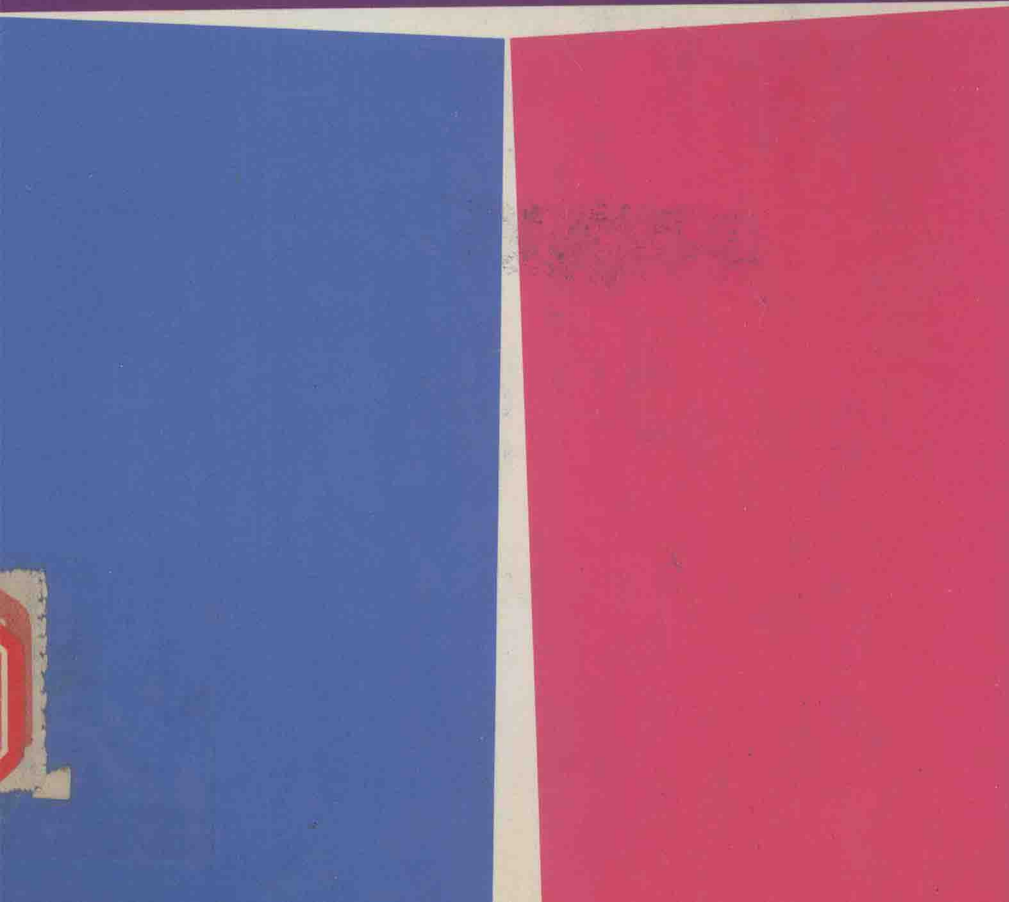


SAMUEL WALKER

POPULAR JUSTICE

A History of American Criminal Justice



POPULAR JUSTICE

A HISTORY
OF AMERICAN CRIMINAL JUSTICE

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To
THE NEBRASKA CIVIL LIBERTIES UNION
and
THE AMERICAN CIVIL LIBERTIES UNION

Preface

Nothing is more fundamental to the quality of life than the question of criminal justice. The machinery of criminal justice represents the ultimate power of the state to invade the privacy of the individual, to deprive that person of his or her liberty, and in the extreme event, to take that person's life.

Despite the importance of this machinery, what we now call the "criminal justice system," we know surprisingly little about it. Fifteen years ago, when crime became a volatile political issue, the president of the United States appointed a national commission to study the administration of criminal justice. That commission helped to launch a massive reconsideration of the entire subject, yielding a steadily mounting volume of information. Today, as the criminal justice "research revolution" reaches flood tide, we have a reasonably good understanding of how our criminal justice system works.

