CRIME & JUSTICE IN AMERICA

Present Realities and Future Prospects

PAUL F. CROMWELL ROGER G. DUNHAM

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To my wife and best friend, Jimmie Cromwell, and to my newest grandchild, Victoria Anne Pettis.

—Paul F. Cromwell

To my wife Vicki, and our children, Jenny, Jason, Joshua, Ben, Seth and Zack.

—Roger G. Dunham

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Paul Cromwell
Wichita, Kansas

Roger M. Dunham
Coral Gables, Florida

PREFACE

> The criminal fascinates us even as he repels us. Like Cain, he is not his brother's keeper. Like the serpent, he tempts us to guilty knowledge and disobedience. He is to men what Lucifer was to the angels, the eternal outcast and rebel, challenging all the assumptions of the moral order and risking heaven to do so. We are dismayed by his often dark and bloody deeds, and we run from him when the sun goes down, leaving the streets of our central cities dark and deserted. But even as we escape in terror, we seek him out in our imagination, as though he held locked within him some dirty secret of our own. He is, after all, a brother, acting out the primitive part in us that we struggle to keep dark. He is hated for being too much like us; he is envied for his freedom and the blessed gift of unrepentance.
>
> *Ysabel Rennie*

The purpose of this volume is to provide a comprehensive range of perspectives on topics and issues critical to the study of criminal justice. We have selected readings from many sources, including recent criminal justice research monographs and articles from the professional and academic literature, case studies, sociological, psychological, and criminological analyses, the popular media and literature, as well as historical and philosophical approaches to understanding the complex issues confronting criminal justice today. This interdisciplinary approach provides a broad coverage of the various topics and issues, presented in an interesting and readable format. We believe that the selections will capture the students' and teachers' imagination and help make the fascinating study of criminal justice even more appealing.

The book is divided into five sections or topic areas: (1) Crime and Justice in America; (2) The Police in America; (3) Adjudication and Sentencing; (4) Jails, Prisons, and Community-Based Corrections; and (5) Looking Toward the 21st Century: The Future of Crime and Criminal Justice. Each section contains selected discussions and analyses of current issues and problems, ethical considerations, and materials related to criminal justice career opportunities, including employment standards and qualifications, and strategies for pursuing employment in the public or private sector of criminal justice. Each section is preceded by brief comments by the editors and is followed by questions to stimulate classroom discussion. *Crime and Justice in America: Present Realities and Future Prospects* also contains an index to assist the reader in locating topics of interest. This volume may readily be used as a stand-alone text for introductory criminal justice courses or as a supplement to most introductory texts. We have also sought to provide readings that create a balance between theory and practice; that promote critical thought about current criminal justice issues; and that encourage a vision for the future. As criminal justice teachers with a combined thirty years teaching and research and over two decades of experience in criminal justice practice and administration, we realize the need to present students with materials that challenge their minds yet keep their interest and make them want to read further. We believe we have accomplished that goal in this volume.

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Section 1

Crime and Justice in America

Introduction

Every known society or group has rules for its members to follow, and, as a result of this and simple human nature, every known society or group has rule-breakers. Once some members break the rules, it is only natural for the remaining members to respond to the rule-breakage. If the sentiment is strong concerning the importance of the rules to the group, the response will be severe. This is the bottom-line of crime and justice. Crime is nothing more than the breaking of rules we consider important to our society, and justice is the official response to breaking those rules. The focus of Section I is on these more general aspects of crime and justice.

In the first selection, entitled "The Evolution of Criminal Law," criminologist C. Ray Jeffery traces the origins of the criminal law from the customs of primitive tribal society to modern concepts of law. He explains the change from law as private vengeance to crime as offenses against the state, and how its focus changed from restitution and compensation to punishment and justice. This is especially relevant today in light of the criticism that our justice system needs to focus more on the plight of victims.

The second selection, "Fallacies and Truths About Crime" by Rutgers University criminologist Marcus Felson, is a unique and provocative analysis of crime in America with particular reference to the misunderstandings and outright erroneous information that many Americans use as a foundation for their concepts of crime and punishment. Marcus Felson provides a general perspective or image of crime and criminals that he sums up as temptation and control. Society provides both temptations and controls, and it is the balance of the two that dictates the amount and nature of our crime problem.

