INTRODUCTION

A Government of Men, Not Laws

Histories of criminal justice in the modern West are not so much studies of substantive doctrine as studies of the rise of the State. They begin with the Weberian assumption that the modern State achieved its authority by gaining a monopoly on the legitimate use of force and trace the development of those institutions of criminal justice – police, courts, and prisons – that the State used to maintain the order that Weber asserted an advanced capitalist economy required. But there are problems with that approach when applied to the United States. As many historians have demonstrated, it cannot engage the constitutional tension between state and federal power. Just as telling, it has no room for the claims of popular constitutionalism and popular sovereignty that echoed across the first century and a half of the constitutional era in the United States.

To avoid that problem the analysis that follows takes an alternative approach, which looks at the history of criminal justice between 1789 and 1939 from a different, less court centered point of view. Its perspective is suggested by Charles Tilly's insight that "[b]anditry, piracy, gangland rivalry, policing and war making all belong on the

same continuum."[1] While Tilly's focus was on the degree to which the State could act like an extralegal, even criminal, enterprise, others have pushed his idea in the opposite direction, investigating extralegal actions that entailed activities normally associated with the State. Studies of pirates and bandits, for example, have explored the ways in which groups living outside the law established their own processes of judgment and punishment. Students of civil society in the nineteenth-century United States have considered how popular constitutionalism allowed people, even those denied full citizenship, to exercise sovereign powers parallel to, and sometimes in competition with, those of the State. Other scholars have examined ways in which some private groups exercised a type of sovereign power that complemented and reinforced the institutions of the State.

To that end, this study looks at the intersection of formal law, private processes, and popular justice, exploring how and why their interplay over those 150 years prevented the creation of a Weberian State, at either the national or the local level. It considers how the constitutional order empowered popular justice, often at the expense of the rule of law, and why it tried to check its power. And it analyzes how and why that dynamic led to the shifts in constitutional theory that brought the older system to a close, and what began to develop in its place as the 1930s came to an end. To explore those issues, this book is organized in a roughly chronological fashion. The initial chapter studies the ambiguous role the national government played in criminal law from the ratification of the Constitution to the eve of the Civil War. The second chapter then moves

[1] Charles Tilly, "War Making and State Making as Organized Crime," in Peter B. Evans, Dietrich Rueschemeyer, and Theda Skocpol, eds., *Bringing the State Back In* (1985), 169, 170.

the discussion of crime and punishment back to the states, looking at criminal justice at the local level from 1789 to 1839. When that period began, criminal justice in the different states was decentralized, rested on local community norms, and was under significant popular control. Over the course of the next forty years, as state governments tried to Americanize the law, they attempted to make their criminal justice systems more formal and to wrest power away from local officials and communities. Those changes continued between 1840 and the end of the Civil War, and the third chapter explores the implications of that shift. By 1865 many institutional changes were in place. Police forces had been established, prison systems had been reformed, rules of procedure were elaborated, statutes modernizing criminal law had been passed, appellate opinions were published and disseminated (to further standardize the law), and lawyers and judges had begun to take control of the courts. The result was a criminal justice system that was somewhat less responsive to community norms. But popular forces of justice gained ground even as criminal justice in the courts became more formal and subject to centralized control. People in communities expressed their notions of right and wrong outside the courts, through extralegal processes of shaming, shunning, mobbing, vigilante justice, and other forms of destructive and deadly violence. In contrast to the earlier era (1789–1839), when popular forces were part of the criminal justice system, the years between 1840 and 1865 were a period of parallel processes. The State worked through the courts to judge and punish; the sovereign people used extralegal methods to take the law into their own hands.

The fourth chapter covers the period from 1865 to 1900. In the aftermath of the Civil War, efforts to wrest the power to judge and punish from popular forces were renewed. State governments (and more sporadically the

