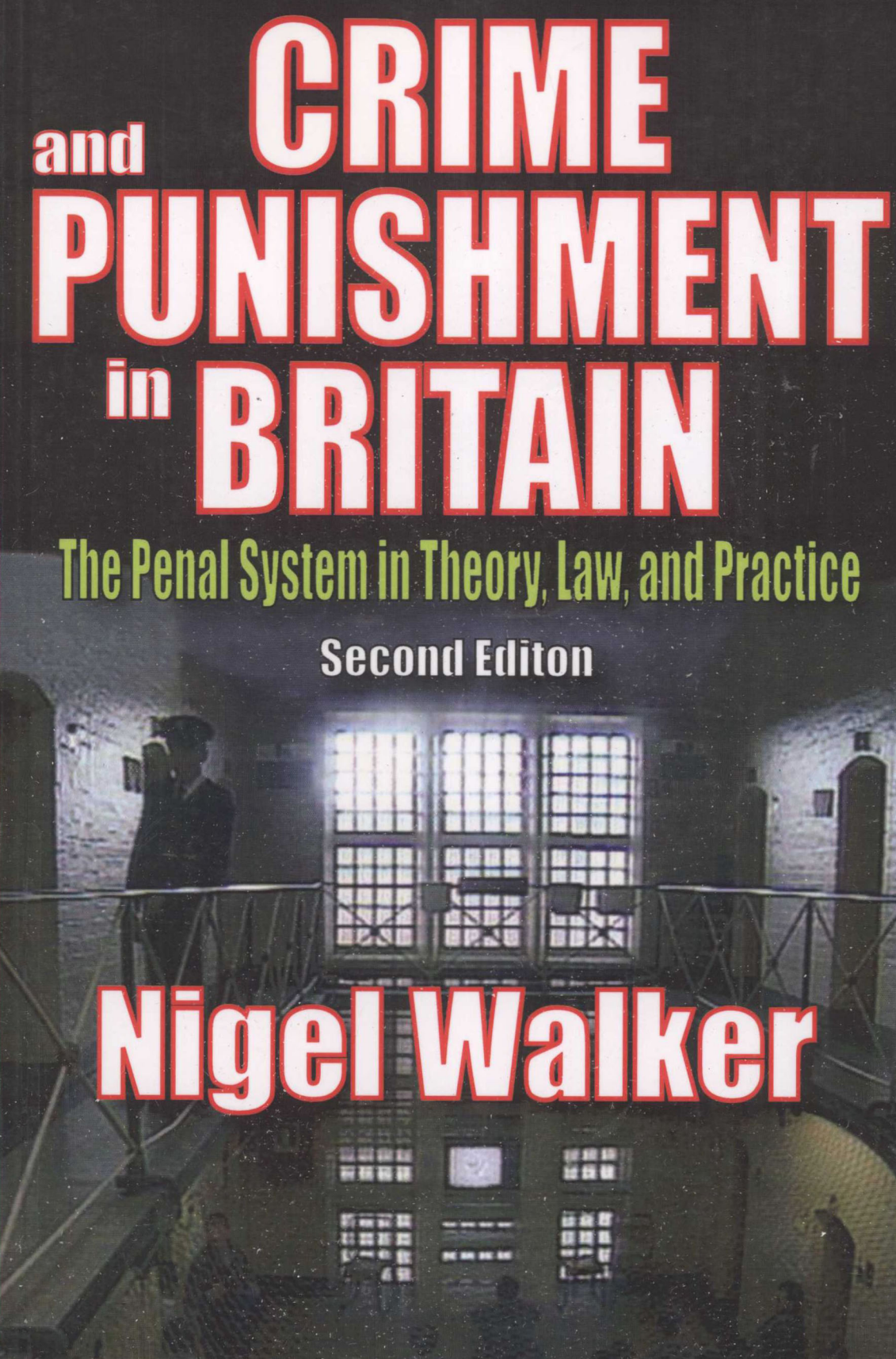
Crime and Punishment in Britain

The Penal System in Theory, Law, and Practice

Second Editon



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CRIME and PUNISHMENT in BRITAIN