What we lack is perspective. Inundated by a wealth of new data, we do not know what it all means. Is the quality of justice better or worse than before? What is the role of the police today, compared with fifty or one hundred years ago? This book is written to provide a brief interpretive overview of the development of the criminal justice system in America. The reader will gain insight into the origins of such institutions as the police and the prison as well as

the factors that have shaped their development. The author views the criminal justice system as a political entity, responding to the changing context of social and political controversies in our society.

This account will challenge many popular assumptions. There never was a “golden age” of law, order, and justice in this country. From the earliest colonial days we have endured not only widespread crime and disorder, but also a criminal justice system pervaded by corruption, inefficiency, and injustice. The idea that criminal justice institutions are resistant to change is also a myth. The account here indicates that our agencies are capable of dramatic changes in rather short periods of time. Finally, this book should dispel the popular notion that the system is “collapsing.” The historical record clearly indicates that institutions can survive no matter how serious the overcrowding, how gross the injustice, or how intense the public dissatisfaction.

Our system of criminal justice is here to stay. It will not only survive, for better or worse, but will continue to change. I hope this book will provide some insight into how it came to be what it is today and the direction in which it appears to be heading.

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the treatment of the colonial period. During his semester in residence in Omaha, Kempes Schnell also helped me to rethink some of the broader themes. Finally, Nancy Lane of Oxford University Press has been a superb editor, a sharp critic where needed but always supportive.

My colleagues in the Criminal Justice Department at the University of Nebraska at Omaha, especially Vince Webb, chairperson, also helped to make this book possible by cultivating an atmosphere that respects scholarship in general and the study of the history of criminal justice in particular. And there are several other friends who helped me through the difficult process of writing this book. To them, my appreciation.

S.E.W.

Omaha
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POPULAR JUSTICE

INTRODUCTION

THE MEANING OF "POPULAR JUSTICE"

Running someone out of town on a rail, Garry Wills recently observed, is almost as strong an American tradition as defending his constitutional rights. Wills's remark provides a starting point for understanding the history of American criminal justice. American attitudes toward law and justice have always been wildly contradictory. While everyone pays homage to the ideas of the rule of law and the protection of individual rights, Americans have not hesitated to violate the rights of individuals and groups they regard as "undesirable."

This book is a brief history of American criminal justice. It examines the changing patterns of criminal activity, the growth and development of the criminal-justice system, and the major themes in the administration of justice.

The central theme revolves around the concept of "popular justice." The special character of American criminal justice lies in the high degree of direct and indirect popular influence over its administration. Popular influence takes many forms: criminal codes written by democratically elected legislatures; the direct election of many officials such as sheriffs and judges; citizen participation on juries; the control of police departments and other agencies by political machines responsive to their constituents; and, finally, the pervasive influence of public opinion

over day-to-day decisions. Compared with that in other countries, the extent of this participation is extremely high.

Popular influence has not always produced the best results, however. This book argues that it accounts for both *the best and the worst* in the history of American criminal justice. Citizen participation is of course consistent with the idea of democracy. Only an unreconstructed monarchist could argue otherwise. Yet, popular influence has contributed to corruption, inefficiency, and injustice. Criminal codes are filled with ill-considered laws. The election of sheriffs, judges, and prosecutors hardly ensures quality. Political control over police departments has been responsible for the worst forms of corruption and inefficiency. And public opinion is notoriously fickle and given to outbursts of passion and prejudice.

Some of the worst injustices in our history, moreover, have occurred when the people took the law into their own hands. The vigilante committee represents the most direct form of popular justice: members of the community using extralegal means to impose their will upon others. Many of the worst abuses of official criminal-justice agencies represent a form of "delegated vigilantism." The public has tended to condone, if not encourage, police brutality directed against the outcasts of society, or the mistreatment of inmates in penal institutions.

A major theme in the history of American criminal justice is the tension between the rule of law and the passions of popular justice. The idea of the rule of law implies fairness, equality, and consistency. But the history of the administration of justice is largely the story of arbitrary and capricious justice, often carried out in the name of community prejudice. The struggle for justice involves reconciling democratic principles, and all their pitfalls, with standards of fairness and equality.

