

THE LAST QUARTER CENTURY, No. 3
A Guide to the Issues and the Literature

CRIME CONTROL & JUSTICE in AMERICA

Searching for Facts and Answers



l W. Keve

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Paul W. Kever

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Foreword

Daily we are bombarded with statistical information and blood-curdling rhetoric about the continuing problem of crime on our streets and, increasingly, in our boardrooms. Paul W. Keve explains and explores the complex issue of crime in our modern urban and industrial society. Drawing upon his many years in both correctional administration and in the classroom, he shows us how the criminal justice system works and why, in some instances, it doesn't.

As he makes clear, the components of the criminal justice system—police, courts, and correctional institutions—interrelate; decisions made by one always have some impact on the other, and often with unforeseen consequences.

Crime Control and Justice in America is the third title in the series “The Last Quarter Century: A Guide to the Issues and the Literature.” Like the other books in the series, it provides a synthesis of recent scholarship, supported by an annotated bibliography for each chapter, and a general resource guide for researching the library. Most of the citations in the bibliographies are to books and articles published within the last decade. The resource guide will lead students and other researchers to library sources that update their knowledge of topics covered in the book. Briefly annotated citations to reference tools and journals will guide the reader to sources found in most academic and many public libraries.

John H. Whaley, Jr.
Series Editor

Preface

The process of defining and administering criminal justice policy is exceedingly complex and continually evolving. Both practical and philosophical adjustments emerge from the confrontation between newly progressive social theories and the more elemental public instinct for protection from crime and the punishment of offenders. No single book can fully cover the subject in its bewildering complexity, but it can introduce students to the basic premises that generally underlie the public debates on this area of policy. Criminal justice, as here addressed, covers the criminal justice system components of law enforcement, courts, and corrections; in addition, related public initiatives such as crime prevention and services to crime victims will be covered. Whereas all these topics have rich and interesting historical backgrounds, history will not be a part of this writing, except when brief historical reference is needed for a better understanding of present conditions or controversies.

Of special significance in any study of this area of public policy is the perspective of the so-called criminal justice *system*. Whereas it can be argued that in fact the criminal justice system is not a system, but a collection of separately operating services, it does nonetheless have much of the character of a system. This is more important than policymakers sometimes realize. As policymakers make material changes in one component of the criminal justice system, they often find it necessary to revise policy in other components to undo the damage done by the unilateral action. Courts are independent from police, as police are independent from corrections, and each of these components operates with its own different parts and agencies, quite independent of each other. But all the system parts are vitally interrelated in the sense that new policy adopted in one may have unexpected and substantive effects in another. In this book, though the various chapters are devoted to the separate components of the criminal justice system, their interacting relationships are essential.

In addition to the appraisal of criminal justice as a system rather than separate parts, this account seeks to give a perspective on one aspect of criminal justice which, though intangible, is of special importance to the long-term interests of a great democracy. It lies in the fact that the principles basic to the criminal laws, and the integrity of a country's obedience to those principles, help to define citizenship and civil rights. The acid test for the freedoms promised in the Bill of Rights comes when these freedoms must be accorded to persons who are "unpopular," whether for inherent prejudicial reasons (race, religion, ethnic identity, etc.), or because of activities considered outrageous by the public.

When the justice system must deal with a defendant accused of some notorious criminal act that has incited public anger, basic civil rights are too easily a casualty in the handling of such a case. But if despite public outrage, the system holds firm in the protection of such an individual's rights, this reinforces society's dedication to the rule of law, and reassures citizens that should they themselves ever become subjects of prosecution, their interests and rights will always be protected.

One aspect of criminal justice that is suggested incidentally by these chapters is its close kinship with political science. Because the essential concerns of political office seekers are likely to be incompatible with the best correctional measures to some degree, it is possible that significant progress in the control of crime and correction of offenders will eventually result not only from improved treatment programs, but also from discovery of ways to make these programs more compatible with democratic political processes.

The general plan of this book is to present in the first eight chapters an account of the components of the criminal justice system and the social and political conditions affecting them. The final chapter reviews the interrelationship of these same components and significant new directions they are taking. A bibliography of relevant source materials is supplied with the endnotes of each chapter, with major items annotated. It is assumed that the student will use this book as a starting point for further study of the criminal justice system; to assist this research, the appendix presents a compendium of pertinent resources, including organizations and agencies as well as conventional library sources, computerized library catalogs, and electronic databases.

