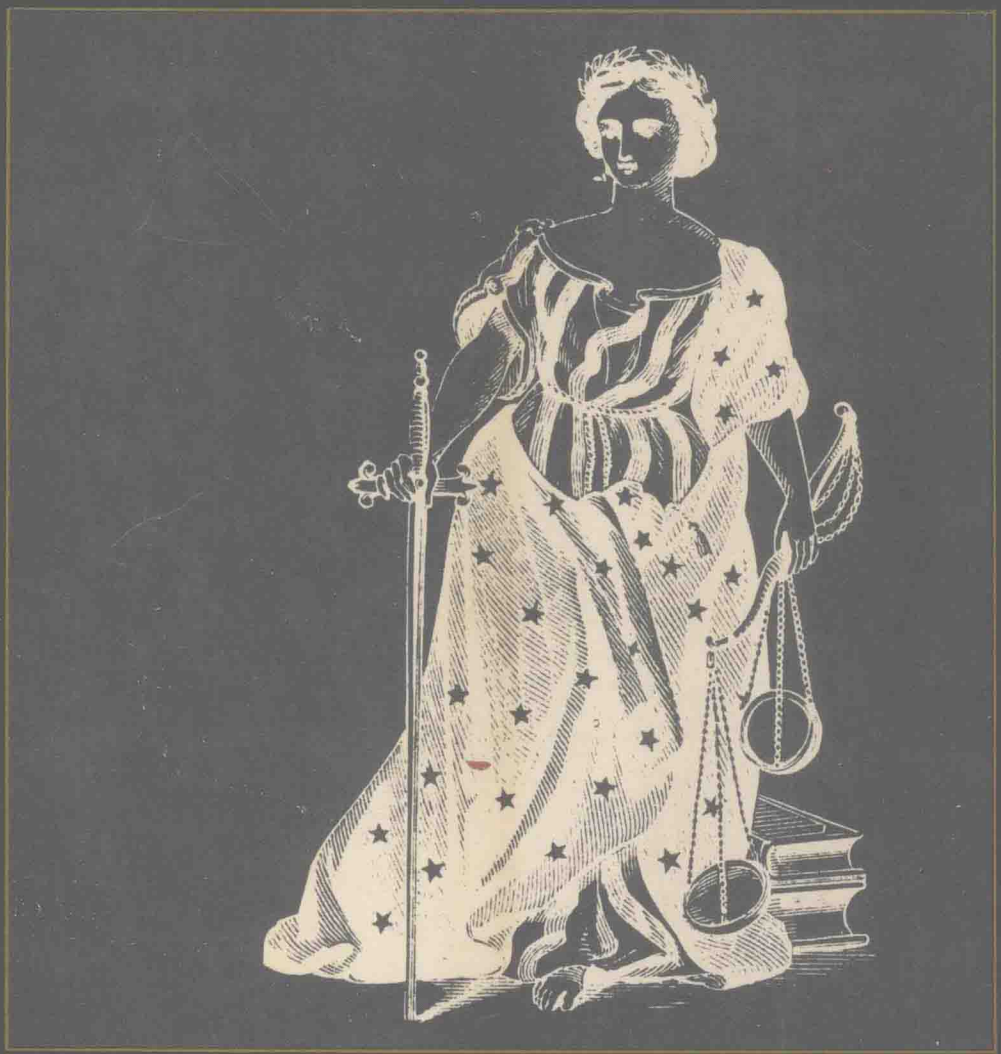
CRIME and the LEGAL PROCESS



WILLIAM J. CHAMBLISS

CRIME and the LEGAL PROCESS

WILLIAM J. CHAMBLISS
Associate Professor of Sociology
University of California, Santa Barbara

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This book is dedicated to Chief Justice Earl Warren
who, more than most men, understands the potential as well as the problems of the American criminal law.

