DOREEN J. McBARNET

CONVICTION

LAW, THE STATE AND THE CONSTRUCTION OF JUSTICE

OXFORD SOCIO-LEGAL STUDIES

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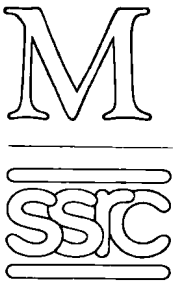

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Doreen J. McBarnet
December 1979

Preface to the paperback edition

Conviction set out with two aims, to provide a critical perspective on the long-running policy debate over police powers and civil rights, and to provide a new theoretical model of the operation and ideology of criminal justice which laid emphasis on the need to probe the substance and form of the law itself.

As the paperback edition goes to press police powers and civil rights are being debated yet again in the House of Commons as the Police and Criminal Justice Bill passes through the Committee stage. Criminal justice has remained a key issue in the early 1980s with the Riots, the Scarman Inquiry, the Report of the Royal Commission on Criminal Procedure, the battles over police complaints procedure, and of course the crystallisation of the debate of the seventies in the 1980 Scottish Criminal Justice Act and the present bill. This book was written while both these pieces of legislation were still only in the making, but the perspective it offers is as pertinent to their future as their past.

Much of the Scottish Criminal Justice Act and the Police Bill only consolidates in statutory, generalised police powers, incursions already made by case law into traditional conceptions of civil rights. A major purpose of this book was to demonstrate this and its corollary, the inadequacy of safeguards for the suspect or accused. Indeed the Royal Commission on Criminal Procedure recognised these problems. Its solution however was to 'clarify' police powers by widening them, extending powers granted in specific circumstances by generalising them, and to cope with the inadequacy of existing safeguards, notably judicial control via the exclusionary rule, by throwing it out altogether and replacing it with the even more questionable control of internal police discipline. The police bill as it stands gives the police wide, generalised *statutory* powers and leaves them to police themselves.

The Commission could have taken quite a different stance. Its

volume on current law and procedure traces historical changes through case law, which *Conviction* underlines as in fact an erosion of civil rights and extension of police powers. But the fact that dubious practices have become 'accepted', does not necessarily mean that they should be further endorsed. The Commission could as readily have traced the dilution of civil rights through case law and recommended that the trend be reversed. It chose not to do so and the result is a police bill which, like the Scottish Criminal Justice Act before it, fits like a glove with the law-and-order politics of the eighties.[1]

Both the Act and the Bill have come in for strong opposition from civil rights groups. But that in itself should be carefully assessed in the light of the analysis offered in this book. For what *Conviction* suggests is that the legitimation of dubious practices is not the sole prerogative of occasional legislation clearly tied to specific political currents. It is a matter of legal routine.

This has two implications. First the emerging statutory situation may in turn prove only a baseline for further extension of powers and erosion of rights. *Conviction* suggested structural reasons for expecting a tendency in this direction – unless the judges acted consciously against it – and this theoretical argument has recently been lent empirical support by American research designed to test it.[2]

Second, the very fact that critical campaigns are fired by the public staging of legislation rather than by the mundane niceties of case law is itself a piquant demonstration of the ideological analysis offered in this book. The duality of case law is itself a mechanism of legal mystification. As a matter of strategy civil rights campaigners prefer to define the law in terms of its broad principles and so to see the police bills of the eighties as new. Such definition keeps the principles alive. But maintaining that symbolic claim for the future carries with it the price of perpetuating the mystification of the present.

DOREEN MCBARNET
February 1983

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1 Introduction

This book began as a study of the routine operation of the criminal courts but has become a study of how the state rules through law. It was inevitably led in this direction by taking an approach unusual for a sociological study, focusing not so much on the routine interaction of the people who enforce the law but on the structure, substance and procedure of the law itself. Law is significant not just as the book of rules for criminal justice; it is also the means by which the democratic state rules. Law, then, provides a bridge between the traditional micro-theoretical concerns of criminal justice and the macro-theoretical issues of the state and dominant ideology. This book is thus about the construction of justice not simply at the level of how verdicts are routinely accomplished but at the more fundamental level of how one central aspect of the ideology of the democratic state works.