federal government) expanded police forces, prosecuted extralegal acts, and used other means to try to discourage popular expressions of justice. But battles between the state and federal government checked those efforts to increase the State's power over criminal justice, and the forces of popular power continued to play a significant role in judging and punishing individuals. The next chapter then traces the effect of that intersection between state, federal, and popular forces on criminal justice in the period 1900–1936. The beginning of the twentieth century saw a continuation of efforts to increase the State's control over criminal justice at both the state and national levels. Early in the twentieth century, the creation of juvenile courts and reforms of police and misdemeanor courts were intended to give the State power over the so-called dangerous classes. In the first decades of the century, calls to end popular (or rough) justice increased as scholars, officials, and elites in both the North and South pushed to give courts monopoly control of a criminal justice system grounded in the rule of law. In some respects, these efforts were successful; efforts to end lynching largely brought that deadly practice to an end by 1936. But other types of popular justice continued to challenge the rule of law, suggesting that extralegal justice was a fundamental part of the constitutional order. So long as the targets of extralegal justice had been outsiders, the popular aspect of constitutionalism was something the constitutional order could accept. But extralegal violence seemed to spin out of control in the 1930s, affecting people and property around the country, and that prompted a constitutional shift. To explore that shift, the sixth, and last, chapter, which covers the years from 1937 to 1939, returns the book's focus to the national government. The end of the 1930s saw the beginning of a new, national paradigm for criminal justice that combined an emphasis on legality and a different approach to rights. The former used federal

law to force many forms of popular protest and action out of the streets and into the courts; the latter suggested a new willingness to use the Bill of Rights to regulate criminal justice in the courts. Taken together, these changes did much to minimize the problems of the older system of criminal justice and the forces of popular sovereignty. The new constitutional order settled some problems of sovereignty, subordinating state to federal power, but the rise of rights gave people another way to check the power of the government, limiting its power.

The result is a study that traces several trends across the 150 years from 1789 to 1939. It looks at how attitudes toward popular sovereignty changed over time, and how and why claims based on rights came to supplant the notion that the people's primary constitutional role was as sovereign. It examines the way the federal role in criminal justice increased over time and sketches the impact that had on the power of the states. It considers changes within the different states and how those changes altered the role of the people in the systems of criminal justice. And it looks at how much the institutions of criminal justice changed over time and the degree to which they remained the same. Ultimately, the picture that emerges from this study is that of a criminal justice system that was far more a government of men than one of laws in the first 150 years after ratification of the Constitution. And it tries to suggest why that system had to break down. But while the interpretation put forward in this book is an alternative to the older, Weberian theory that ties criminal justice to the rise of the capitalist economy and the State, it resembles that older model to the extent that it, too, describes the connection between criminal law and constitutional order.

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CRIMINAL JUSTICE AND THE NATION, 1789–1860

Histories of criminal justice in the West are typically accounts of the rise of the State, specifically the nation-state. Those studies trace the way central governments consolidated control over the institutions of criminal justice, a process that allowed legal processes to be standardized, helped guarantee the rule of law and fundamental fairness, and ensured social stability and order. More to the point, because "the criminal justice process [was] the most explicit coercive apparatus of the state," that process gave the nation-state the monopoly on violence that modern theories of sovereignty assume.[1]

The United States is the exception that proves that rule. Across the nineteenth century, while other Western nation-states centralized their control over criminal justice, the United States did not. Although there is general agreement on that point, there is no consensus about why the United

[1] Doreen J. McBarnet, *Conviction Law: The State and the Constitution of Justice* (1981), 8, quoted in Bruce Smith, "English Criminal Justice Administration, 1650–1850," *Law & History Review* 25 (2007): 593, 601.

States resisted the Western trend. According to some, it was a product of constitutional imperative: the U.S. Constitution reserved police powers – the authority to protect and regulate the health, safety, and welfare of the people – for the governments of the various states; since criminal justice fell squarely within the scope of the police power, constitutional theory required congressional inaction. According to others, it was a matter of choice: the U.S. government did not become involved in criminal law between the implementation of the U.S. Constitution and the beginning of the Civil War, because Congress refused to take much action in the realm of criminal justice and the U.S. Supreme Court held that without congressional action there was no national criminal law. As I suggest later, the evidence tends to support the latter interpretation more than the former. But to some degree, it is a distinction without a difference. For whatever reason, through the eve of the Civil War, criminal justice in the United States was not controlled by the central government and the federal government had no credible claim to have a monopoly on violence.

CONGRESSIONAL INACTION

Although Congress displayed little interest in developing an extensive system of criminal law between the start of the constitutional era and the eve of the Civil War, nothing in the text of the U.S. Constitution compelled that result or barred the creation of a national code of criminal law. On the contrary, Article III, Section 2 of the Constitution explicitly stated that the federal courts could have jurisdiction over all cases of law and equity, which seemed to include criminal law. That section also provided that all criminal cases (except cases of impeachment) should be tried before a jury. Read together, these provisions suggested that federal courts could hear criminal cases. Nor was anything in

Article I, which outlined the powers of Congress, clearly inconsistent with that expansive reading of federal power. That article gave Congress the power to legislate in the area of specific criminal laws, notably counterfeiting and piracy on the high seas. At the same time, other parts of Article I, among them its directive that Congress pass no ex post facto laws and its restrictions on the power to suspend habeas corpus, appeared to recognize that Congress could and would pass laws related to other types of crimes and punishments. And the provisions in the first ten amendments to the Constitution that related specifically to arrest, prosecution, and punishment for crimes revealed a desire to constrain the power of the U.S. government in the realm of criminal law, which seemed to imply the expectation that the federal government would act in that field.