PREFACE

The law touches every man. In varying degrees it is one of the shaping influences in every life; and in that word "varying" lurk a wealth of insistent questions, urgent problems of profound scope and significance to scholars and laymen alike. More often than not, when one speaks or writes of "the law" the subject matter is shrouded in an aura of mystery. In some respects the law appears even more magical in character than comparable social institutions, such as education or medicine. No doubt part of the mystery of the law reflects the fact that for the most part inquiry into the law has engaged in what Mark Twain saw as the distinguishing characteristic of science—the production of "wholesale returns of conjecture out of such a trifling investment of fact." This book is intended to provide the scholar, layman, and student with a compendium of the social sciences' (and I include here legal scholarship) "investment in fact" and to lace this investment with enough theoretical "conjecture" to give it meaning.

The impetus for this book derived from a desire to provide a sourcebook in the sociology of criminal law. It was apparent to me from working In this area that its interdisciplinary nature had the undesirable consequence of keeping persons in different disciplines relatively ignorant of the work being done by others. I was continually impressed by the law-related literature which appeared in journals of political science, philosophy, anthropology, and law, but I was depressed by the realization that so many of the scholars working in these areas were not aware of one another's works or of the sociological studies which were relevant to their problems. Similarly, I was constantly surprised to discover pieces of research pertinent to my own and other sociologists' interests in various journals of other disciplines. My intention, then, was to bring together a selection of the best pieces in the various journals and monographs in the fields of anthropology, law, philosophy, political science, psychology, sociology, and economics bearing on the criminal-law process.

As I began surveying the literature, however, I realized that one book could scarcely do justice to both the ideas *and* the empirical research contained in these journals. Furthermore, it was my impression that scholars, laymen, and students were more likely to have been exposed to the Ideas prevailing about the law than to the facts which have been gathered. I decided, therefore, that the book should be limited to empirical studies of the legal system. But facts without theory are blind and theory without facts is misguided—so I have taken it as my responsibility to provide the empirical studies with a theoretical framework, in the form of the Introductions to each of the sections of the book.

The book is divided into what I take to be the three major questions of concern to the sociology of criminal law: the emergence of legal norms,

the administration of criminal law, and the impact of legal sanctions. The administration of criminal law, which comprises the largest and, in many ways, the most important area of inquiry, is subdivided into the processes which characterize arrest, prosecution, and trial and sentencing. In each section the intention is to present to the reader a theoretical framework that makes sense of the empirical studies that follow (as well as of those cited in the references and bibliography but which could not be included) and then to provide a collection of the best research studies available. In the final section of the book, the epilogue, I have attempted to spell out the general implications of research and theory for the social organization of the criminal law.

In making the selection of what to incorporate in this volume, I have left out some areas which are as important as those which have been included. Two areas that have been omitted deserve special mention:

The focus of the book is purposefully, and at the same time unfortunately, on Anglo-American law. This focus is necessitated by the lack of comparable data from studies of the law in other cultures. Although I have included a few studies from other countries, the framework remains Anglo-American out of necessity. It is to be hoped that the few studies of a comparative nature included in the volume will suggest fruitful areas for further research. Another limiting feature of this volume is that the numerous studies of the legal profession *qua* profession (with the accompanying questions of recruitment, training, and professional-association membership) are not represented. This decision was dictated by the desire to keep the volume relatively compact. Another reason for omitting the research on the legal profession is that the focus of this volume is more narrowly limited to the everyday events which take place in the legal process.

The systematic study of the law is still in the embryonic phase; therefore, it would be a mistake to expect our efforts to have yielded definitive answers. Beginning is always hesitant—and tentative. It is hoped that this book will stimulate some inquiring minds to produce other works which will benefit from the mistakes as well as the truths contained in this volume.

