of "criminal law" as lawyers would conceive of it; it is not an intellectual history of penology or criminology; it is not about the philosophy of good and evil. It is about a working system and what makes it tick. And it is told from an outside perspective—from a perspective tinged with the viewpoint of the social sciences.

This means that I assume, at every step of the way, that the shape of the system, and what it does, is not accidental or random or "historical"—and is definitely not shaped by some intellectual or philosophical tradition. Rather, what makes the system is social *structure* (the way society is organized) and social *norms* (people's ideas, customs, habits, and attitudes). These interact chemically with the context, and with what is happening in the world—with specific events and situations; for example, the sheer size of the country, its climate and geography, its natural resources; plagues, depressions, and wars; and with human-made factors of change, like the invention of the telephone or the automobile.

If crime itself is a *social* concept, then the reaction to it is social squared. Is crime entirely a social construct? Are there acts that are *inherently* crimes? The older writers made a distinction between acts that were, as Blackstone put it, *mala in se*, that is, evils in themselves, "crimes against the laws of nature, as murder and the like," and *mala prohibita*, that is, mere offenses "against the laws of society."⁵ These are sonorous Latin phrases, but hardly anybody takes the distinction seriously anymore. Certainly it is a fact that people consider some crimes more deep-dyed and horrible than others; cold-blooded murder is at one end of a pole of blameworthiness, and trivial regulatory crimes—taking the label off a mattress—are at the other.

But blameworthiness itself varies tremendously from society to society, and period to period. It is true that most (perhaps all?) societies have rules about murder and theft. It is hard to imagine a society—certainly no modern society—that would let people roam about killing each other to their heart's content, with no rules, limits, or controls. Even the Nazis had a concept of murder: anyone who killed a member of the party or an SS officer soon found this out.

On the other hand, no two societies have exactly the same definition of murder. Most modern societies outlaw blood feuds; other societies

have allowed, or even fostered, revenge killing. Abortion, in the Republic of Ireland, is a crime, a killing; this used to be true in most American states. At this writing (1993), in the United States early abortion is not a crime at all but a woman's right, her free and open choice, by virtue of *Roe v. Wade*.

Crime definitions, then, are specific to specific societies. Social change is constantly at work on the criminal justice system, criminalizing, decriminalizing, recriminalizing. Heretics were burned at the stake in medieval Europe; there is no such crime today. Colonial Massachusetts put witches to death. In antebellum Virginia and Mississippi, two slave states, black runaways, and any whites who helped them, committed crimes. Selling liquor was a crime in the 1920s, during Prohibition. It was a crime during the Second World War to sell meat above the fixed, official price; or to rent an apartment at excessive rent. These are now extinct or obsolete crimes.

Every state, and the federal government, has a penal code: a list of crimes to be punished. In every state, too, and in the federal government, criminal provisions are scattered elsewhere among the statute books. This is particularly true of regulatory crimes. The modern criminal code, even after pruning, is still much bulkier than older codes. There were no such crimes as price-fixing, monopoly, insider trading, or false advertising in the Middle Ages. Many new crimes—wiretapping, for example—are specific to high-tech society. We live in a welfare and regulatory state. Such a state produces thousands of newfangled offenses: dumping toxic wastes, securities fraud, killing endangered species, making false Medicare claims, inserting a virus into computer programs, and so on.

Clearly, there are crimes and crimes. It is conventional to draw a line between property crimes, crimes against the person, morals offenses, offenses against public order, and regulatory crimes. Social reactions depend on the type of crime. Typologies are not very systematic; but they can be illuminating. For example, there are what we might call *predatory* crimes—committed for money and gain; usually, the victims are strangers. These are the robberies and muggings that plague the cities and inspire so much dread. There are also lesser and greater crimes of *gain*: shoplifting, minor embezzlements, confidence games, cheats, frauds, stock manipulations in infinite form. There are also what we might call *corollary* crimes, crimes that support or abet other crime—conspiracies, aiding and abetting, harboring criminals; also perjury, jail break, and the like. Much rarer are *political* crimes—treason, most notably; also, sedition, and, in a larger sense, all illegal acts motivated by hatred of the system, and which strike out against the constituted order. Then there are crimes of *desperation*—men or women who steal bread