THE AMERICAN STATE FROM THE BOTTOM UP: OF HOMICIDES AND COURTS

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The local political economy links courts to society. A consideration of this linkage helps explain why so few of New York City's nineteenth-century homicides resulted in punishment. Their punishment requiring both state and local governments' cooperation and expenditures, high homicide rates manifested fiscal contradictions imposed by local voters, who desired high service but low taxes. Thus trials for homicides did not index homicides but were complex, indirect outcomes of fiscal, political, and soical processes.

Sometimes the obvious poses a greater explanatory challenge than does the less visible. And sometimes what we think we already know is exactly what we should be endeavoring to understand. We know that in the United States most lawmaking and most legal activity occur at the state and local level. It is obvious that these things are rooted in a political structure that has only a loose relationship to social circumstance. Murder, a social and legal action, occurs in a legal/structural context of the known and the obvious. Hence we seek to understand it on the social and cultural level. Yet the initial results of my study of homicide in mid-nineteenth-century New York City raise some doubts about the "known" and "obvious," for such a small proportion of some eight hundred homicides ever went to court that we ought to wonder about the precise role of the legal system and the state.

Studies of courts and their actions over long periods have long assumed that courts index social behavior in the context of legal practice and legislation. The argument is that court outcomes mirror social actions, filtered by institutions (Friedman, 1989b). As a result, for example, a quarrelsome society has more litigation than a quiescent one. The relationship of litigation to quarrels would be constant if procedures, laws, and the access to courts did not change, but because they do change, court outcomes are usually conceptualized as reflecting two processes, one social and the other institutional. Rather than abandon the idea that courts index soci-

The research reported here has been supported in part by a grant from the Academic Senate of the University of California at Los Angeles.

LAW & SOCIETY REVIEW, Volume 24, Number 2 (1990)

ety, however, I wish to argue that the two-part model, consisting of society on the one hand and legal institutions on the other, needs a third component: the local political economy. And to make this third component theoretically and historically meaningful, the political is best conceptualized as a portion of the complex American State.[1]

I. DYNAMICS OF THE LOCAL STATE IN THE NINETEENTH CENTURY: NEW SERVICES AND FISCAL CRISES

Between the Civil War and 1920, an organizational "revolution" reshaped the economic institutions of the United States. However, the State participated only partially in the sea change because, unlike other organizations, it was subject to a fiscally conservative, service-demanding electorate. As traced by Galambos (1983), this fundamental shift in the U.S. economy revolved around the nature of economic organization. The growth of the large corporation and its internal structure changed the way in which all large-scale economic activities were conducted. An extensive historiographical debate centers on the caused/causal nature of this change, along with the question of the impact on organizations of the military mobilization of the Civil War and attendant government expenditures. But within the debate, no one questions the actuality of the organizational transformation. Similar transformations affected the organization of governments, regulatory agencies, and rulemaking bodies, but unlike economic organizations, these bodies were subject to a fiscally conservative electorate that demanded services and parsimony. That is, their organizational and functional transformation took place within the constraint of an active political economy where the local public purse formed a direct link between voters and the State. In the aggregate, local governments controlled far greater fiscal resources than did states or the federal government, and governments used these resources to build complex institutional and physical infrastructures. But they did so with a stingy hand on the purse strings and a more liberal one on borrowing.

This revolution in economic organization affected State organization (including the local State) in three major ways. First, there was an uneven rationalization and centralization of its power (Skowronek, 1982); some functions indeed became centralized and bureaucratized, while others did not. For example, interstate commerce acquired a centralized control bureaucracy, while building codes and policing remained local. The ideology of a republican, federal order forestalled the seemingly necessary centralizing of major functions or often crippled those that did centralize. Second, a service orientation became the permanent and "natural"

[1] For the sake of clarity, I capitalize "state" when it refers to the concept and leave it lower case when it refers to one of the fifty state governments.

