IUS COMMUNE

Zeitschrift für Europäische Rechtsgeschichte

Veröffentlichungen des Max-Planck-Instituts
für Europäische Rechtsgeschichte
Frankfurt am Main

XXI

Herausgegeben von Dieter Simon
und Michael Stolleis

Vittorio Klostermann Frankfurt am Main
1994

DAVID COHEN

Crime, Prosecution, And Punishment In Early Modern England*

In the past twenty years, social historians of Early Modern England have largely re-invented the study of the history of English criminal law. The seminal work of scholars like D. Hay, J. Beattie, J. Cockburn, E. P. Thompson, and J. A Sharpe has succeeded in making this once sorely neglected field into one of the most exciting, dynamic, and intensely researched areas in contemporary legal historical scholarship.[1] Their contributions have been of considerable interest to scholars working in a variety of disciplines, but with common interests in the emergence of the modern state and the relationship between legal institutions and social control. These contributions have also not been uncontroversial, and have sometimes been greeted by legal historians (strictly speaking) with indifference or dismay.[2] Moreover, although I have lumped them together here for the sake of convenience, it would be grossly inaccurate to assume that they represent a single intellectual movement or deploy a common methodology. A recent group of contributions, spanning the seventeenth, eighteenth, and nineteenth centuries, offers an opportunity to assess some of the strikingly different

* Review of: CYNTHIA B. HERRUP, *The Common Peace. Participation and the criminal law in 17th-century England*. Cambridge: Cambridge University Press 1987. 232 pp., £25.00; ROBERT B. SHOEMAKER, *Prosecution and Punishment. Petty crime and the law in London and rural Middlesex, c. 1660–1725*. Cambridge: Cambridge University Press 1991. XVIII, 352 pp., £40.00; FRANK MCLYNN, *Crime and Punishment in Eighteenth-Century England*. London: Routledge 1989. 392 pp., £25.00; MARTIN WIENER, *Reconstructing the Criminal. Culture, Law and Policy in England. 1830–1914*. Cambridge: Cambridge University Press 1991. 400 pp., £30.00.

[1] The massive scale of current research in this area has prompted some scholars to refer to it as "the crime wave." See, J. INNES and J. STYLES, "The Crime Wave: Recent Writing on Crime and Criminal Justice in England", in: Journal of British Studies 25 (1986), pp. 380–435.

[2] See, e. g. the polemical review by J. LANGBEIN, "Albion's Fatal Flaws", in: Past and Present 98 (1982), pp. 96–120.

orientations and methods which characterize this ever growing literature.

Cynthia Herrup presents *The Common Peace* as a hybrid of social history and legal history, focussing both on legal norms as well as upon the social behavior and predispositions which translated the provisions of the statute books into law as "process."[3] Herrup's work is also a particular kind of social history. It encompasses a very narrow geographical and chronological range (eastern Sussex, 1592–1640), and operates through exhaustive archival research (2412 Assize and Quarter Sessions cases). On the basis of the careful examination of court records Herrup reconstructs the process of individual initiative and decision making which led from the detection of a crime, to prosecution, trial, and judgment. The emphasis is on uncovering the patterns of community perception and involvement in identifying and sanctioning criminal activity. Given the intensely local focus of the work, Herrup's historiographical orientation appears to envision her study as one of "innumerable building blocks" which will eventually permit the reconstruction of what she, with some acknowledged vagueness, calls "the social history of the law."[4]

After a brief introduction, *Chapters Two* and *Three* sketch the background for the study, describing the economic and social conditions of eastern Sussex, general statistical trends in crime and prosecution (diminishing "serious criminality," increasing crimes associated with poverty[5]), and the judicial setting of the Quarter Sessions and Assizes. Building upon this foundation, Herrup moves to the central contribution of her study, encapsulated in three chapters which trace the passages "from crime to criminal accusation," "from accusation to indictment," and "from indictment to conviction." Collectively, these chapters are guided by the premise that, "No administrative structure in the early modern era functioned independently of the men and women who used it." In other words, Herrup rejects the notion of "impersonal" institutional histories in favor of a conception of the legal process as constituted by the actions of the multiplicity of individuals who interact with it at particular moments. She attempts to trace the complicated web of decisions by which victims came to complain of crimes and received the help of