LAW AND THE PROCESS OF CONVICTION[1]

Behind the verdict of the criminal court lies a process of conviction—conviction in two senses; first how judges[2] or juries come to *be convinced* beyond reasonable doubt of the appropriate verdict; second how that verdict so routinely, according to the statistics, comes to be a verdict of guilt. The verdict is the product of a process of conviction in both the subjective and the legal senses.

The conviction process in the legal sense poses a problem for explanation because it raises a strange paradox. All the rhetoric of justice we are so familiar with presents a picture of a system of criminal justice bending over backwards to favour the defendant rather than the prosecution. Every accused has the right to a fair trial. He is innocent till proved guilty; it is the prosecutor who must prove his case. What is more, the accused has a right to silence, he is not a compellable witness and he need not incriminate himself, so that the prosecutor has to be able to prove his case without the co-

operation of the accused. The police for their part cannot arrest or search on suspicion to *find* evidence but only in relation to an already specified offence. They cannot force anyone to answer questions and must give a caution before asking them. Evidence for the prosecution case cannot therefore be collected or presented by *any* means but only within the limits set by law to safeguard the citizen. The accused *need* prove nothing, but can choose if he wishes to establish a defence case to counter that of the prosecution with the less stringent requirement not of 'proof' but merely of raising a reasonable doubt, and he may use legal expertise to do that. The whole flavour of the rhetoric of justice is summed up in the idea that it is better for ten guilty men to go free than for one innocent man to be wrongly convicted. Why then the paradox that the vast majority of cases processed through a criminal justice system so geared to favouring the accused results in a finding of guilt?

For they do. According to the criminal statistics for 1978, conviction rates were as follows: 90 per cent of Scottish cases involving crimes, 95 per cent of Scottish cases involving offences, 84 per cent of English Crown Court cases, 93 per cent of indictable cases, 95 per cent of non-indictable cases, in the English magistrates' courts.[3] Some samples show even higher rates—a 98.5 per cent conviction rate for magistrates' courts in Sheffield (Bottoms and McClean, 1976). Conviction depends in court on the plea or the verdict. If the accused pleads guilty to the charge against him, conviction follows as a matter of routine. If he pleads not guilty, a contested trial follows. According to Bottoms and McClean, 72.5 per cent of those contesting the case in magistrates' courts, 55 per cent of those choosing jury trials, and 71 per cent of those allocated to the higher courts were convicted on some or all counts (pp. 106, 209). In the rhetoric of justice everyone is entitled to a fair trial; yet most defendants plead guilty. In the rhetoric of justice any reasonable doubt should result in acquittal; yet for the clear majority of cases the court is convinced *beyond* reasonable doubt, despite all the rhetorical hamstrings on police and prosecution, that the accused is guilty. Why?

One answer might be quite simply that the defendants *are* guilty; the case against them is too strong to be plausibly disputed; the facts speak for themselves. Sir Robert Mark has suggested indeed that the very limitations placed on police and prosecution bringing a case to court make it highly probable that only the indisputably guilty come through the process at all:

> The procedural safeguards for the suspect or accused in our system of criminal justice are such that committal for trial, involving the participation of lawyers and bench, is itself an indication of strong probability of guilt. (Alderson, 1973, p. 16)

But this is where we come to the process of conviction in its other, subjective, sense. Given the ambiguities and uncertainties that dog real-life incidents, how are clear-cut facts of the case and strong cases produced? How do judges and juries come to be persuaded *beyond reasonable doubt* by one case or another? Evidence, the facts of the case, strong and weak cases are not simply self-evident absolutes; they are the end-product of a process which organises and selects the available 'facts' and constructs cases for and in the courtroom. Behind the facts of the case that convince judges or juries to an unambiguous verdict lies a process of construction and a structure of proof that need to be probed and analysed.

Mark's point raises another question. What exactly *are* the procedures of criminal justice that are so readily assumed to protect the accused? For though they are constantly referred to in theory and in practice they are remarkably little investigated.

