CONVICTION

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CONVICTION

*Law, the State and the
Construction of Justice*

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Wolfson College, Oxford*

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Doreen J. McBarnet
December 1979

Preface to the paperback edition

Conviction set out with two aims, to provide a critical perspective on the long-running policy debate over police powers and civil rights, and to provide a new theoretical model of the operation and ideology of criminal justice which laid emphasis on the need to probe the substance and form of the law itself.

As the paperback edition goes to press police powers and civil rights are being debated yet again in the House of Commons as the Police and Criminal Justice Bill passes through the Committee stage. Criminal justice has remained a key issue in the early 1980s with the Riots, the Scarman Inquiry, the Report of the Royal Commission on Criminal Procedure, the battles over police complaints procedure, and of course the crystallisation of the debate of the seventies in the 1980 Scottish Criminal Justice Act and the present bill. This book was written while both these pieces of legislation were still only in the making, but the perspective it offers is as pertinent to their future as their past.

Much of the Scottish Criminal Justice Act and the Police Bill only consolidates in statutory, generalised police powers, incursions already made by case law into traditional conceptions of civil rights. A major purpose of this book was to demonstrate this and its corollary, the inadequacy of safeguards for the suspect or accused. Indeed the Royal Commission on Criminal Procedure recognised these problems. Its solution however was to 'clarify' police powers by widening them, extending powers granted in specific circumstances by generalising them, and to cope with the inadequacy of existing safeguards, notably judicial control via the exclusionary rule, by throwing it out altogether and replacing it with the even more questionable control of internal police discipline. The police bill as it stands gives the police wide, generalised *statutory* powers and leaves them to police themselves.

The Commission could have taken quite a different stance. Its

volume on current law and procedure traces historical changes through case law, which *Conviction* underlines as in fact an erosion of civil rights and extension of police powers. But the fact that dubious practices have become 'accepted', does not necessarily mean that they should be further endorsed. The Commission could as readily have traced the dilution of civil rights through case law and recommended that the trend be reversed. It chose not to do so and the result is a police bill which, like the Scottish Criminal Justice Act before it, fits like a glove with the law-and-order politics of the eighties.¹

Both the Act and the Bill have come in for strong opposition from civil rights groups. But that in itself should be carefully assessed in the light of the analysis offered in this book. For what *Conviction* suggests is that the legitimisation of dubious practices is not the sole prerogative of occasional legislation clearly tied to specific political currents. It is a matter of legal routine.

This has two implications. First the emerging statutory situation may in turn prove only a baseline for further extension of powers and erosion of rights. *Conviction* suggested structural reasons for expecting a tendency in this direction – unless the judges acted consciously against it – and this theoretical argument has recently been lent empirical support by American research designed to test it.²

Second, the very fact that critical campaigns are fired by the public staging of legislation rather than by the mundane niceties of case law is itself a piquant demonstration of the ideological analysis offered in this book. The duality of case law is itself a mechanism of legal mystification. As a matter of strategy civil rights campaigners prefer to define the law in terms of its broad principles and so to see the police bills of the eighties as new. Such definition keeps the principles alive. But maintaining that symbolic claim for the future carries with it the price of perpetuating the mystification of the present.

DOREEN MCBARNET
February 1983