[3] Herrup p. 10.
[4] Herrup p. 10.
[5] Herrup p. 35–40.

neighbors in investigating them, constables decided to present cases to magistrates, magistrates elected (based upon the actions of sureties, witnesses, victims, jailers, constables, and accused) to prosecute, and juries came to convict. For her, then, the history of the criminal law is not to be written through the application of grand social theory or Foucauldian "genealogy", but rather through careful generalization based upon quantitative assessments and the phenomenological depiction of individual cases as constituted by the decisions and actions of all the individuals whose lives they touched.[6]

Fundamentally, then, the criminal law is not to be conceived as a national "institution", but rather as "an inheritance of the local community," and "above all else the responsibility of local residents."[7] Social control, then, is not a creature of the "state", nor even of the judges or magistrates whose duty it was to implement the statutes. Rather, "Successful prosecution required that victim and neighbors, headboros and hundredal constables, grand jurors and petty jurors, and magistrates and judges reach generally complementary conclusions about both culpability and criminality. When no broad agreement existed, suspects were left unapprehended, unindicted, unconvicted, or unpunished."[8] In other words, she concludes, the central government was doomed to ineffectiveness unless it could command the willing participation of a broad range of individuals at the local level. In the end, then, it seems that for Herrup the social history of the English criminal law, when it is written, will be the story of the way in which individual communities implemented, ignored, resisted, or adapted the statutes, policies, and administrative reforms instituted at the national level. However, despite the undoubted importance of the achievement of Herrup and other scholars like her, such a history will also have to address the host of theoretical questions about law, society, and institutions which *The Common Peace* largely ignores.[9]

[6] The anti-Foucauldian premises are apparent from statements like, "The enforcement of the law was an exercise of choices, not of categorizations." (p. 193) Herrup, however, chooses not to engage these theoretical questions directly. Her theoretical premises are merely implicit in statements such as these.

[7] Herrup p. 65.

[8] Herrup p. 195.

[9] I do not mean to imply that other English social historians are not actively engaged in addressing these larger questions. This is one of the principle ways in which the work of scholars like E. P. Thompson and Douglas Hay differs from those who adopt a "pre-theoretical" stance.

In a number of ways Robert Shoemaker's study of petty crime is similar to Herrup's *The Common Peace*. There is the same kind of narrow chronological and geographical focus (London and rural Middlesex, 1660–1725), and the study is largely based upon analysis of the records of the Middlesex Quarter Sessions courts (excluding the City of London and the southern suburbs). Shoemaker's method also involves careful examination of individual cases to reconstruct the considerations which led individuals to adopt their particular strategies of prosecution or settlement. Also as in *The Common Peace*, Shoemaker's study is largely structured in relation to the procedural stages or options in misdemeanor prosecution. Thus, the central chapters take up informal mediation, binding over by recognizance, indictment, and summary commitment to the house of corrections. Unlike, Herrup, however, Shoemaker begins by orienting his study to the larger interpretations of law and society in early modern England which have been advanced by Douglas Hay and E. P. Thompson.[10] In fact, to some extent he appears to see his study as a kind of test case for their arguments: "More importantly, historians have yet to test Hay and Thompson's assertions that the criminal law was the most important institution for maintaining social stability in post-revolutionary England."[11] A few pages later, however, he reformulates the question in an even more uncontroversial way: "With its areas of relative social stability and instability, Middlesex offers the possibility of testing the hypothesis that the law contributed to social order in preindustrial England."[12]

It is hard to imagine that anyone familiar with the past twenty years of scholarship on the social history of English criminal law would seriously maintain that the various institutions of the law made no contribution to social order in this period. These centuries, after all, saw the development of the institutions, which would, by the late nineteenth century, become essentially the system for the administration of justice in England which still exists today. The problem here seems to be that Shoemaker has diluted the force of Hay's and Thompson's work which made it so influential and contro-

[10] SHOEMAKER pp. 3–5.