HISTORY AND CRIMINAL JUSTICE

One might well ask, why bother to study the history of criminal justice? How can an understanding of colonial forms of punish-

ment or the early forms of police administration possibly contribute to the solution of our present problems? These are serious questions which merit thoughtful consideration.

The study of history can have enormous contemporary relevance. Recent scholarship on slavery and the black experience, for example, has contributed greatly to our understanding of the contemporary racial problem. Unfortunately, the study of history is too often little more than a sterile recitation of names, dates, and facts. History of this sort is indeed boring and of little interest. But the study of history can be much more. It can, in the words of William Appleman Williams, be "a way of learning." Properly organized and interpreted, the facts of history can illuminate the dynamics of change. It is useful for us to know, for example, how and why our various criminal-justice agencies originated. Who wanted them? For what purposes? To cite only two recent examples, David Rothman's *The Discovery of the Asylum* and Anthony Platt's *The Child Savers* have contributed greatly to the reconsideration of the proper role of the prison and the juvenile court. The study of history can tell us something about how people in different times viewed their own problems and how new ideas became translated into social policy. This can help us to understand our own response to contemporary problems.

Perspective on contemporary problems is invaluable. It is important to recognize that there has never been a "golden age" of law and justice in our history. Crime, disorder, deviance, and injustice have always been serious problems. Life and property have never been secure from attack. Our cities have a long history of riotous disorder. We also have a long and sad history of corruption, inefficiency, and misconduct on the part of criminal-justice agencies. Today's problems are serious, but they are hardly new ones. Nostalgia for some nonexistent golden age only inhibits our attempt to deal with our problems.

The myth of a changeless criminal-justice system also hinders a proper understanding of our present situation. The popular cliché that "the system never changes" is simply not true. This book traces the very substantial changes in our criminal-justice

system over the past three hundred and fifty years. Even the changes of the last fifteen years have been quite dramatic.

PAST AND PRESENT

Inevitably, this history of American criminal justice is shaped by present concerns. It views the past in terms of the present, seeking perspective on contemporary issues. The first issue involves an understanding of the criminal-justice system *as a system*. Informed discussions about the administration of justice recognize the interrelationship of the various criminal-justice agencies. The institutional growth and development of the system provide the basic framework for this book. The three sections of the book trace the establishment of the first institutions in the colonial era, the development of the major institutions in the nineteenth century, and the quest for reform in the twentieth century.

A second issue is the informal decision-making process that pervades the administration of justice. The law is not applied in a mechanical and impersonal fashion; discretionary decision-making is a constant theme in the history of American criminal justice. The amount of discretion has neither increased or decreased, but has largely moved from one agency to another.

One consequence of discretionary decision-making, and the third issue of this book, is the arbitrary, capricious, and often discriminatory pattern in the administration of justice. The demand for equal justice today makes us highly conscious of the unequal application of the law. Our heightened consciousness of racial and economic injustice should not lead us to believe that the situation has suddenly worsened. Injustice has been a tragic constant theme in the history of American criminal justice. Indeed, in many respects the quality of justice was far worse fifty, one hundred, or two hundred years ago.

A fourth issue is the influence of politics over the administration of justice. The criminal-justice system is an agency of social control. It defines the boundaries of acceptable conduct and punishes those who transgress them. But the administration of

justice mirrors the distribution of political power in society. Those with power have never hesitated to use the criminal-justice system to serve their own interests at the expense of the less powerful: racial and ethnic minorities, political dissidents, and those pursuing alternative cultures and lifestyles.

Each of these issues illustrates the struggle between the rule of law and the demands of “popular justice.” Criminal-justice agencies have too often been used to serve partisan political ends rather than the public interest. Discretionary decision-making has permitted both random capriciousness and more systematic patterns of favoritism and discrimination. The struggle for justice today involves undertaking the unfinished business of our criminal-justice history: making the rule of law a reality and not merely a dream.