mode of local government. Cities became providers of services in those situations where free riders made private provision dysfunctional (e.g., water supplies and sewerage). Though more pervasive and powerful than ever, the State grew less visible to its users, in part because it successfully became bureaucratized and efficient. Third, the local State had internalized its entrepreneurial and nonregulatory role: its job was to set the stage for economic growth. Inasmuch as such reform affected trial court business, the growth of regularized services stripped away functions. Probation and parole replaced petitions by judges and juries to governors for clemency or pardons. In such a low-profile, high-service State, the essentially confrontational, episodic and externally driven system of court trials had no place. The invisibly efficient yet highly complex local State grew away from court trials as most cases became routinely administered. Trials became quaint, an Old World anachronism.

The aggregate outcomes of these conflicting demands and the larger changes in the structure and management of organizations were the overlapping local governmental hierarchies—including special districts (Diamond, 1983), townships, cities, and counties—whose potential power was in turn limited by action from the next higher level of rulemakers. For example, as municipalities discovered and explored the creative use of their fiscal power to issue debt, state governments moved to limit the extent of the debt. It was in the interest of each municipality to borrow the most relative to other municipalities so as to attract people and industry: each strove to maximize its own debt for infrastructural development and economic incentives while simultaneously striving to lower the debt and economic advantages of competing municipalities. The consequence: the organizationally complex, flexible, responsive, and powerful local State, remained simultaneously self-limited by its own fiscal conservatism.

In its self-limiting nature, the local State had a powerful competitor: the federal government, which was equally self-limiting. This kept a broad spectrum of governmental activities local and made state and local governments more important than the federal government (Scheiber, 1975; Campbell, 1980). That is, policymaking, fiscal action, citizen participation, nonfiscal economic intervention, and legislative initiative and interpretation all took place at the local level. As Terrence McDonald has pointed out, this contradicts certain assumptions of the best recent studies of the American State, which focus on the federal government (McDonald, 1986; Skowronek, 1982). This focus on the national level may be applicable to the post–World War II era, but the basic question should not be, as it too often is, "Where did the national

State come from?" Rather, the questions should be, "What has happened to the local State?" "How did the local State work?"[2]

Felony Courts, Homicides and the State

The American State has developed on three parallel, independent, and sometimes inconsistent tracks: the national and state governments and local governments (counties, cities, towns, and various special districts).[3]

In this multilayered political system, felony courts have been a part of county government, although the laws, court structure, and procedural rules have been state mandated. For homicides, county officials (coroners, prosecutors, jurors) and city officials (police and jailers) cooperate in arrest and punishment. For all these officials, the local political economy is of essential importance in making the presence of the State felt. Only local finance makes possible a thorough and careful state presence. When a felony occurs, only after local government has completed its work does the state step into the process. Yet the felony and its punishment are one of the critical arenas in which the State establishes its presence, legitimates itself, and protects its final power. Thus the attention it pays to felonies constitutes an essential part of the State's existence.

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[2] One recent work on U.S. unemployment compensation, conducted within the paradigm of State studies, has an explicit research design focused on state governments, for the project recognizes that long before the federal government's activities in unemployment compensation, state governments had either implemented or tried to implement such programs. It is founded on the explicit understanding that "state level processes were central to the shaping of U.S. public social provision" (Amenta *et al.*, 1987: 140). State studies tend to conceptualize the State in terms of a centralized system. A federal, highly decentralized system such as that of the United States poses what may be a false problem, one which inheres in the concept of a State study: Why is the system not centralized? To avoid such a false, or perhaps more accurately, premature question, Amenta *et al.* pose their problem as a comparison between nation states, thus facilitating their conceptualization without being trapped by the question of "Why no centralized unemployment compensation?"