The content of this work has derived mainly from my own experience of over a half century in the general field of criminal justice. In addition to administrative service with corrections agencies in three states, my experience has included teaching, occasional projects in survey and consultative work, staff training, and research or program development for many agencies throughout the country and abroad. To update and supplement the knowledge of criminal justice functions thus gained,

the preparation of this work has entailed inquiries of many professionals who are experts in their respective corners of the criminal justice field. I have thanked them individually as they shared with me their wisdom, and again I say to them collectively that their help has been indispensable and sincerely appreciated.

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Seeking Rational Understanding of Crime

Early criminal codes in the western world developed as patchworks of old habits, religious dogma, superstitions, and prejudices, unrestricted by any precise or clear definitions. Beccaria presumed that criminal offenders acted in rational ways, committing their crimes for the sake of calculated personal advantage. Punishment, consequently, should be just severe enough to offset the advantage gained by the crime. The specific reforms he proposed, radical at the time, included such points as:

The criminal laws should be clear and precise and no one should be prosecuted for a crime that is not defined and published as such in law.

Presumption of innocence should be assumed at each stage of prosecution.

The defendant should be judged by his or her peers.

Every aspect of the prosecution must be open to public observation, with no secret indictments or trials, as this is the only way to protect fairness of the system.

Punishments must be defined in law, limited, and proportionate to the crime.

The use of torture must be abolished.

Capital punishment must be abolished. (Maestro 1973, 22-27)

In advocating these reforms Beccaria was hoping partly for enhanced deterrence of crime, but also was acting on his feeling that basic humanity in the law was a virtue in itself. He saw that the lack of logic and system in the criminal law was causing many people to be victimized through torture, wrongful convictions, and excessively harsh penalties. "If in defining the rights of man and of truth I should help to rescue from the agonies of death one victim of tyranny and ignorance, both equally fatal, the blessings and tears of that single innocent man will console me for the contempt of mankind." But it also appealed to his sense of logic to argue that rational criminal laws would be better understood by the people, and, "the greater the number of those who understand them and have in their hands the sacred code of the laws, the fewer will be the crimes committed." (Beccaria as quoted by Maestro 1973, 21-22)

The first major challenge to Beccaria's theory of crime causation and control came a little more than a century later when Cesare Lombroso, an Italian doctor, concluded from his research that crime had organic causes. His assertion that criminal offenders had anatomical characteristics that could be explained as being atavistic, or inherited throwbacks

to more primitive ancestors, influenced the thinking of criminologists for many years.² Although his 1876 book, *Criminal Man*, contradicted Beccaria's view of the causes of criminal behavior, it did not weaken respect for Beccaria's legal principles.

Lombroso's findings remained influential until gradually repudiated by researchers early in the twentieth century. Notwithstanding the substantial departures from the theories of both these pioneers, it is striking how their ideas presaged modern thinking. Beccaria's legal theories have matured in the legal concepts of due process, whereas Lombroso's search for organic causes of crime is echoed today in the research into possible genetic factors affecting individual cases of criminal conduct.

In distinguishing the two philosophical schools of thought, the theories shaped by Beccaria became known as the "Classical School," while Lombroso's findings led to a philosophical approach known as "Positivism." (Rennie 1978, 67-78)

The Modern Concern about Causation

It could be supposed that policymakers look for a rational understanding of the factors that cause crime so that crime control policy will be based upon this soundly reasoned knowledge. Logically, if we can understand what causes people to commit criminal acts then we can design processes of prosecution and corrective punishment best calculated to suppress crime effectively. To some degree this process will work, but it is made difficult and uncertain by the bewildering complexity of the human personality and the impossibility of identifying and controlling the myriad social forces affecting it.

The human tendency to react to crime on an emotional, subjective basis rather than a logical, rational one further complicates policy on crime and criminals. Attitudes toward capital punishment sharply illustrate the irrational character of public opinion. A 1973 nationwide Harris poll showed that more than half of the respondents said that they would support the death penalty even if shown proof that it had no deterrent value. (Bedau 1982, 74) Thus, the subjective feelings of voters carry more weight than scientific knowledge in defining policy on crime control.