TO MY FATHER AND MOTHER

PREFACE

This book is an attempt to describe our penal system in a particular way. It is not about the criminal law except to the extent that this defines and sets limits to the types of conduct which we call 'offences', and curtails the flexibility and severity of the penalties which we apply to offenders. It is not about the philosophy of punishment, although it tries to describe objectively the aims, assumptions, and the techniques of current penal measures. It does not offer a unified explanation of crime, although it tries to sort out some of the tangles between contemporary theories. What it attempts to be is a study of our present ways of defining, accounting for, and disposing of offenders, regarded simply as a system in operation. To the extent that the book succeeds in adhering to this ascetic principle it is a work of criminology.

Criminology is not, and does not include, moral or political philosophy. It does not argue about the right of states or societies to limit the freedom of individuals to rob, rape, murder, or commit suicide; or about the sense in which a stupid or deluded man can be said to be responsible for a crime. At the same time, the criminologist is interested in differences between, and changes in, the views held by legislators, lawyers, philosophers, and the man in the street, on such topics, and the extent to which they reflect the facts established and the theories propounded by psychologists, anthropologists, and sociologists.

Nor does criminology overlap with jurisprudence. To the criminologist the arguments of Beccaria and Bentham, Hart and Wootton, are flags that show where the wind of change is blowing, not battle standards round which to rally and skirmish.

Perhaps the hardest impression to eradicate is that the criminologist is a penal reformer. It is true that he is concerned to establish the truth or falsehood of some of the assertions upon which campaigns for penal reform are based – for example, the assertion that the death penalty is not a deterrent. But since the driving force of such campaigns is not a purely logical or purely scientific appreciation of fact, but a humanitarian motive, it is to that extent non-criminological. The criminologist may confirm (or refute) the facts or methods of inference which are used to support the arguments of penal reformers; he may note with scientific interest the changing objectives of the Howard League, or the establishment of a society known as the Anti-Violence League with the aim of restoring corporal punishment; but it is no more his function to attack or defend the death penalty than it is the function of a political scientist to take part in an election campaign. The confusion, however, between criminologists and penal reformers has been encouraged by criminologists themselves, many of whom have also been penal reformers. Strictly speaking, penal reform

is a spare-time occupation for criminologists, just as canvassing for votes would be for political scientists. The difference is that the criminologist's spare-time occupation is more likely to take this form, and when it does so it is more likely to interfere with what should be purely criminological thoughts.

The result of this process of reasoning may be to allot criminology to the discipline of sociology – if discipline is not too strong a term. If so, this still leaves the criminologist considerable room for manoeuvre, since the boundaries of sociology are wide. Nor need this disqualify him from appraising, for example, sociological attempts to explain delinquency just as critically as he must approach psychological or economic theories.

To some readers much of this book may sound inhuman. If so, I shall have achieved an important objective. Admittedly the machinery of justice, which is only metaphorically mechanical, involves the interaction of human beings in their roles of victim, offender, policeman, judge, supervisor or custodian, and there must be a place for human sympathy in the understanding, and still more in the treatment, of individual offenders. Humanity also sets a limit nowadays to the unpleasantness of penal measures, whether these are regarded as retributive, deterrent, prophylactic, or remedial. Ideological notions and moral judgements, too, may be relevant when the aims of the penal system are under discussion. But when we are concerned, as I am, with the efficiency of the system as a means to these ends, emotions such as sympathy or horror, praise or blame, pity or vindictiveness, are irrelevant, or even confusing. One of the main reasons why penal institutions develop more slowly than other social services is that they are a constant battlefield between emotional prejudices; and battlefields are unproductive places.