William J. Chambliss

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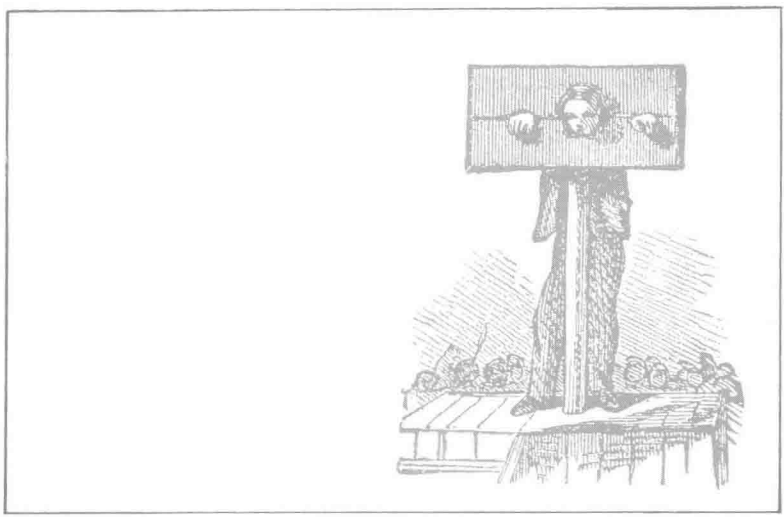
THE EMERGENCE of LEGAL NORMS

PART ONE



INTRODUCTION

To inquire into the criminal-law process is to embark on an investigation of one of the cornerstones of all modern societies. Nations have increasingly turned to the legal system in an effort to bring order out of chaos or to maintain stability in the face of dramatic changes in the fabric of society. Even efforts to control international conflicts are being seen as problems to be handled by legal processes, and it is "the law," with all its mystery and its presumed integrity, which is viewed as the means through which international conflicts can be controlled. The scope of the problem faced in attempting to establish the boundaries of this vast system of activities provides an intellectual challenge second to none. Although the emphasis in this book is primarily upon contemporary legal processes, it is essential that we have an understanding of the historical events which have been so significant in shaping the current state of the legal system. Let us therefore begin our inquiry with a brief overview of the historical background of Anglo-American law.

Anglo-American Law in Historical Perspective

William the Conquerer was faced with a formidable task when he took the throne of England. The kingdom he had conquered in 1066 was composed of a number of groups of people with quite divergent ways of looking at the world and equally diverse sets of values. The various social groups were not organized in such a way that they paid homage, much less taxes, to one central authority. By contemporary standards, William had conquered an anarchy whose salient characteristic was a pluralistic value system: a land divided into eight subdivisions, each with its own king. The country's only unifying characteristic was the presence of Christianity, a remnant of the Roman occupation six centuries earlier. One of

William's first acts was to declare this heterogeneous conglomeration subject to his leadership and to claim all land for the crown.

He attempted to gain control over the church, which was at that time a major landholder, and as a means of achieving this, William separated the lay and ecclesiastical courts of law. His moves constituted a grave threat to the economic well-being and the political power of the church. Not surprisingly, the conflict between church and state played a major part in the history of England for several centuries, coming to a head during the reign of Henry II. The crown also asserted that it was solely responsible for peace ("the king's peace") throughout the realm. To enforce this peace, the king sent judges into the countryside. By so doing, the crown took away much of the power of the barons, and the lines of conflict between the crown, the barons, and the church were drawn.

From the time of William until the reign of Henry II a quasi-legal structure prevailed which was strongly influenced by the tribal heritage of England prior to the Norman conquest. But during the reign of Henry II, most of the fundamental features of the structure of Anglo-American law emerged.

First and foremost, Anglo-American law has inherited a reliance on force and coercion as the appropriate mechanisms for handling disputes. At an earlier time in England, the emphasis in settling disputes had been on reconciliation rather than on coercion. Thus, if a member of one kinship group had violated the rights of someone from another group, the guiding principle was to effect a reconciliation of the individuals and the groups. But the legal system emerging from the reign of William through that of Henry II emphasized the use of force by the state as the right and proper means of settling disputes.

An equally important inheritance from the earlier years of the Anglo-American legal system is the view that personal wrongs are transgressions against the *state* and that the state and *only* the state has the right to punish such acts. This principle contrasted sharply with the norms of English society prior to the time of William, when wrongs were considered a highly personal matter.

