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## Popular Justice: A History of American Criminal Justice

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POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE. By *Samuel Walker*. Oxford: Oxford University Press. 1980. Pp. xiii, 287. Cloth \$12.95; paper \$4.95.

The struggle for justice today involves undertaking the unfinished business of our criminal-justice history: making the rule of law a reality and not merely a dream. [P. 7.]

Professor Walker's latest book traces the development of the American criminal justice system from the seventeenth century down to the present. His title reflects what he perceives to be the distinctive feature of that development: a high degree of popular influence which, Walker argues, accounts for "both *the best and the worst* in the history of American criminal justice" (p. 4). An intriguing theme emerges: a pervasive tension has existed between the theoretical rule of law and the reality of a "popular justice" that often succumbs to popular passions (p. 4). In practice, our criminal justice system has never fully embodied the dispassionate rule of law to which we aspire. A rule of law implies fairness and consistency, but "popular justice" has often produced violence and discrimination.

Walker presents his history in three parts: Early America (pre-1815); Building a Criminal Justice System (1815-1900); and Reforming the System (1900-present). The Early America period occupies but forty pages and serves primarily to introduce the rest of the book. The first serious reform efforts came after 1815, when Americans realized that a systematic and efficient law enforcement system would also serve to prevent crime.

At the opening of the nineteenth century the predecessors of today's police forces sprang into being. Communities consolidated

various law-enforcement offices (night watch, day watch, sheriffs, and constables) into a single agency. Unfortunately, the new police failed to preserve social order. Problems plagued the cities. Immigration, urbanization, and the rift over slavery all produced disorder. A wave of riots swept through several cities in the 1830s. Early police forces did little to preserve order because, Walker argues, "[o]fficers were primarily tools of local politicians . . . [and] were not impartial and professional public servants" (p. 61).

Modern prisons also developed during this period.<sup>1</sup> Society began to view crime as the product of harmful influences, and incarceration as a means of rehabilitating offenders.<sup>2</sup> Rehabilitation was to be achieved by removing the victims of harmful influences from their environments and subjecting them to corrective pressures, including solitude, silence, hard work, and religious study. Unfortunately, the prisons proved to be a dismal failure. Walker reports:

Prison brutality flourished. It was ironic that the prison had been devised as a more humane alternative to corporal and capital punishments. Instead, it simply moved corporal punishment indoors where, hidden from public view, it became even more savage. Like its counterpart, police brutality, prison violence was a form of "delegated vigilantism." For the most part the general public did not know what went on behind prison walls. But it regarded the prison as a form of punishment and believed that the undesirables confined there deserved whatever they got. [P. 70].

By the end of the century society began to recognize the deficiencies in both the police and the prisons, and the populace demanded reform anew.

During the twentieth century, law enforcement underwent two major reforms. Professionalization was the first.<sup>3</sup> Society could no longer tolerate the frustrations of inefficient, disorganized, and corrupt law enforcement. The key to reform was the "elimination of the influence of politics" (p. 134) from police administration. Necessary reforms included the hiring of trained experts devoted to public service rather than to the perpetuation of local political machines. The second reform Walker calls the "nationalization of crime control" (p.

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1. For a history of penal institutions, see B. MCKELVEY, *AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS* (1977) and D. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* (1971).

2. See J. BENTHAM, *THE THEORY OF LEGISLATION* 338 (C.K. Ogden ed. 1931) (1st ed. Paris 1802) (1st English ed. London 1864). Bentham remarks, "It is a great merit in a punishment to contribute to the *reformation of the offender*, not only through fear of being punished again, but by a change in his character and habits" (emphasis in original).

3. Professor Walker has dealt with the subject of police professionalization elsewhere. See S. WALKER, *A CRITICAL HISTORY OF POLICE REFORMS: THE EMERGENCY OF PROFESSIONALISM* (1977).

144). The most obvious manifestation of increased federal involvement was the creation of the Federal Bureau of Investigation (FBI). J. Edgar Hoover's agency developed police practices as a science and established new standards of professionalism.