Nevertheless, behavioral and social scientists search avidly for causes of crime and, if definitive explanations prove elusive, at least there is continuing progress toward useful understandings of the important factors. These can be grouped as (1) those developmental and personality problems that lead to the deviant behavior of an individual juvenile or adult offender; or (2) those broad social conditions that foster the criminal tendencies of various classes of people. As one expert

puts it, "In trying to understand nonconforming behavior, we can look inward at the individual's mind and emotions, and we can look outward at the society in which he or she lives." (Sykes 1978, 36) Another says, "Scientific explanations of criminal behavior may be stated either in terms of the processes which are operating at the moment of the occurrence of crime, or in terms of the processes operating in the earlier history of the criminal." (Sutherland and Cressey 1974, 74)

Causation: Theories and Theorists

An understanding of the dynamics of personality factors in the individual criminal case is likely to require insights from organic medicine and the behavioral sciences, with the focus of study often being dysfunctional family relationships. Research by a British psychiatrist, Dr. John Bowlby, demonstrated that children deprived of loving maternal care for a prolonged period are likely to grow up without the capacity to feel a normal sensitivity toward other people. As they become adults, their lack of concern for others and their withdrawn, self-centered personalities increase the likelihood of criminal behavior. (Bowlby 1952, 32) Other researchers have carried this study further to confirm the findings that family problems, especially defects in the mother-child relationship, are criminogenic factors.³

Though findings of pathology are commonly found in individual cases, it is also apparent that many individual offenders are essentially normal personalities, but reacting to "abnormal" social environments. One criminologist points out the general expert opinion that "while a small proportion of criminal behavior is due to psychiatric disturbance, there is in general very little difference between criminals and noncriminals. Those who break the law, it is argued, tend to show a distribution of psychological abnormality similar to that of their law-abiding fellows." (Sykes 1978, 37) In accord with such findings, it is evident that individual factors and the broad sociological factors overlap and must be considered together. Too many times an individual offender is found to be essentially a normal personality adapting to an antisocial environment.

With regard to the broad social conditions, three sociologists, Emile Durkheim, Robert K. Merton, and Edwin H. Sutherland, have constructed theories important to the modern understanding of crime causation. Durkheim's theory of anomie argues that if the group loses its cohesiveness the individual members are less restrained and some will be more likely to resort to criminal activity. (Durkheim 1938) Merton points to the factor of unfulfilled expectations, the frustration of an individual who, lacking the necessary skills, is unable to acquire the material goods that his cultural group seems to value and expect. The

individual may resort to criminal activity as the only way to achieve the living standards of the group. (Merton 1968, 220–223) Sutherland has added the theory of “differential association,” explaining how one person may receive from the people important to him or to her a preponderance of messages favoring a law-abiding style of life, while another person in a more delinquent social group may receive a preponderance of influences that reward a more criminal lifestyle. (Sutherland and Cressey 1974, 75)

A Revived Interest in Biology of Crime Causation

Scientific study, which in the early twentieth century had repudiated Lombroso’s theory of inherited organic causes of crime, came full cycle late in the century as a new generation of scientists, with sophisticated new techniques, found strong hints that certain biological conditions might indeed be causal factors, or at least could predispose a person to criminal conduct. But today, though improved investigative tools are available, there are complicating elements that Lombroso could not have imagined in the research about the links between biology and crime. This has become a controversial area of study, engendering strong emotional reactions to its racial and political implications, and leaving a frustrating dilemma for policymakers.

The biology of crime causation is an area of research that promises to continue as long as modern science seems to be finding antisocial behavior rooted in either inherited or traumatic physical conditions. The infant at birth, for example, is highly vulnerable to conditions causing damage to the central nervous system (CNS), damage that can eventually emerge as any of various types of disability. One expert asserts that there is “accumulating evidence that violence and some types of criminality are associated with disorders of the central nervous system.” The same author explains that “Considerable research points to associations among prenatal and perinatal complications and CNS dysfunction. Generally, early brain damage, primarily due to hypoxia (a severe lack of oxygen) may be related to later neuropsychiatric disturbances.” (Denno 1990, 8) Lead poisoning, another source of damage to the nervous system, is more common than usually suspected. Because the poisoning process is unseen and subtle it leaves a family unaware of its presence until the damage is done. Whereas it does not directly cause delinquent behavior, it can induce developmental problems that exacerbate any antisocial tendencies the child might have.