Other characteristics emerging at this time include the state's use of an ostensibly independent and unbiased government official to handle disputes between individuals and the state or between two or more persons. In modern times this is, of course, the judge.

It is also significant that the judicial function was separated from the legislative functions. The legal system was so designed that those who would decide disputes would not be the same as those who made the laws. Finally, there emerged in this early period the use of a group of the accused's peers as the rightful body for determining guilt and innocence.

These innovations more than any others can be said to represent the salient structural features of the Anglo-American legal system. Much of the content and most certainly the focus of the legal norms have undergone dramatic shifts over the centuries; but the reliance on coercion through force, the use of judges, the differentiation of functions between the judiciary and the legislature, and the use of peers (juries) have remained firmly ingrained features of the legal order.

Thus, this heritage from feudal England has been more important in establishing the *structure* of the legal system than in determining the *content* of the laws. The bulk of the offenses which occupy the attention of the legal order today were unheard of in early English law, and even laws which have roots in early England, such as the Law of Theft and the Vagrancy Statutes, differ so in their content today that they are more appropriately to be seen as new laws than as continuations of old ones.

The content of the legal system has also changed through the death of many laws which at one time occupied a central place in the legal order, laws that provided penal sanctions for indebtedness being but one example of this attrition.

There have also been dramatic changes in the types of sanctions meted out for various types of offenses. In early England, punishment for even minor offenses was exceedingly severe: "[I]n medieval England peasants were hanged for stealing a few eggs." [1]

Compliance, Coercion, and Rule Makers

Although the legitimate use of violence has remained the exclusive right of the state, such a device is not sufficient for maintaining social order. Indeed, it is not the most efficient means of ensuring even so relatively simple a goal as the collection of taxes. It is thus not surprising that rulers should attempt to legitimize the morality of the legal system. The use of peers to decide guilt and innocence represents an effort on the part of the government to underpin the legal system with an acceptable moral base. As Lenski has pointed out:

> Though force is the most effective instrument for seizing power in a society, and though it always remains the foundation of any system of inequality, it is not the most effective instrument for retaining and exploiting a position of power and deriving the maximum benefits from it. Therefore, regardless of the objectives of a new regime, once organized opposition has been destroyed it is to its advantage to make increasing use of other techniques and instruments of control, and to allow force to recede into the background to be used only when other techniques fail.[2]

More important than the use of peers as a mechanism for legitimizing the legal order is the fact that throughout the centuries the dominant Christian religion in England and America has lent spiritual support to the legal system. The Christianizing of England thus eventually led to the fusion of the coercive power of the state with religious morality.

Under these conditions, the prevailing view of the law came to be one of respect, though not necessarily compliance. Then, as now, the legal order came to be looked upon with reverence, and the morality of the legal order was seen as containing sets of "eternal truths" and "natural laws."

[1] Gerhard Lenski, *Power and Privilege*, New York: McGraw-Hill Book Company, 1966, p. 271; H. S. Bennett, *Life on the English Manor: A Study of Peasant Conditions, 1150–1400*, London: Cambridge University Press, 1960.

[2] Lenski, *op. cit.*, p. 51.

In this atmosphere, "the law" came to stand for what the legal order was in blueprint. No one was so presumptuous as to attempt to see how, in fact, the law operated. It was assumed even by those involved in the process that the legal system in its day-to-day acitvities bore a close resemblance to the way in which, with all its presumed morality, it was supposed to operate.

It is a tribute to the strength of the coalescence between the church and the state that this perspective dominated scholarly as well as lay thinking until very recently. Among legal scholars, members of the intellectual movement, generally referred to as the "legal realists," have done (and are doing) much to challenge this traditional view. The apt phrase, "the living law," captures the essence of this movement. The point made by the realists is that the law cannot be understood merely by looking at the blueprint of the legal system. Rather, the law is a living institution, and it can be described and understood only by systematically studying what is taking place at all phases of the legal process, from the making of laws to the release of law violators.