[3] The local governments, too, often have been wrongly conceptualized as powerless, essentially trivial, and purely dependent on state government, a conceptualization in conformance with their constitutional status. The result: a vast underestimation of the political (and economic) power of local government in the nineteenth and early twentieth centuries (Frug, 1980). Recent work has shown convincingly that the formal nature of Dillon's Rule, which in the late nineteenth century articulated the dependent nature of all local government, had little impact on local government behavior. Teaford (1984) has analyzed legislation to show that in most cases, local governments and cities got exactly what they wanted from legislators. Partly because it was so intensely local, and partly because of electoral control over taxes, the local State has always been underfunded, thus fiscally constrained by its own taxpayers, not state governments. McDonald's (1987) study of San Francisco makes clear that the limitations of local government "imposed" by the state government were in fact done so at the request of local government. My work on finance, for instance, has shown that local finance was very much a local political tool (Monkkonen, 1988; see also McDonald and Ward, 1984).

The local State's regulatory presence was built on seemingly trivial day-to-day matters and decisions. Local ordinances, ad hoc city council rulemaking, and concrete interpretations of the law from village, town, and county courts made the local State an important part of daily life. A steady stream of new legislation originated at the local level, and it may well be that state constitution making reflected local demands as well. Trial courts, too, opened a way for the local State to insert itself, or more accurately, to be pulled into, the lives of the populace. Litigation, among many other things, represents aggressive citizen usage of the state. And criminal prosecution often resulted from assertive complainants (Steinberg, 1984).

Yet what we know about local courts has come from research designed to answer a different set of questions and to address a different research agenda. Local court studies have purposely conceptualized the court as telling us about society, or have asked what roles courts played in society. The records produced by courts have given us glimpses into otherwise unseen worlds; they will continue to do so. But we can also use the records produced by courts to provide us with primary, unfiltered information about the local State: they were and are about how the State works. From this point of view, then, courts do not index anything—they are the thing. From this point of view we can query courts to discover how the state works, how it routinely dealt with the nonroutine, how it defined itself behaviorally. And from this point of view, the division of courts in substantially different categories (criminal/civil) is of importance to the empirical analysis but sensible only if division is not concomitant with scholarly exclusion.

The business of criminal courts is the business of the state, by definition. Criminal violence, in Anglo-American law, has been the business of the State since the early middle ages. Its legal proscription, prosecution, and punishment machinery have been minor but persistent features of the state for so long that the popular mind associates the prosecution of criminals with the protection of society, not with the state (Hall, 1935). And those historians who study criminal violence cannot help but focus on the episodic violent acts themselves, wondering about the people and the circumstances. Within the inherent drama of a violent narrative, the sorry survivors of a drunken brawl appearing in court seem to have little relationship to so grand a creature as the State. Yet, a careful consideration of the State and its reaction to or deliberate ignoring of episodic, personal violence is essential to finding any systematic, historical meaning in the drunken brawls, angry outbursts, and plain premeditated evil that together constitute homicides.

In the context of the peculiar local State and courts in the United States, murder constitutes a "hard case" for several reasons. It is episodic, irregular, often quite murky in specific circum-

stance, often dependent on the accidental conditions, and usually not a repeated series of events or a regular process—characteristics that do not lend themselves to monitoring, regulation, and bureaucratic management by the state. On the other hand, murders help generate a series of court outcomes so that the episodic behaviors underwrite a process. Of interest is the relationship of the process—trials—to the episodic behaviors—murders—for it is at this intersection that the state and the rough edges of society meet. I will argue that the trial proceedings give us information meriting a close textual analysis. Properly counted, such proceedings can serve as a measure of the State itself, an index to its busyness. But, on the other hand, this activity does not give us an accurate index to the proscribed behavior. Consequently, great care must be taken to make sure that the questions asked address issues extrinsic to the courts or intrinsic. That is, in the case of murder, do we ask about the nature of murder or about the nature of the State?

The feature of U.S. local State directly relevant to court studies is its dependence on voters for funding, including the supporting apparatus of courts, something that has escaped no politician's notice. The operational costs of the criminal justice system had to be kept low: a successful local political system had to operate without extracting much from taxpayers. Arresting felons was inexpensive; holding, prosecuting, and punishing them was not. A new courthouse could be financed by bonds and might attract new enterprise to a county; jailers drained local annual revenues. The local politics of fiscal constraint probably affected the entire criminal justice system unevenly: under close local scrutiny catchers of criminals are more likely to gain funding than are the punishers.