"Highlights From 20 Years of Surveying Crime Victims" chronicles much information that is only available through the National Crime Victimization Survey. This report includes crime rates in the United States. Who are the victims of crime? What is the relationship of victim and offender? Where and when does crime occur? How much crime occurs in schools? Trends over the past two decades are also discussed and analyzed in this important overview that addresses victims, one of the most neglected subjects in the study of crime.

The fourth selection, "Racism in the Criminal Justice System: Two Sides of a Controversy" by William Wilbanks and Coramae Richey Mann, presents two sides of a

longstanding controversy. Mann argues that racism pervades the criminal justice system, while Wilbanks suggests that the system discriminates in favor of African-Americans. Each author makes his or her case and then points out "flaws" in the other argument. The debate introduces more questions than definitive answers, which provides a catalyst for all those interested in racial justice.

The final selection in this section is entitled "Drugs, Crime, and the Justice System." This report presents a detailed discussion of the relationship between drug use and crime. Currently, drugs are thought to stimulate crimes beyond the illegal use of drugs. It would be futile to try and understand the crime problem without understanding illegal drug use and its role in the criminal enterprise. The authors of this selection analyze the linkages between drug use and violent crime and between drug use and income-generating crime. Their presentation of extensive empirical evidence supports their conclusion that drug use has a strong influence on crime.

The Evolution of Criminal Law

C. Ray Jeffery

Tribal Law

The transition in social organization was from tribal to state, from simple to complex, and from hunting and fishing to agricultural to industrial and urban. Law as we know it emerged from this transition from a tribal society to a state society.

Primitive tribes are governed by custom, tradition, magic, and witchcraft. Anthropologists have taken two different approaches to the nature of primitive law. One view maintains that all custom is law, and therefore primitives have a legal system. Malinowski argued, for example, that primitive social systems are governed by custom, which is enforced by reciprocity or "a body of binding obligations...kept in force by specific mechanisms of reciprocity and publicity inherent in the structure of their society" (Malinowski, 1926:58).

The problem with the definition of law as custom is that it equates law with all social norms. All laws are social norms, not all social norms are laws. Custom is enforced by ridicule, tradition, social pressure, public opinion, and threats of ostracism from the group. Law is enforced by the use of force and coercion. Seagle (1941:7) wrote that "it is the fact that the sanction is applied exclusively by organized political government that distinguishes law from religion, morals, and custom." Hoebel (1954:28) stated that "a social norm is legal if its neglect or infraction is regularly met by the application of physical force by an individual or group possessing the socially recognized privilege of so acting." In commenting on the sociological and anthropological usages of the term "law," Roscoe Pound (1945:300) said: "This broader usage (law as custom) is common with sociologists. But certainly for jurists, and I suspect for sociologists, it is expedient to avoid adding to the burden of the term of too many meanings, and to use 'law' for social control through the systematic application of the force of politically organized society."

Primitive people had little or no law because they are controlled by custom, religion, magic, and witchcraft, and the basic unit of society is the kinship group, not the political state (Redfield, 1967; Bohannon, 1967b; Seagle, 1941; Radcliffe-Brown, 1935; Llewellyn

C. Ray Jeffery, *Criminology: An Interdisciplinary Approach*, Englewood Cliffs, NJ: Prentice-Hall, 1990, pp. 49–56. Used by permission of the publisher.

and Hoebel, 1941). The shift from *tribal law* to *state law* is one of the basic changes in institutional structure that occurred in the history of human social organization.

The Nature of Tribal Law

Primitive law is based on the principle of *self-help*. Primitive law is private law, and it is enforced by the tribal group. In most primitive societies the *feud* is carried on by groups related to one another by blood or by social obligation. An injury to a member of tribe *A* by a member of tribe *B* led to a retaliatory strike against a member of tribe *B* (Barton, 1949; Llewellyn and Hoebel, 1941; Popisil, 1967; 1971).