Sociologists have taken the question of how the criminal justice process works in relation to the principles of law by investigating only one side of the equation, the operation of justice, not the law itself. Explicitly or implicitly the question underlying sociological analysis of the criminal justice process always seems to be concerned with why the people who routinely operate the law also routinely depart from the principles of justice—depart from them in either or both of two ways—violating the principle of equality before the law by being more likely to arrest, convict, or sentence with greater severity lower- rather than middle- or upper-class people, blacks rather than whites, men rather than women; violating the principle of a criminal justice system geared to safeguarding the accused by routinely subverting the rights surrounding arrest, the right to a trial, the right to be presumed innocent till proved guilty.

So we are presented with a picture of how social and human factors undermine the workings of a criminal justice system geared to constraining state officials and favouring the accused. One study after another shows up class, race, and sex prejudices on the part of magistrates and policemen; bureaucratic pressures pushing the police into acceptable arrest rates, lawyers into negotiating pleas, court officials into a speedy rather than necessarily a just through-

put of cases; personal ambitions, friendships, enmities, pressures from family and colleagues affecting the way justice is administered. The fact that courts and police stations are not just legal institutions but the daily work-places of policemen, lawyers, clerks of court, leads to the development of stereotypes, networks of shared understandings, alliances of alleged adversaries, techniques for routinising the work of policing or processing cases, to a situation where the suspect or defendant is the only one who is not part of the routine, is mystified by the language, bureaucracy, and processes of justice. Interaction on the beat, information games, remedial routines, degradation ceremonies in court, all help explain in fascinating and colourful detail why criminal justice operates as it does.[4]

What is barely touched on is the nature and role of the law itself. In a way it is not surprising. Law, like so many of our significant institutions, does not invite study. The statutes written in the dullest and most convoluted of prose, the shelves and shelves of dusty law reports, and the maze of common law decisions they contain can hardly raise the same immediate interest as the fascination of observing people in action, policemen ferrying drunks home from carnivals, lawyers negotiating and string-pulling, clerks of court organising cases round the tea break. But the failure to investigate the law is based on more theoretical grounds too, on an aversion to the naive role theory which equated formal rules and roles on how people *should* behave with how they *do*, which confused the prescriptive with the descriptive and presented people as passive puppets. Interactionist studies focused instead on the active nature of human beings, on the interactive processes by which the working of any institution was accomplished, on the personal and social variables which intervene between how institutions should work and how they do. In the realm of criminal justice the formal structures and rules of law were quite simply not a relevant subject for investigation.

Ironically, however, some vague notion of 'the law' is usually there as a background assumption, as a vague standard from which the law-enforcers under study are assumed to deviate. The same polarities appear again and again. The criminal justice system is seen in Packer's (1964) terms as modelled on 'due process' with law-enforcement agencies making it veer in practice towards 'crime control'; the 'law in the books' is presented as subverted by the 'law in action'. The assumption has been in effect that the law

incorporates rights for the accused, and the problem has been simply to ask why and how the police and courts subvert, negate or abuse them. Thus Skolnick (1966) notes that the purpose of his book is 'not to reveal that the police violate rules and regulations—that much is assumed' (p. 22). In conventional sociological studies of criminal justice then, 'law' stands merely as a supposed standard from which the enforcers of law routinely deviate; legal procedures are simply *assumed* to incorporate civil rights. The 'law in action' is scrutinised but what the 'law in the books' actually says is simply taken as read; it remains unproblematic and unexplored.

At the level of policy rather than explanation the same assumption is made. Throughout the debate of the 1970s both those advocating law geared more to crime control, like Sir Robert Mark, or his successor as Metropolitan Police Commissioner, Sir David McNee, *and* those advocating more effective civil rights, like the National Council for Civil Liberties, tend to assume that the law does incorporate safeguards for the accused. Hence from one perspective the police are too hamstrung by the law to do their job and the guilty go free; from the other, the law does not work because the police abuse it to secure convictions. So NCCL writers note:

> All policemen are under the same pressure; *bend the rules* to deliver the goods in the form of convictions. . . . It is the *abuse* of police powers in these circumstances—arrest, search and questioning—that has created the most intractable police/civil liberty problem in recent years. (Cox, 1975, p. 164; my emphasis)