[11] SHOEMAKER p. 5.

[12] SHOEMAKER, p. 8, and cf. p. 16, where he states that, "This book examines the contrasting prosecutorial strategies that were adopted in this complex environment, and asks whether the judicial system should be considered as one of the forces which contributed to social stability in the metropolis."

versial. Hay and Thompson, in very different though complementary ways, sought to show how the law was inextricably entwined with political structures and elite strategies of power, authority, legitimacy, and social control.[13] Shoemaker has here reduced their arguments to a truism which hardly needs an exhaustive study of misdemeanor prosecutions to support it. The underlying problem appears to be that Shoemaker's investigation, despite its introductory remarks, essentially operates at a "pre-theoretical" level.

I do not want to appear to suggest, however, that the book is without its merits. It is an interesting, well-crafted, and much needed study, but what makes it so has little to do with demonstrating that misdemeanor prosecution and, metonymically, the "law," made some ill-defined contribution to "social order." Rather, it is in investigating the processes of social conflict, dispute settlement, prosecution, and punishment that Shoemaker has a good deal to say that is of interest both to English specialists and to all those scholars in a variety of disciplines who are interested in such questions. Rather than attempting in a rather perfunctory way to relate his study to Hay and Thompson, he could have found far more fertile ground in the vast sociological, legal, and anthropological literature on crime, social conflict, and dispute resolution. His exploration, for example, of the pressures bought to bear upon defendants to plead guilty and the slight probability that the poor would experience trial by jury place contemporary discussions of plea bargaining and the like in important historical perspective. Likewise, his lengthy analysis of the kinds of circumstances which would be likely to lead to informal settlement are significant both for contemporary studies of alternative methods of dispute resolution as well as for anthropological analyses of dispute in pre-modern societies. Such scholars will find a great deal to interest them in Shoemaker's account, but his work might have profited from an explicit acknowledgment of the relevance of such scholarship.

Nonetheless, the series of chapters which analyze the individual prosecutorial options contain fascinating material ably presented. Further, the concluding chapter, "Law and Society in Preindustrial

[13] In, e.g., D. Hay, "Property, Authority, and the Criminal Law", in: Albion's Fatal Tree, ed. by D. Hay, P. Linebaugh, et. al., Harmondsworth 1975; D. Hay, "Policing and Power", in: Policing and Prosecution in Britain 1750–1850, ed. by D. Hay and Snyder, Oxford 1989, and E. Thompson, Whigs and Hunters, Harmondsworth 1977.

England," makes a number of important claims. In recent years anthropologists and social theorists have progressively moved away from a "rule-oriented" to a "process-oriented" approach to law and dispute resolution.[14] Such an approach emphasizes the way in which individuals exploit the ambiguities and flexibility of rules and procedures to attain their ends. It invites us to study the social processes in which the law is enmeshed rather than to ask what the rules are which were applied in a particular case. In a similar vein, Shoemaker emphasizes the way in which the complexities of the system of misdemeanor prosecution were utilized both by plaintiffs and defendants for a wide variety of purposes. Malicious prosecution, for example, was a favorite tactic among those with knowledge of the system to use against business rivals, enemies, or those who had initiated a private suit against them. Further, "Just as the flexibility of the judicial system frequently facilitated satisfactory informal settlements of disputes, the discretion it accorded to plaintiffs and justices allowed the law also to be used aggressively to seek the punishment of adversaries (or to attempt to control an underclass) whose activities were not necessarily criminal ... For those with access to it, the judicial system provided a useful set of tools for advancing their interests."[15] Formulation of his approach through rigorously engaging the kinds of important issues raised by such conclusions would have given this important book a sharper theoretical edge than do bland references to "contributions to social stability."