Early Egyptian and Greek law was organized along tribal principles, based on a doctrine of "lex talionis," or an eye for an eye, a tooth for a tooth. This principle is found in the Code of Hammurabi (2400 B.C.) (Koschaker, 1935), which placed a limitation on revenge since the offended party could take no more than an eye for an eye. Out of early tribal law we find the historical beginnings of a major justification for punishment: that revenge is justice and that punishment must fit the crime. We discuss retribution and revenge in later chapters.

The feud was very costly in terms of lives and injuries, so limitations were placed on the conditions under which the feud could be carried out. The feud was limited in many societies by the use of ridicule and the singing duel, in which the litigants insulted one another until satisfaction was obtained (Bohannan, 1967b).

A common way to limit the blood feud was through a system of compensation, or payment of damages to the injured party. The amount of the payment depended on the extent and nature of the injuries (Barton, 1949). Among the Comanche Indians restitution often took place in the form of horses. The military societies of the Cheyenne Indians performed police functions, especially during the communal buffalo hunts, and these military societies were an important step toward the development of the state system (Hoebel, 1954; Llewellyn and Hoebel, 1941).

The Teutonic tribes of northern Europe had a system of self-help and the blood feud. A system of compensation for injuries developed to assure peace between the conflicting parties (von Bar, 1916; Huebner, 1918). The Teutonic tribes who settled England (Angles, Saxons, Danes) brought with them the Germanic system of tribal law. The Anglo-Saxons developed a detailed system of compensation, called the *wergild*, money paid for the death of a tribal member. The payment schedule corresponds to our modern insurance contract, whereby a person is paid so much for the loss of an eye or an arm or a life (Thorpe, 1840; Attenborough, 1922; Rightmire, 1932; Kemble, 1879; Pollack and Maitland, 1899; Robertson, 1925; Seebohn, 1902).

From Tribal to State Law

As discussed above, the pattern of social evolution was from a hunting and fishing economy to an agricultural economy. Villages, population growth, and a more complex division of labor resulted in the decay of the tribal groups. Territorial groups replaced kinship groups. These territorial groups took the form of feudal kingdoms governed by lords, and eventually by a unification of kingdoms under a lord, which became the modern nation-

state system (Stubbs, 1891; Traill, 1899; Rightmire, 1932; Kemble, 1879). *Land* replaced *blood* as the basis for social control. Individuals now owed allegiance not to the kinship group but to the land. The person who owned the land judged the person who had no land. Under a feudal system this was the lord-serf relationship, and anyone who lived on the land owed the lord services and allegiance. Under the state system the citizen owed the king services and allegiance.

In his *Ancient Law*, Sir Henry Maine (1906) referred to this shift from tribalism to state sovereignty as a shift from "status to contract." Under a status system rights are determined by one's membership in a family; under a contract system one's rights are determined by individual contractual relationships worked out within the framework of the political state. In his *Ancient Society*, Lewis Henry Morgan (1878) called this movement one of "savagery to civilization." "A tremendous change takes place when the tribal tie gives way to the territorial tie" (Kocourek and Wigmore, 1915). "Legal controls came to be associated with locality rather than with bloodstock or descent" [Goebel (1937a); see also Barton (1949) and Titiev (1954)]. Simpson and Stone (1948) summarize this movement as follows: "The cardinal characteristics of an emergent political society is that kinship is no longer the main bond of social cohesion. Stated affirmatively, this means that political organization has been superimposed upon kin organization." Mueller and Besharov (1986) have traced the growth of the criminal law from the family to the clan to the nation-state and finally to international bodies such as the United Nations.

The Emergence of State Law

The Unification of England

The political unification of the feudalistic settlements in England came about as a result of feudal warfare and conquests by one lord of another lord. The emergence of Christianity in England was also a unifying force. The conquest of England by the Normans under William the Conqueror (A.D. 1066) united the kingdoms of England under one king for the first time in history (Traill, 1899; Rightmire, 1932; Stubbs, 1891; Kemble, 1879).

The King's Peace

After the conquest William the Conqueror became the source of law and authority. The concept of the "king's peace" emerged; that is, any violations of the peace, such as fighting or thievery, were punished by the king as violations of the rights and authority of the king. The guilty party had to pay compensation to the king for these violations (Pollack and Maitland, 1932; Seagle, 1941).