Likewise the Criminal Law Revision Committee's proposals to modify the right to silence were based on the assumption that current law does incorporate some such right, while its critics assume the same. So the liberal lawyers group, Release (1973), could say:

> At present, the only protection offered by the law to a man facing accusations from the police or other officials is his right to remain silent. If, as so often happens, a man is arrested late at night, taken to a police station and interrogated by several police officers using the methods that we have already described, he has the right to say: 'I wish to remain silent, I will not be questioned. I will not be intimidated or bullied. I will not incriminate myself, my friends, or my family as you wish me to do.' He is entitled to

> say this without running the risk of anyone at a later stage being able to argue that by refusing to speak when questioned, he showed himself to be guilty of the accusation against him.
>
> It is the intention of the CLRC to remove this sole protection. According to their proposals, failure to mention any fact later relied on in his defence, would expose the defendant to 'adverse inferences' in court. In other words, the jury or magistrates would be entitled to regard silence as evidence of guilt. (p. 26)

Champions, critics, and students of the criminal process alike, then, base their arguments on *assumptions* about the law. But does the law incorporate due process, safeguards for the accused, civil rights? The vague notion of 'due process' or 'the law in the books' in fact collapses two quite distinct aspects of law into one: the general principles around which the law is discussed—the rhetoric of justice—and the actual procedures and rules by which justice or legality are operationalised. The rhetoric used when justice is discussed resounds with high-sounding principles but does *the law* incorporate the rhetoric? This cannot simply be assumed; the law itself, not just the people who operate it, must be put under the microscope for analysis.

This is the approach which this study adopts. It focuses not on the interaction of policeman and citizen, lawyer and client, magistrate and defendant *per se* but on the legal context in which that interaction takes place. It supplements the interactionist approach by asking a different question. Instead of showing why police, magistrates, and lawyers might be motivated or pressurised into processing people as they do, it asks why they *may* process people as they do. That involves looking not at the informal rules of social interaction but at the formal rules of the law itself, at what is permitted or prohibited by statute, at what judges treat as acceptable, accountable, or sanctionable police and court practices.

In short, this study approaches the paradox of a high conviction rate in a legal system allegedly geared in favour of the accused by scrutinising the legal system itself. It turns 'the law' from a background assumption of interactionist research into a central sociological problem in itself. It does so for three reasons. The first is quite simply a need for information. Both theoretical and policy debate in the area of criminal justice are based on an assumption about the law which may be false. The second is the potential influence of the law on its enforcers. Interactionist scepticism

regarding those who equate the prescriptive with the descriptive is entirely valid, but to say people do not *necessarily* obey the rules is not to say they never do. The law *can* constrain, especially when it is public and subject to controls. The law itself is also one of the contextual elements of decisions. Bureaucracy, colleagues, and personal ambitions do not have a monopoly on shaping decisions. The law itself may incorporate pressures and inducements which motivate decisions by policemen, lawyers, and defendants. What is more the rules may be facilitative as well as prohibitive. Law is, for example, one of the raw materials that lawyers work with. This book is full of illustrations of how lawyers use the law in courts to score points for their own case or against their adversary's. Clearly they act upon that raw material; they use it; but they are able to use it because it is there, able to use it *openly* because it is legitimate, because they *may* make their case in that way according to the law. The role of formal law in how the process of conviction is achieved should not be underplayed.

The third reason shifts the theoretical ground completely. Interactionist studies of criminal justice have scorned the study of formal rules because they were more concerned with what law-enforcers *do* than with what they *should* do: what they *should* do is, however, from a quite different theoretical perspective, a legitimate question to ask. It raises issues not so much about the operation, as about the politics of criminal justice.