Whereas the potential effects on the personality of these types of trauma have long been known to the medical field, more recently, scientists have discovered that inherited genetic makeup may also be

a possible explanation for criminal proclivities in some individuals. During the early 1970s, while the country was experiencing much social unrest, and minority groups were discovering newfound militancy, scientists were at the same time rapidly advancing their understanding of human genetics. These two developments were on a collision course that would add memorably to the social stress of the time.

In the 1950s, medical scientists discovered the structure of DNA, which contains the genetic "code" that transmits physical characteristics being passed from one generation to the next. During the same period, scientists were also pursuing related research into the techniques of genetic engineering to combat disease or to improve species of either animal or vegetable life.

Those concerned with the civil liberties of disadvantaged classes were quick to see a likely sinister misuse of the new techniques. If genetic science could offer the prospect of a method to identify in advance those who were likely to be threats to public peace, there could come with it the prospect of unfair preventive controls. DNA "holds an individual's unique genetic code or profile. This genetic code contains the past history and thus dictates the future of an individual's racial and geneological makeup and influences an individual's medical and psychological makeup." (Shapiro 1990, 456) Herein lies an opportunity for the dominant social group to practice what has come to be known as racial or ethnic cleansing. As with so many technical discoveries that are implemented before the ethical implications are clear, this rapidly advancing science has incited intense controversy about the motivations of its researchers, and about the possible application of the new scientific techniques for unethical purposes.

Genetic engineering caught extra public attention and controversy for its application to crime-solving. In 1985 a British medical researcher unexpectedly found that this area of scientific inquiry could be a service to criminology by providing a new way of identifying criminals. By taking a sample of tissue or bodily fluid from an identified person and comparing that person's DNA structure with organic human residue from a crime scene, the two samples can be proved to be—or not to be—from the same person (so the genetic scientists claim). This technique has proved to be so popular that one journal reported in 1992 that "DNA fingerprinting has been admitted in evidence in more than 2000 court cases since 1988."⁴

Aside from this generally accepted technique of identification, the prospect of genetic tampering, while welcomed by some, appears ominously threatening to others. An altruistic but politically naive view presents the enticing prospect that some criminal careers might be forestalled by using genetic engineering to detect a person's predisposition to future violence and then by applying preventive controls. But this kind

of scientific advance encounters the determined resistance of those who are sensitive to issues of human rights. "Proposals for the prediction of violence or other forms of undesired behavior, because they are inevitably linked with control, amount to medically legitimized preventive detention. As such, they should call up in each of us the most profound concern lest we allow our society insidiously to become a therapeutic police state." (Coleman 1985, 142)

Nevertheless there is an inevitable public response to the prospect of controlling violent behavior through some process of genetic surgery. The degree of popular interest in the subject is seen in its extensive coverage in the media. As *Time* magazine reported, "Fresh interest in the field reflects a recognition that violence has become one of the country's worst public health threats. . . . Homicide is the second most frequent cause of death among Americans between the ages of 15 and 24 (after accidents) and the most common among young black men and women. More than 2 million people are beaten, knifed, shot or otherwise assaulted each year, 23,000 of them fatally."⁵

Genetic Science in a Social Context

Though scientists seem ready and eager to probe the genetic factors that may be contributing to the tendency toward violence, political sensitivity in this area is called for, since in the past, the science of eugenics has served the ends of tyranny. The reality of this as a stumbling block to unwary policymakers was made evident when the National Institutes of Health (NIH), as part of its Human Genome Project, organized and funded a conference to be held in 1992 on the subject: Genetic Factors in Crime: Findings, Uses and Implications. It seemed an obvious topic for the NIH, which exists to oversee government spending on medical research. Many scientists, pleased about the conference, saw it as a needed opportunity to share knowledge on the subject and to stimulate further research. But others objected, and shortly before the conference was to be held the objections became so strident that the NIH withdrew the funds and allowed the conference to be canceled.⁶

Some of the prospective participants heatedly protested the suppression of proper scientific inquiry, while others, particularly members of minority groups, noted that the conference planners apparently were presupposing that some feature of the genetic structuring of an individual may predispose the person to crime. This, they thought, sounded too much like racial eugenics, and was too reminiscent of Nazi concepts of race purification, and even of white racial superiority as touted not long ago in parts of the United States.⁷