By the time of Henry II (1154–1189) the Court of the King's Bench was open to citizens who had the proper legal writ, known as Pleas of the Crown. The Court of Common Pleas was established for pleas not involving the king directly (Maitland, 1931).

The king appointed local judges to represent him in local courts, and these judges made decisions that were recorded on the Pipe Rolls. In time these many judicial decisions

came to be known as the common law of England. Common law is judge-made law with the authority of the king behind it; it is not customary law or tribal law.

Trial Procedures

The doctrine of self-help was based on the *appeal* of the injured party, where an accusation was made against the accused by the injured party. This was a private procedure that was replaced by a trial procedure by which the innocence or guilt of the accused party was determined. These trials originally involved trial by *ordeal*, a physical test involving the hot iron ordeal, the cold water ordeal, or the dry cereal ordeal. If the accused did not suffer injury from the ordeal, it was assumed that he was innocent. The ordeal depended on divine intervention, and clergy played an important part in the ordeal until the Fourth Latern Council of A.D. 1215 forbade clerical participation in the ordeal.

The Normans introduced the trial by *battle*, whereby the two litigants fought one another until one was killed or injured. The trial by battle also took the form of the *duel*, by which men of honor settled their differences (Radin, 1936; Attenborough, 1922).

The *indictment* came into existence at this time also, whereby local officials would take testimony from witnesses as to the type of crimes committed in the county. This led to the modern grand jury and became a means of public prosecution of criminal cases. The indictment led to a *trial by jury* in place of the ordeal, and such trials were held in the king's court (Holdsworth, 1923).

Compensation to the King

The old system of compensation to the victim or his/her family was replaced by compensation to the king. Crimes were no longer family or tribal affairs, but were offenses against the king. "The very core of the revolution in finance and law that took place in Henry II's reign was the transfer of the initiative in criminal matters from the kindred of the injured man to the king as public prosecutor" (Jeudwine, 1917:84; Pollock and Maitland, 1899). The payment made to the king as part of the king's peace was called an *amercement*.

Gradually, the law of wrongs was differentiated into the law of torts and the law of crimes. Tort law involves compensation for injuries done to another party for which private responsibility exists; criminal law involves punishment done for injuries done to the general public or to the state. A distinction was now made between those offenses for which compensation was made and those for which compensation was not made. For those guilty of a criminal offense who could not pay the compensation to the king, a different kind of punishment had to be used, such as mutilation, outlawry, transportation, and death. The inability of a defendant to pay for the crime was a basis for the development of criminal sanctions (Potter, 1943). Pollock and Maitland (1899) wrote: "Gradually more and more offenses became emendable; outlawry remained for those who could not or would not pay." They cite the case of a forger who was saved from the gallows by the payment of the amercement to the king. A murderer could buy back his life, although a thief without the means of restitution was hanged. There can be no tort law for a judgment-proof population [Pike (1873); see also von Bar (1916)]. The fact that the compensation went to the king and not the victim discouraged victims from pur-

suing criminal cases in the court system, and the initiative to prosecute criminal cases was left to the king and his agents.

Punishment

As was noted above, the death penalty developed for those who were unable to pay the compensation due to the king. Executions were carried out for a great variety of offenses and they were public affairs attended by huge crowds in a holiday spirit. Cruel and ingenious methods of torture and death were used at these executions. By the time of Henry VIII there were over 200 capital offenses, and children, women, and animals were executed as well as men (Holdsworth, 1923; Plucknett, 1948; Radzinowicz, 1948–1957; Stephens, 1883).

Although many capital offenses and many executions occurred, the number of executions to the number of eligible offenders was small. Criminous clerks (priests) were exempted from the criminal law of the king under the benefit of clergy doctrine. Sanctuary was granted to a fleeing criminal by the monasteries, and a criminal who reached the safety of the church could leave the country, usually at Dover, for a foreign land (Plucknett, 1948; Holdsworth, 1923).