Criminal courts have been a relatively small part of the literature of court studies, with some exceptions (Friedman and Percival, 1981; Monkkonen, 1975). In his introduction to Laurent's study, Willard Hurst speculates that criminal legislation existed more as an "easy outlet for righteous indignation" than as a means of actually dealing with crime (Laurent, 1959: xxiii). Thus in the real world with which the courts dealt, civil legislation affected civil courts more often than criminal legislation affected criminal courts. Hurst recognized that in the practical sense courts had little to do with defining criminal behavior. But the relative detachment of courts from more assertive involvement with criminal behavior may also reflect an important connection to the local political economy, namely, the consistent underfinancing of the local State. In contrast to civil courts where caseload depends heavily on the choices of litigants, criminal courts are only busy when other agents of local government, agents who are intimately tied to the local government's revenues, prosecutors and police, are busy.

II. RECONSTRUCTING THE NINETEENTH-CENTURY COURT'S ROLE

When we look at homicide in nineteenth-century New York City, we find that courts were irrelevant to understanding murder, because they tried and convicted so few murderers. And if one were to continue to only consider the duality of court and behavior, then courts might well become only a footnote to the study of violence. But by keeping the triangle of State, local political economy, and social behavior as the conceptual map, one can begin to ask what murder can teach us about the growth and change of this whole tripart complex. Since the mid-nineteenth century, the United States has had the industrial world's highest homicide rates, a blemish on its historical record customarily ignored except in current discussions of crime. The rates may have declined from about 1850 to 1950, but they did not decline nearly so much as rates in Europe. The reasons are in some unknown part political, for Americans refused to implement the mechanisms to enforce their felony crime laws, proscriptions, and punishments. The American criminal justice system was remarkably similar in form to those of the rest of the Western world but not similar in substance. In 1850 the United States had far fewer police departments than did European countries, again reflecting the nature of the local State, for U.S. police were locally formed and funded. In 1850, about 5 percent of the United States was policed, as was about 50 percent of Britain; by 1870 the figures were about 20 percent and 100 percent (Monkkonen, 1984a). In addition, American juries, especially coroners' juries, were reluctant to indict or convict. In New York City in the decades around the Civil War, between 10 and 25 percent of felony cases actually reaching trial resulted in some form of acquittal. Once tried and convicted, offenders still had a chance to avoid serving full sentences. Governors pardoned or commuted the sentences of about 10 percent of those convicted and sentenced, often yielding to the petitions of the same judges, prosecutors, and juries who had convicted the offender in the first place. For example, in 1856 New York's governor commuted five of a maximum possible twenty-one capital sentences to life. In the whole state, 1,205 of 2,215 felony indictments reached the trial stage in 1856; 844 resulted in conviction, while 323 resulted in acquittals (New York State, Secretary of State, 1857).

In Table 1 I use data from my ongoing study of homicide in New York and London to sketch the pyramid of events from actual violent behavior to the final state-driven actions punishing "murder by death," as Benjamin Rush called executions. At the base of the pyramid are the actual number of homicides, an unknown figure: above it are those homicides I identified from newspaper accounts (determined by scanning for every day the *New*

York Times and the sometimes published coroner's lists).[4] (Above the number of homicides should be those for which an indictment appeared, but the data cannot be reconstructed.) Above these are given the cases coming to trial. And above them the actual number of convictions. Above this number should be the sentences actually carried out, but again the data have not yet been reconstructed. Near the top of the pyramid are the punishments actually meted out and at the top the actual executions (almost always for offenses committed one to four years earlier). Ideally one would like to see such a pyramid constructed in time series so that executions are related to year of offense; the practical barriers to so doing—the basic difficulty in obtaining the information—make constructing estimates of all points extremely difficult and fragile.