One function of a preface is to create the illusion that the book was written on a preconceived and logical plan; and certainly the sequence of subjects in this book requires an explanation. Since one cannot have a penal system without deciding what conduct to penalise, the first chapter discusses the scope of the prohibitions imposed by the criminal law, and the principles on which attempts to justify them are based. In the second half of the chapter the accuracy of the system in identifying those who break the law is discussed. This is followed by a chapter on the current trends and patterns of serious and minor crimes. The second part of the book analyses the essential features of fashionable explanatory theories, the relationship between them, and the reasoning which has caused them to be overshadowed by the predictive approach in recent years. The third part is an outline of what I call 'the system of disposal'. A description of the underlying aims and assumptions of our penal measures is followed by a chapter on the law of disposal as it applies to the mentally normal adult male. The disposal of the young offender is the subject of the next chapter. Part Four describes the sentencing process and attempts to assess the efficacy of sentences. To reduce complexity, the main part of the book mostly ignores three minor but important groups of offenders – recidivists, women and girls, and the mentally abnormal; these are dealt with in Part Five.

The bibliography has one unusual feature. Since the value of many of the investigations reported in the literature depends to a great extent on the methods by which their samples of delinquents and non-delinquents were obtained, the references to reports of major investigations are supplemented by short specifications of the samples on which these were based. This saves digressions in the text of the book. In the footnote references, the date of publication is followed by the chapter, section, or page number, when appropriate, thus:

K. Friedlander, 1947, chapter IV, and E. Glover, 1960.23&.175.

To save elaborate cross-references, the letters q.v. are used after a name or phrase to indicate that a fuller explanation of it will be found by consulting the index and looking up the page reference followed by the letter 'E'. Abbreviations of statutes and the special meanings of some phrases used in Parts Three and Four are explained at the beginning of Chapter Nine. Unless otherwise ascribed, all statistics in the text, in tables, and in figures are based on the published or supplementary Criminal Statistics for England and Wales for the year 1961, which was the year of the decennial census.

Here and there in the book I have drawn attention to features of the Scottish penal system where these seem to differ markedly from their English counterparts. These references are not prompted by mere nostalgia or desire for comprehensiveness; they are addressed to the reader who finds it difficult to imagine alternatives to the English practice which would be countenanced within this island. Not long ago a professor of law discussed the idea that a majority verdict might be accepted from juries, and said 'a verdict of guilty by a bare majority could not be tolerated'[1]; yet, had he known it, such verdicts are not only tolerated but even defended north of the Tweed. This is not to suggest that Scottish differences (of which Scots themselves are proud to the point of narcissism) are necessarily for the better; but merely to emphasize the fact that the boundaries of practical possibility are wider than supporters of the *status quo* believe.

Nigel Walker, *Oxford, January 1964*

[1] Listener, 10 May 1962.

PREFACE TO THE SECOND EDITION

The first edition was reprinted in 1967 with a few amendments and corrections. For this second edition, however, the book has been much more thoroughly revised, and takes account not only of the important innovations of the Criminal Justice Act, 1967, but also of recently published research. A new final chapter deals briefly with the important sources of influence on the penal system.

I have also profited by criticisms and suggestions from reviewers, friends and complete strangers. One reviewer's criticism, however, drew my attention to a misunderstanding which I should like to put right. He complained that I had omitted to mention some important research outside Britain. I must therefore emphasise that this is not intended to be a general textbook about criminals and penal systems the world over. Such books have been written, but we are beginning to realise their limitations. One thing that sociology has taught us is that generalisations about, say, delinquent subcultures in Chicago cannot safely be applied to English cities, any more than descriptions of French prisons can be taken for descriptions of their American counterparts. Of course there are fields of research in which the findings can more safely be generalised (on the assumption that the research was properly done): an example is Christiansen's follow-up of Danish twins, which seems relevant to the explanation of criminal behaviour wherever it occurs. But when dealing with the behaviour of British offenders, or the measures which we take to deal with them, I have naturally relied on British studies, although even so I have been deliberately selective. Where no British study has yet been reported, I have relied on others: for example, on Kalven and Zeisel's admirable investigation of the decisions of American juries. But as soon as an equally sound British study on this subject is available, I am logically bound to turn to it. This is not insularity, but science.