In capital cases the judges would interpret the statutes narrowly, or fail to apply the death penalty. Juries would return verdicts which required less than the death penalty, or they would find the defendant not guilty. Prosecutors would reduce charges through plea bargaining. All of these practices are still to be found in the criminal justice system. Such legal practices made the use of capital punishment most capricious and uncertain (Hall, 1952).

Transportation as a punishment was introduced in the late seventeenth century. Inmates were shipped to colonies, such as Botany Bay in Australia. Alexander Maconschie, a British penal reformer, made his reputation at the penal colony in Australia (Mannheim, 1970). In the nineteenth century imprisonment and the growth of our present prison system replaced the use of capital punishment and transportation as a major means of dealing with the crime problem. The development of the modern prison system, probation and parole, and treatment techniques are the subject matter of corrections and the criminal justice system (see Chapters 8 and 9).

The Police System

The disintegration of the tribal system left the community without a means of enforcing law and order. A system of local control was developed called the *hundred*, 100 men designated as responsible for the good behavior of the people in the community. A body of armed citizens, called the *posse comitatus*, pursued the criminal, and local political units were responsible for police protection, which was in the hands of private citizens (Pike, 1873; Pollack and Maitland, 1899).

As the crown gained power it extended this power into each local county government. The king's reeve or shire reeve (a shire is a county) watched over the king's financial and legal affairs in each shire, and he presided over the county court. The shire reeve came to be known as the sheriff, who is still the police officer at the county level in most states (Stubbs, 1891; Jeudwine, 1917).

From 1300 to 1900 there was no strong public police force in England. Pike, Stephens, Radzinowicz, and other legal historians described this period as one of lawlessness and violence. Local merchants organized private police forces to combat crime. John and Henry Fielding and Patrick Colquhoun led a movement to establish a strong centralized police force in England. John Fielding established the Bow Street Runners as a police unit in London, and in 1829 Sir Robert Peel organized a centralized police force for England, which at this time was limited to the city of London. Scotland Yard was also established during this period (Radzinowicz, 1948–1957).

The police system, like the court system, shifted from private to public during this period. Today we still depend on public police agencies—but with an increase in the usage of private police forces since public resources are not adequate to deal with the crime problem.

Later Developments in the Criminal Law

The enclosure movement, by which land was taken by the lords from the peasants and enclosed for herding sheep rather than for growing crops, led to a shift in population from rural to urban areas. Peasants moved from farms to towns and villages, and a new class of vagrants was created, forming the basis for some major social problems. A growing population and industrialization also contributed to this rural-to-urban shift. The Statutes of Labourers of 1349 ordered men to remain on their jobs and in the township. The Elizabethan Poor Laws of 1598 and 1601 attempted to provide relief for a population of poor and destitute people. Workhouses and houses of correction were established, one to provide work for the able bodied, the other to provide punishment for those who would not work. However, in practice the two institutions were never clearly distinguished. The Settlement Act of 1662 made each parish responsible for the welfare of those residing in the parish, which meant residence by birth. Crowded slum areas were characterized by vagrancy, begging, gambling, drunkenness, prostitution, and theft (Pike, 1873; Stephens, 1883).

At this time a number of criminal laws were passed aimed at controlling vagrancy, theft, poverty, drinking, and gambling. Eighty percent of the executions of the day were for property offenses. "Sending paupers to Bridewell" was a common expression. The Waltham Black Act made it a capital offense for anyone to have a face blacked while doing injury to person or property. This act was aimed at the highwaymen and robbers of that time, and it extended the death penalty to many new areas of theft (Radzinowicz, 1948–1957). The Gin Act of 1736 was an attempt to control the public gin houses, and it caused so much popular resentment that rioting occurred as a result. Many rebellions and riots involving political and religious groups, such as the Lollards and Anabaptists, occurred at this time (Radzinowicz, 1948–1957; Pike, 1873). The criminal law was shaped to handle the many social problems created by urbanization and industrialization.

In *Theft, Law and Society*, Jerome Hall (1952) traces the changes that occurred in the law of theft due to the impact of urbanization and industrialization. His study begins with the *Carrier's Case* of 1473. In this case the defendant had been hired to carry goods to Southhampton. During the course of the journey he broke the bales and took the content. The concept of larceny as it developed in common law included the element of tres-