Frank McLynn's *Crime and Punishment in Eighteenth Century England* is an interesting but somewhat confusing book. McLynn begins with a brief introduction that gives little idea of the contours of the study, other than that it will investigate the social and political meaning of the "Bloody Code" which formed the basis of 18th century English criminal law. Invoking Douglas Hay, E. P. Thompson, and Antonio Gramsci, McLynn claims that the Code functioned as part of a strategy of "social camouflage, so that the special interest of the elite could masquerade as the General Good. The same 'mystifying' effect was achieved by the use of exemplary rather than certain punish-

[14] See, e.g., S. Moore, Law as Process, London 1978, and J. Comarroff and S. Roberts, Rules and Processes, Chicago 1981. Comaroff and Roberts convincingly argue for an approach which integrates the two perspectives.

[15] Shoemaker p. 319.

ments."[16] After such an introduction one would expect the rest of the book to be organized around the kind of conceptual models which undergird the conclusions of Thompson and Hay which McLynn endorses. Instead, the organization of the book is opaque, and one has little sense of what connects individual chapters. For example, *Chapter One*, "London," discusses crime in the metropolis. *Chapter Two*, "Law Enforcement," briefly examines the question of how in England the law was applied without a central police force. Three Chapters then take up particular offenses ("Homicide," "Highwaymen," and somewhat more amorphously, "Property Crime"), but then follow two chapters on women (as victims and as criminals). The next chapter is defined by a sociological category, "Crimes of the Powerful" (Chapter 8), but then McLynn immediately returns to his earlier scheme, with four chapters focussing on individual offenses ("High Treason," "Smuggling," "Poaching," and "Rioting"). The last five chapters take up a variety of topics, ranging from "Execution," and "Crime and Social Change," to "The Impact of War."

What makes this manner of proceeding particularly obscure is that most of the chapters consist of a narrative of anecdotal evidence strung together with little explicit argument or connection to the theoretical claims briefly alluded to in the introduction. In other words, rather than a sustained argument marshalling a body of evidence to support a set of controversial interpretations of 18th century law, politics, and society, most of the book reads like a very conventional study of the period which simply recounts large numbers of particular cases with little sustained analysis. The chapter on homicide, for example, tells the story of many grisly or spectacular murders in great detail, but has little to say about them other than the fact that the murderer and victim knew each other well in a majority of the cases. Similarly, the chapters on women very much follow conventional narrative lines, interspersed with comments like: "When aroused, the homicidal instincts of women could be tigerish in their ferocity."[17] Apart from questionable banalities like these, one also finds unsupported sweeping generalizations such as McLynn's explanation of why women sometimes brutally murdered their husbands: "The motive here was all too obvious. In all ages a majority of women would certainly have left their husbands but for economic

[16] McLynn p. xviii.
[17] McLynn p. 118.

constraints ..."[18] Or, finally, a detailed description of a number of cases of dueling (in Chapter 8) contains little argument other than the statement that, "Two impressions of eighteenth-century combat are striking: the poor level of marksmanship and the triviality of the issues on which most duels were fought."[19]

There are, of course, threads of argument which run throughout the book. For example, McLynn passionately claims in a number of places that capital punishment never has a deterrent effect.[20] This claim, however, is not founded upon solid evidence or convincing arguments. In his first discussion of the matter, McLynn notes that by the end of the century there had arisen considerable doubt about the efficacy of the Code. He then asserts, "The draconian laws ordaining the death penalty for an immensely broad spectrum of offences had had no effect on violent crime ..."[21] But in the preceding pages he had just recounted how from about 1750 London grew steadily safer and the level of violent crime had diminished.[22] How then, does he support the conclusion that capital punishment had no deterrent effect on violent crime? I am not suggesting that it did, but it seems incumbent upon McLynn to offer more than a general statement, yet neither here nor in subsequent discussions does he make his case. Indeed, he seems to assume that unless all crime prohibited by a capital statute ceases, then, "The principal of deterrence [is] once again proved a flop."[23] Yet no theorist of deterrence would seriously argue that capital punishment will prevent all crime. The question is how many persons were deterred who might otherwise have committed the offense. This is a notoriously difficult question to answer, and McLynn provides none of the careful sifting of available evidence which would be required to make a serious attempt to do so.

In the end, then, one is left with a book which contains a wealth of interesting material, but little of the assiduous analysis of the

[18] McLynn p. 118.