Walker argues that the popular pressures of the Progressive era led to both of these reforms. The reforms reflected both the good and the evil influence that popular sentiment can have on the administration of criminal justice. On one hand, the professionalization and federalization of law enforcement agencies reveal popular determination to take crime control seriously, to create effective law enforcement agencies, and to provide sufficient resources to assure their effectiveness. Professionalization brought discipline, training, and organization to the agencies. But on the other hand, the agencies adopted the gun-toting mentality necessary for waging the "war on crime."<sup>4</sup> By the 1930s the handgun had become the symbol of the American police officer. Some agencies soon became uncontrollable bureaucracies. The massive FBI fingerprinting campaign, an early Hoover brainchild, foreshadowed what an unmanageable Goliath a federal, bureaucratized, and politically immune law enforcement agency could become. Popular reforms of the police, in short, sacrificed individual liberties to law and order.

Reforms in the correctional process during the twentieth century have been less dramatic and more disappointing than police reforms.<sup>5</sup> Progressive reformers sought to make the punishment fit the criminal rather than the crime. They used the new social and behavioral sciences to diagnose and classify inmates in order to "individualize" treatment. They reformed prison industries and allowed inmates to govern themselves (pp. 149-54). Probation, parole, and indeterminate sentencing also furthered the ideal of individualized justice; nevertheless, the performance of our correctional system remains a disappointment. Recidivism rates are high. Rehabilitation<sup>6</sup> remains an ideal rather than a reality. "The reality of the prison experience," Walker contends, "ma[kes] a mockery of the lofty rhetoric of correctional professionals. In practice, virtually all of the re-

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4. Walker reports that "for the first time in their history the American police fully embraced a military mentality, complete with the ideology of a 'war' on crime and the weaponry to carry it out." P. 188.

5. *But see* F. ALLEN, *Legal Values and the Rehabilitative Ideal*, in *THE BORDERLAND OF CRIMINAL JUSTICE* 25 (1964). Professor Allen writes:

Although one is sometimes inclined to despair of any constructive changes in the administration of criminal justice, a glance at the history of the past half-century reveals a succession of the most significant developments, . . . [including] the widespread acceptance of . . . the juvenile court, systems of probation, and systems of parole.

6. For a discussion of the rehabilitative ideal, see generally F. ALLEN, *supra* note 5.

sources and energy of the prison [is] devoted to maintaining custody over inmates" (p. 215). Conditions are, in fact, so bad that prison rebellions have become commonplace. Tragedies like that at Attica call attention to "the already growing disillusionment with the entire correctional system" (p. 246).

Although *Popular Justice* succeeds as a history for the general reader, it nevertheless lacks a satisfying discussion of the courts' role in the administration of criminal justice. Walker cites the creation of juvenile courts as a significant development, comments on the obscure origin of the institution of plea bargaining (p. 112), and acknowledges that the Supreme Court's intervention in police practices during the 1960s was an encouraging development that brought the practices into public view and made them conform with the idea of a rule of law. Nevertheless, he makes only fleeting references to how the judicial process changed over the years.<sup>7</sup>

Walker also occasionally leaves the reader wishing that his treatment had been more detailed. *Popular Justice*, however, does not pretend to be an exhaustive work. The book moves swiftly and seldom bogs the reader down in esoteric detail. Some will surely be grateful that this survey of American criminal justice history, so rich in ideas, remains so manageable.

Professor Walker concludes, not by setting an agenda for the future, but by simply reminding us that we have unfinished business. Our task is to establish a rule of law, to remove the violence and capriciousness from our criminal justice system. But, in view of the persistent popular forces in society, Walker warns that we cannot expect the task to be easy.

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7. For example, Walker writes:

Juries played an important though declining role in the criminal process during the nineteenth century. . . .

Trial juries were an even more direct instrument of popular justice. . . . The jury became the direct voice of the community, expressing all of its irrationalities and prejudices. . . .

The question of the proper role of the jury posed, in a direct fashion, the dilemma of "popular justice." . . .

As the jury played a less important role in the criminal process, the prosecutor rose in prominence.

Pp. 111-12. He provides little elaboration.

On the history of the courts, see generally H. ABRAHAM, *THE JUDICIAL PROCESS* (4th ed. 1980); R. IRELAND, *THE COUNTY COURTS IN ANTEBELLUM KENTUCKY* 9 (1972); M. TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC* (1978), reviewed in Konefsky, *On the Early History of Lower Federal Courts, Judges, and the Rule of Law*, 79 MICH. L. REV. 645 (1981); and Friedman, *The Devil is Not Dead: Exploring the History of Criminal Justice*, 11 GA. L. REV. 257 (1977).