In mid-nineteenth century New York City, over 95 percent of the homicides resulted in an arrests, some in several. Often witnesses were confined as well. About 40 percent of known homicides came to trial; those for which I could actually find a sentence typically resulted in a two-year committal in prison; about one homicide in fifty resulted in an execution. The biases in these estimates are all toward undercounting homicides, and therefore the estimates of proportions convicted and sentenced are high, as those receiving no official attention were less likely to be in the newspaper. Charge or plea bargaining appears to have been common, in part because murder carried with it the death penalty, while manslaughter carried various shorter lengths of imprisonment.

Homicides occurring during brawls and drinking bouts inevitably carried minimal manslaughter charges. For example, a jury found Owen Kiernan guilty of beating his drinking partner to death with a cart rung, sentencing him to one year on a conviction for fourth-degree manslaughter. The same court on the same day put a forger away for fifteen years (*New York Times*, 23 November 1857). How long, or even if, either defendant actually served time is unclear, of course. Discovering the actual results of sentencing is very difficult. Even in the case of executions, the newspaper was more likely to note a death sentence than a death. The summary of the 1830–60 period in Valentine's *Manual*, which claimed that nineteen of forty-three capital punishments were actually carried out, is the most reliable-sounding statement I have found on this. Of the twenty-four capital offenders not hung, thirteen were sentenced to life. The question then becomes, How long did they actually serve?

[4] Above this should be the numbers arrested. Here I omitted the data: when reported, the arrests often exceed known murders, probably due to multiple arrests in response to the same offense. Note that arrests do not include name lists, hence may not overlap with the newspaper and coroner reports. In a newspaper-constructed data base, almost all of the mentioned homicides resulted in arrest.

Table 1. Homicides in New York City, 1850–1869

Year	Homicides	Trials[a]	Convictions (N.Y. State)[b]	Executions
1850	19	4	25	0
1851	15	16	36	5
1852	24	10	24	1
1853	18	20	36	1
1854	7*	-	42	-
1855	38	10	28	0
1856	35	12	20	1
1857	86	19	36	2
1858	45	29	48	0
1859	49	19	36	0
1860	58	32	39	0
1861	43	25	58	1
1862	-	19	46	-
1863	47	19	43	0
1864	100	-	-	-
1865	55	2	-	1
1866	56	7	50	2
1867	55	14	-	3
1868	36	-	-	0
1869	45	-	-	0

Source: Compiled from search of *New York Times* and supplemented from Emerson (1941).

* Unverified

[a] Listed as convictions in Valentine (1864), but probably all trials. 1865–67 from *New York Times*.

[b] Convictions for murder and manslaughter combined, from New York, Secretary of State (1905).

Although it is not explicitly clear that Owen Kiernan charge bargained for his sentence, nine years later the *New York Times* editorialized against the plea bargaining practice in an article titled "Murders Lightly Punished" (9 December 1866). Blaming the apparently regular bargaining on the "reprehensible indifference" of the district attorney's office, the article claimed:

> Instead of bringing a clear case of murder to trial, and doing all he can to convict the culprit, the acting representative of the District-Attorney is content to receive a plea of manslaughter in the lowest grade, and the murderer is sent to rusticate for a couple [*sic*] of years at Sing Sing in place of expatiating the offense on the gallows.

The most obvious conclusion to be drawn is that in nineteenth-century New York City, one could get away with murder: at least 50 percent and probably more than 75 percent of all murderers did. And those who did not escape punishment got off rela-

tively lightly, serving mainly one or two years in prison with a 10 percent chance of pardon or commutation. Considering that most murderers were initially arrested, these figures should give pause to those of us who have mistaken a few highly publicized nineteenth-century hangings as somehow representing a stiff punishment regime (Kasserman, 1986). Given the nearly universal twentieth-century opinion that homicide is the most serious crime, and given the public nature of most murders (all the homicide cases I have counted in this analysis were from news items), one can only conclude that the criminal courts of New York City simply were uninterested in prosecuting vigorously the most elemental criminal behavior. The poor funding of local crime control organizations and state-level punishment systems and the inability of local courts to mete out costly justice meant that the severe punishment regime in the United States existed only on paper.