The reality of such abuses is more stark than most Americans realize. During the 1920s a strong interest developed in the use of sterilization

of "undesirable" people as a means of preventing feeble-mindedness, illegitimate pregnancies, and welfare families. Virginia was especially aggressive in pursuing this solution, but "within that decade thirty state governments had passed sterilization laws, many of them based on Virginia's model. . . . A total of 8000 people were involuntarily sterilized in Virginia during those years [up to 1972] and nationally more than 60,000 people underwent the same procedure." Meanwhile, the same measures were being adopted by the Nazis in Germany, where an estimated two million people were sterilized between 1933 and 1945. "Hitler's actions were applauded by American eugenicists." (Smith 1993, 6)

The new scientific interest in eugenics, set against the history of its misuse, serves to illustrate the modern dilemma for policy planners who seek a rational path to an understanding of crime and a consequent approach to crime control. In fact, it is just that expected approach that becomes the stumbling block; inherent in the objections is the awareness that when behavioral scientists find an apparent causal factor, it will promptly become the basis for procedures to correct or control the criminal. This in turn reveals how many people mistrust theories of crime causation that focus on the individual rather than on broad sociological factors. "By dwelling on the individual offender, contend the critics, scientists divert attention from the social injustice, the poverty, and the many other problems responsible for violence." (Nelkin and Swazey 1985, 354)

Notably ironic is the coincidence that strong objections to biological explorations of crime causation are coming at the same time that significant advances are being made in scientific understanding of aberrant behavior and ways to modify it. A virtual reversal of criminal justice philosophy has in recent years turned the courts and corrections practitioners away from attempts to rehabilitate, as will be discussed in chapter 3. Instead of using new knowledge of behavior for rehabilitative purposes, public policy has in large measure turned again toward a preference for punishment of the criminal. One criminologist, optimistic about the prospects for new applications of biological psychiatry, sees much reason to hope that criminal activity could yield to medical intervention were it not for the philosophical shift. "We have given up the treatment model at a time when the behavioral sciences are about to make a major contribution to our knowledge of human behavior," he asserts. (Jeffery 1985, 45) Nevertheless, the reality is that increasing knowledge of genetics and biochemistry comes at the same time that the U.S. population has also gained a new realization of its history of racial oppression, and a corresponding realization that residual unfairness persists in many everyday practices that handicap minority persons in unsuspected subtle ways. It is certain that in such a context any policies that hold, or even just seem to hold, potential for denigration of a class of people will raise deeply felt objections.

Evolving Definitions of Crime

The average citizen may suppose simplistically that crime is crime; even if it cannot be defined, a person will always know it when he or she sees it. So why must crime be defined?

In fact, the definitions of some crimes have changed considerably from time to time, and often public policymakers have had difficulty in reaching consensus in their efforts to define crime. Of course certain basic offenses are recognized as inherently criminal in virtually any society or any generation. These are usually referred to as acts which are “wrongs in themselves,” distinguishing them from acts that are crimes because they are defined as such in the statutes. Inherent wrongs would include any unprovoked action, such as assault and battery, which physically hurts another person, any theft of another person’s property, and the taking of another person’s life. But even with these, the fine points of their definitions change from time to time. In defining murder, for instance, public policy varies considerably from state to state and recognizes different gradations of guilt according to motivation, provocation, amount of deliberate planning as compared with the impulsive act, the degree of cruelty involved, and the degree of provocation by the victim. Punishments for homicide are graded accordingly, as they are for assaults and thefts, but definitions of theft are more complex in response to varied public attitudes about property values and personal safety. Legislators face continual demands from the public fearful of crime for fine adjustments in the criminal laws.

Defining and Counting Crimes: A Frustrating Process

One of the crimes usually thought of as a “crime in itself” is rape, an act that stands as a despicable crime in all societies and in all times. But here too, application of the law is flexible, bending to adjust to the sensibilities and prejudices of the affected public at the time and place. An insensitive law enforcement agency, skeptical of a complainant’s innocence, may treat the matter lightly, as in fact has been the case for much of law enforcement history. Actually, the crime of rape often causes almost unresolvable frustrations for both victims and police. The problem starts with the fact that usually this crime is committed without witnesses, leaving it exceedingly difficult to sort through the emotional, conflicting testimony of the principals. Basic to the validity of a rape charge is forced sexual intercourse despite the victim’s nonconsent and resistance, but the quality of the resistance often comes into dispute. Conventional, middle-class society has long been unrealistic in expecting the rape victim to oppose the attacker with heroic physical force