But while the Constitution seemed to permit Congress to pass criminal laws, by and large that was an opportunity that Congress refused to seize between 1789 and 1860. During that period, Congress did pass laws prohibiting a few crimes and established an equally modest criminal justice system to enforce those laws. When it passed the Judiciary Act of 1789, the first Congress established the Supreme Court and created the lower federal courts.[2] Section 9 of that Act gave the lower federal courts jurisdiction to hear "all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." Other sections of the Act listed offenses punishable by death and established procedures and standards

[2] 1 Stat. 73 (1789).

for issuing warrants or setting bail. But although those provisions made it clear that the federal courts had some jurisdiction over criminal law, nothing in the Judiciary Act of 1789 gave any indication of what the crimes and offenses that were "cognizable under the authority of the United States" were. Did the federal courts have the power to hear cases involving common law crimes, or were those courts restricted to hearing cases on crimes that Congress identified by statute? The Act of 1789 did not say.

In two respects, the Judiciary Act of 1789 did create new mechanisms that clearly involved the federal courts and agencies in criminal justice. The Act gave the U.S. Supreme Court the right to review state court cases, including criminal law cases, which turned on questions of federal law or constitutional claims. In addition, the Act created the office of U.S. marshal, assigning one marshal to each district court. Those officials were given the power to arrest and detain, and were also allowed to employ deputy marshals as needed. The marshals and their deputies could also expand their ranks temporarily by compelling local citizens to serve as part of the *posse comitatus* when necessary to keep the peace. In addition, the Judiciary Act of 1789 allowed U.S. marshals to ask the president to call up the militia, a power that one marshal promptly used in 1792 during the Whiskey Rebellion in Pennsylvania. In other respects, in the first decades of the nineteenth century Congress was unwilling to create many institutions of criminal justice. It established courts, including criminal courts, in federal territories and also set out the laws that established systems of judgment and punishment for members of the armed services.[3] It also passed laws creating courts, including a criminal

[3] See, e.g., 2 Stat. 301 (1803) (judges for Mississippi Territory); 2 Stat. 359 (1806) (courts martial and judicial procedure for Army); 3 Stat. 213 (1815) (courts for Indiana Territory); 10 Stat. 627 (1855) (courts martial and punishment for Navy).

court, for the District of Columbia and established a penitentiary to hold criminals convicted in that city.[4] But before the Civil War it did not create any federal prisons; rather, it passed a series of laws that directed state prisons to house people convicted of federal crimes.[5]

In 1790 Congress passed the Federal Crimes Act, but its scope was very narrow.[6] It declared certain actions – treason, counterfeiting or forging of public securities, perjury in federal courts, theft or forgery of judicial records, bribery of federal officials, and aiding the escape of federal prisoners – federal crimes. It also made it a crime to try to arrest foreign ministers or to engage in murder, manslaughter, robbery, piracy, and the receiving of stolen property on the high seas. And it set out the proper punishments for that handful of offenses. At the same time, the Federal Crimes Act set specific limits on the power of the federal courts (including the U.S. Supreme Court) to review state court criminal procedures and provided that no appeal could be taken from a state to a federal court unless the decision of the state court turned on a federal claim. As a practical matter, that meant that virtually no defendant in a state criminal trial had the right to appeal a judgment to the Supreme Court of the United States. In much the same way, the Judiciary Act of 1789 had also limited the power of the federal courts to intervene in state court proceedings. The Judiciary Act declared that the writ of habeas corpus existed "for the purpose of an inquiry into the course of the commitment," but its reach did not extend to those in state custody.

[4] 2 Stat. 390 (1805) (District of Columbia Court); 4 Stat. 178 (1828) (penitentiary for the District of Columbia); 5 Stat. 306 (1838) (criminal court for the District of Columbia).
[5] 3 Stat. 646 (1821); 4 Stat. 739 (1834); 11 Stat. 2 (1856).
[6] 1 Stat. 116 (1790).