Nigel Walker, *Oxford, January 1968*

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Dr Ann Smith
Mr T. R. Tudor
Mr R. J. Whittick
Mr H. D. Willock

CONTENTS

PART ONE

*

INTRODUCTION

[1]

THE SCOPE AND ACCURACY OF THE PENAL SYSTEM

Those who attempt to describe the essentials of any system for dealing with offenders must make up their minds at the outset what questions they are trying to answer. Some are of a kind which can be answered only by making moral judgements: for example, 'Is the system of trial a fair one?' or 'Are inhumane punishments awarded?' The answers to these are bound to be to some extent emotional, and to beg other questions, if not whole philosophies, of morals and politics. There are, however, questions which are less ambitious, and to which the answers can be more factual. The most important of these seem to be:

1. 'What forms of conduct are dealt with by penal measures?': in more popular language, 'What is criminal?'
2. 'How accurate is the system in identifying those who indulge in prohibited conduct?': in popular language, 'How many of the guilty escape conviction, and how many of the innocent are wrongly punished?'

In this chapter I shall try to give answers to these questions in relation to the British penal system; or at least to show the lines on which they could be answered.

WHAT IS CRIMINAL?

Penal measures are not of course the only way – merely the most formal and drastic – of dealing with types of behaviour which people find objectionable. An enormous sector of our actions is regulated simply by what we believe to be the expectations of our fellow citizens and by our occasional experience of their disapproval when we fail to fulfil these expectations.

Codified Rules. When it is necessary that these expectations should be observed with precision, they become rules, which are sooner or later systematised and promulgated; the 'unwritten convention' becomes the published code. For example, when sport becomes competitive it requires precise rules, although when it is non-competitive conventions seem to be

sufficient. Thus in rock-climbing there is simply a convention that one may cut footholds in ice but not in rock, whereas in golf there is a published code of some complexity, which even limits the designs of clubs, and in chess the permissible moves are similarly defined.

Rules with sanctions. Most uncodified conventions are enforced simply by the ordinary man's dislike of being regarded as abnormal by his neighbours or acquaintances, or, worse still, of being treated as abnormal. He fears ridicule, criticism and in the last resort ostracism. Many written codes are enforced by similarly informal sanctions. Just as one does not go rock-climbing with someone who cuts holds in rock, so one does not play golf against someone who lifts his ball out of bunkers.

Independent sanctions. But violations of some written codes are discouraged by more formal sanctions, that is, sanctions which are themselves imposed according to rule. This is common in groups of people which have a formal organisation. Associations of doctors and other professional workers, trade unions and similar organisations expel, suspend and otherwise punish members for infringement of their rules.

Civil Law. In all societies, however, some forms of behaviour are so frequent and at the same time so objectionable that they are prohibited under a code which both provides for certain sanctions and is universal in its application to members of the society. In its elementary forms this code allows a person aggrieved by certain actions of another to retaliate. What distinguishes this system from mere spontaneous vengeance is that it is approved by the other members of the community; and indeed in some primitive societies there does not seem to be any other authority to which the aggrieved person can apply. Perhaps this might be called the stage of 'approved retaliation'. Something of the sort was observed by Rasmussen among Eskimo communities. Probably because this leads to vendettas, it is replaced by an approved system of compensation with approved retaliation to fall back on if the compensation is not paid. At some later stage of development it becomes possible to raise the matter before a formal meeting of the older men, and eventually some sort of 'court' is evolved. The result is control of behaviour by civil law, of which the essential features seem to be an impartial authority, administering and interpreting a code[1] accepted as binding upon all members of the society, acting only at the application of the aggrieved party, and pronouncing decisions designed to compensate the aggrieved or put an end to whatever harm is being done.

In some societies this is the only form of law.[2] In others – and in all sophisticated societies – a distinct system has grown out of the civil law. The courts by which it is administered may or may not be distinct from civil courts – in Britain the same man often sits as judge in civil and criminal cases in the same week; but there are more important differences:

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[1] It is true that it is often alleged that there is no 'code' of civil or criminal law in England. But this is so only to the extent that in comparison with some other codes it is more fragmentary, less difficult to modify by interpretation, and less easy to study in writing; it is still a 'code' *in* the sense that it is a body of rules which is intended to be consistent.

[2] See, for example, Hoebel, 1955.