Once the law is viewed in this way, it becomes apparent that the legal system, like all other social institutions, reflects the character of the times. New laws are passed in an effort to solve perceived problems of prevailing social conditions. Old laws are given new interpretations and applications; the judiciary and the police focus efforts on some laws during one period and on other laws during another.

Recent Trends

The last 200 years have brought profound changes in the Western world, and with these changes we also find equally significant alterations of the legal order. The most important of these changes are not to be found in the types of behaviors which are prohibited or in the types of punishments applied; on the contrary, the most significant changes occur in the institutionalized procedures and the institutionalized conceptions of the basic values of the legal order. For it is these perspectives which ultimately shape the legal system, although their immediate impact may be seen more readily in an alteration of the idea rather than an alteration of the fact of the legal system.

Of the changes to be mentioned here, none is more important than the twentieth-century trend toward an ever-increasing secularization of the legal system. The jury system, as it has developed, illustrates this general process.

Initially, the wisest composition of the jury was seen as consisting in peers chosen because they were familiar with the facts of the case. Being familiar presumably made them better able to establish the truth. Today, of course, the criteria for jury selection are almost the exact opposite: A prospective juror is not allowed to serve if he knows very much about the case prior to the trial. A similar example is the rule governing venue: If a defendant can show that the community at large is too intimately familiar with the case, then it is possible to force the trial to take place

elsewhere. The tendency to conceive of deterrence as the most important, if not the only, legitimate justification for the existence of punishment is still another example of this process, for an emphasis on deterrence places increasing emphasis on the role of the law in achieving objectively defensible goals. The more traditional arguments for punishment, which suggested the need for "retribution" or the necessity for obtaining "an eye for an eye and a tooth for a tooth," have become much less persuasive in modern legal thinking than they once were. More and more the law is being structured and judged according to how well it meets certain explicit societal goals; it is no longer sufficient that the law supposedly represents a system of "natural" rights and obligations.

We have seen in very recent years what is perhaps the most important outgrowth of this trend to secularize the legal order, in that courts and legislatures have increasingly turned to empirical evidence of how the legal system works *in fact*—as opposed to simply reifying the beauty of the logical structure of the law. In England, for example, criminal laws against prostitution, drug use, homosexuality, and gambling were abolished in part because there was evidence that requiring agencies to enforce these laws led more often to the corruption of the enforcers than to the reduction in the frequency of such "immoral" acts.[3]

The Supreme Court in the United States has recently shown an equally impressive tendency to look for empirical evidence of the "law in action" as a basis for making legal decisions. The recent "Miranda decision" represents a landmark case in criminal law illustrating this tendency.

The issue in the Miranda case was whether or not the police could interrogate a suspected criminal without the suspect's having first been given the right to refuse to submit to such interrogation. The Supreme Court held in this classic decision that evidence (including confessions) thus gathered was inadmissible in court and could not be used as a basis for finding a defendant guilty. It was certainly not a new principle: the Court had always held that a defendant's civil liberties had to be protected and that the police could not use undue pressure (such as physical brutality) to obtain a confession. As an illustration of the increasing sensitivity of the legal system to empirical data, however, what is significant about the Miranda decision is the fact that the Court did not rest its case simply by reaffirming the rights which are guaranteed by the logical structure (the blueprint) of the legal norms; rather, the Court attempted to assess what was in fact taking place in police stations as officers enforced the laws. To accomplish this, the Court analyzed the contents of police training manuals to determine the tactics and strategies suggested in these manuals for police to use to obtain confessions. It was on the basis of the contradiction between these practices and the spirit of the legal system that the Supreme Court established new rules for ensuring that defendants not receive undue pressure from police.[4]

In addition to this shift to ever-increasing rationalism of the legal sys-

[3] Wolfenden Report in Parliament, *Criminal Law Review,* England: 1959.

[4] *Miranda v. Arizona in Official Reports of the Supreme Court,* vol. 384, 1966, U.S. part 3, pp. 436–718, 982–995.