III. CONNECTING THE FAILURE OF CRIMINAL JUSTICE TO THE POLITICAL ECONOMY

The study of trial courts over time helps us understand the nature of the American polity, and, in turn, the nature of the polity helps us reconsider the nature of trial court change. Any approach to New York City's criminal courts that examined only their business would have obscured their fundamental detachment from the world of homicidal violence.[5]

Considered in the context of historical change of the American state we have a framework within which to incorporate existing longitudinal studies of courts. A fiscal conservatism dominated the political economy. Costly revenue-funded activities were deemphasized. Activities that could be relatively well supported by fees or that represented legitimate debt funding went ahead, while any commitment to high operating costs got held back. Commitment to prison represented a high annual outlay, as might a serious felony prosecution. Civil courts could collect fees, but that was not always possible for felony courts. Thus court behavior could not mirror society; instead, it mirrored the state as medi-

[5] Should we take this as evidence of an "autopoeitic" system, that is, a system that operates in relative independence from its environment (Teubner, 1984)? Perhaps. The behavior of the state courts exhibited somewhat less annual variation than did the murder rates in New York City, suggesting that the court system had a more stable, internally coherent process while the homicide rates fluctuated more randomly. Regressions of New York City homicides and state-level convictions as pure functions of time also suggests that convictions had a slightly smoother linear drift (R^2 for the former is .05, the latter, .15). These statistics confirm to a very slight degree the independence of local criminal courts from actual crime. In that one can interpret R^2 as proportion of variance explained, one could interpret the statistics to mean that internal court processes accounted for 10 percent of the court's behavior. My sense is that the 10 percent of convictions for which simple linear drift accounts is an appropriate proportion of court behavior determined by "autopoeisis" and that the remainder comes from the external environment.

ated by a complex political economy, one relatively sensitive to voters. Applying this framework to the relationship of the court to homicides in New York suggests an active city government, one that reflected the local political economy. Police arrested most murderers; an active county and state government deliberately sided with the strong fiscal conservatism by dropping costly criminal prosecution of murderers. As an index of homicide in this period, courts prove to be terrible. But as an index to the American State, they are enlightening.

A multitude of studies from Laurent (1959) to Daniels (1986) provides us with the conceptual and empirical building blocks to structure several new questions about the local state. How active has the local state been? How can we measure this? Has there been variation or stability across time and region? Has there been a continual process of sluffing off the nonroutine when it becomes routine (e.g., divorce)? Has this routinization resulted in the building of state organizations at the local level virtually hidden from the dictates of any broader political consensus? In spite of any compelling legal mandate to do so, criminals have been prosecuted in a very similar manner across many legal systems. How can such a diverse patchwork of local governments end up acting in such amazingly copycat ways? Has the extraordinarily decentralized American system reflected a consensus, thus homogenizing its apparent local diversity?

No single study can answer all of these questions. But as an orienting device, focusing on political economy as a link between State and society will help empirical researchers attend to what they generally exclude. In so doing the promise that the research is additive and intellectually useful is greatly increased. For one of the latent problems in empirical longitudinal studies is that of moving beyond description. Since Francis Laurent's study (1959) of Chippewa County and the Massachusetts Superior Court project (Hindus *et al.*, 1979) we have nearly two decades of research experience, but so far the results are disappointingly scattered and nonadditive. Of all aspects of longitudinal court-based studies, the one that has proved to be the most exciting is the litigation explosion (Galanter, 1983a). It is exciting simply because the research addressed an unexamined assumption, turned it into a hypothesis, and then dramatically and counterintuitively rejected it. In order to create more exciting hypotheses, we must conceptually relocate court studies. A tripart scheme of the political economy, state, and society helps remind us where courts fit, provides us with cues we should take from other research hypotheses when we do our research, and helps us use the results of court-based research to address larger social science problems.