LAW, THE STATE AND DOMINANT IDEOLOGY

Studies of law-enforcement so far have in fact been less about the law than about occupational groups who happen to operate the law and incidentally impinge on it, a significant issue but not the only one. Law-enforcement analysed instead from the perspective of how it is meant to operate provides a more direct entrée into the nature of the law itself and the judicial and political élites of the state who make it. Here methods scorned for studying how the police and courts operate become vital for studying the law. Law reports may not tell us much about the actuality of police and courtroom behaviour but they do tell us what kind of behaviour is acceptable in law. Analysis of the 'law in the books' does not tell us what police and court officials do but a good deal about what they are legally allowed and legally expected to do. Law-enforcement, in short, is

not exclusively an area for interactionist study at the micro level; it is also an issue in the politics of law at the macro level. This means a change of focus, shifting attention from the routine activities of petty officials of the state to the top of the judicial and political hierarchies where rules are made and sanctions operated, switching our question from the effectiveness or otherwise of rules and sanctions (assuming they were intended to be effective) to the intentions themselves. The question of whether the law does incorporate civil rights as in the ideology of legality it should, thus takes on a new significance. It is not just relevant to the structural framework within which petty officials routinely operate, it is also relevant to the *action*, the *intentions* of those at the top of the legal hierarchy. In that sense the micro-sociological conception of people and analysis of action is simply moved up the power structure, from those who administer the law to those who make it. But at the same time macro-sociological issues are raised too. Shifting the focus to the political and judicial élites also shifts the focus to the very core of the operation of the state.

To question whether the law incorporates its own rhetoric is to ask whether deviation from standards of justice and legality are not merely the product of informalities and unintended consequences at the level of petty officials, but institutionalised in the formal law of the state. This has implications for how the state rules. One of the essential justifications of the democratic state is precisely that it is based on legality, that the relationship between the state and the individuals of civil society is one governed not by the arbitrary exercise of power but by power exercised within the constraints of law. The criminal justice process is the most explicit coercive apparatus of the state and the idea that police and courts can interfere with the liberties of citizens only under known law and by means of *due process* of law is thus a crucial element in the ideology of the democratic state. To question whether the law in fact incorporates the rhetoric of justice is to question the ideological foundations of the state. It is to raise the possibility of contradictions within dominant ideology and questions about the mechanics of its management. It is to raise questions about what the whole idea of the rule of law means and how it operates.

It is a long way from the Saturday night affray to the Law Lords; a world of meaning separates the breach of the peace or burglary or assault and theories of how the state rules. Yet they are inextricably interlinked. This study tries to take one small step to bridge the gap.

METHODS AND DATA

This research began as an observational study in the courts; 105 cases (referred to throughout the book by case numbers 1 to 105) were observed in the sheriff and district courts of Glasgow, under the jurisdictions of stipendiary and lay magistrates, sheriffs sitting alone, and sheriffs sitting with a jury. The nature of the study led to textbooks on the rules of evidence and procedure, mainly at that stage as background information. They in turn led to law reports and statutes in a naive attempt to pin down what exactly the law was, and the law of criminal procedure and evidence itself, first its substance, then its very form, became a central focus of analysis. The study therefore draws on both observed empirical data, along with some informal interviews with lawyers, policemen, defendants and witnesses, and an analysis of law reports, statutes, committee reports, and legal texts.

The empirical data are mainly Scottish; the study of law ranges over both Scots and English law. In evidence, procedure, the structure of trial and prosecution they vary far less than is sometimes supposed, and where they vary the impact is not always significant. This is not, however, a comparative study. It simply shows how both Scots and English law define and affect the conviction process; where there are marked differences they are noted and where a point specific to English law requires empirical illustration it is done by drawing on observation in English courts conducted in the course of a more recent project.[5]

Taking the approach of examining law and the legal system itself has meant taking on board data more normally associated with 'lawyers' law' than with sociology. There are risks in doing this, risks of being accused by sociologists of being unsociological, by purists of being eclectic, risks particularly of criticism by lawyers. The sociologist is an amateur in the field of law and risks quite simply getting it wrong. Yet the law is not such a mystical area; it takes time but it is accessible. Indeed as evidence of the discourse of the powerful it provides via the law reports a veritable bank of readily available data. Sociologists may, in pointing out how defendants are mystified by the law, also have been too readily deterred by the mystique themselves. The risks are not merely worth taking; they are necessary steps if the sociology of law is to move beyond being the sociology of just another set of occupational groups and become truly a sociology of *law*.