[19] McLynn p. 144. That there is a good deal more to say about the matter appears from the extensive literature on dueling in early modern Europe. For England see, e. g., D. Andrews, "The Code of Honour and Its Critics", in: Social History (1980), pp. 409–434, and A. Simpson, "Dandelions on the Field of Honor", in: Criminal Justice History (1988), pp. 99–155.

[20] See, e. g., pp. 14, 51, 82, 90, 206.

[21] McLynn p. 14.

[22] McLynn p. 11–14.

[23] McLynn p. 206.

evidence which makes Herrup's or Shoemaker's studies so valuable. Whereas Herrup and Shoemaker operate with a methodology which defines a particular body of evidence to support certain kinds of conclusions, McLynn's anecdotal method lacks the authority to convince. It is telling that the brief "Afterword" (pp. 341–346) begins with the following remark: "It will be clear from the foregoing that my preference in eighteenth century historical analysis is for the 'empirical Marxism' of E. P. Thompson, Douglas Hay, Peter Linebaugh, and others of that school." Yes, that some kind of Marxist orientation is at work appears readily enough from statements like: "In the USA, not only do high levels of crime and violence coexist with high economic performance, but the former may be said to be both parasitic and patterned on the latter. It is a favourite sport to demonstrate that Marxism must logically lead to Stalinist dictatorship. It is less often underlined that the Mafia has a much closer organic relationship to American capitalism."[24] What distinguishes the work of Thompson and Hay from that of McLynn, however, is that a sophisticated and nuanced methodology is brought to bear in a rigorous and systematic way in support of a carefully argued thesis. McLynn may attempt to surround his work with the aura of these distinguished scholars, but it would be a mistake to regard *Crime and Punishment in Eighteenth Century England* as an exemplar of the historiographical orientation which they have helped to define.

Martin Wiener's *Reconstructing the Criminal: Culture, Law, and Policy in England, 1830–1914* is an ambitious and important contribution to the study of nineteenth century English culture and institutions. Wiener focuses less upon the statutes and procedures of the criminal law than do Herrup or Shoemaker, and more upon the social policies, cultural transformations, and shifting conceptions of the individual which on his view shaped the English penal system during this period. In framing his study in this way, Wiener aims to challenge and broaden the methodological assumptions according to which the history of nineteenth century penal institutions is traditionally written. He explicitly distances himself both from the traditionalists, with their progressive account of steady reform from the barbarity of the early criminal law, and from the revisionists, who (on his characterization) emphasize that this march into modernity

[24] McLynn p. 318. And see fn. 117, p. 382: "So although capitalism and ... the Mafia are distinct sociologically, they do not differ significantly morally or philosophically ..."

has in fact produced ever more effective forms of social control. Situating himself in between these camps, Wiener attempts to bring the methods of cultural history to the study of the institutions of the criminal law: "I hope to persuade historians of crime and criminal justice that their field will be enriched by the use of more literary approaches than they have been accustomed to draw upon. At the same time, I hope to bring the growing body of work on criminal justice to the attention of historians of Victorian and Edwardian ideas and sensibility and to demonstrate its value for their cultural concerns."[25]

Wiener believes that such methods are required because a true understanding of the development of penal institutions requires an appreciation of the deeper transformations which were taking place in English society during this period. Using a wide variety of documentary and literary sources he argues that Victorian criminal policy responded to deep rooted anxieties about disorder, loss of control, and the nature of the individual will. These anxieties produced a penal system which focussed upon discipline and inculcating moral character so as to make "immoral" and "disorderly" persons masters of their will, who could assume a productive role in society. Accordingly, the violent, discretionary, and public rituals of punishment yielded to "the uniform and disciplinary regime of the new prisons."[26] As the century progressed, however, the very success of the Victorian imposition of discipline upon the "disorderly" and "dangerous" classes diminished those anxieties and opened the way to new ideas about volition, heredity, and character which had a profound impact upon social policy. On Wiener's view, scientific and technological advances were steadily weakening the notion of the self-willed, autonomous individual on which the edifice of Victorian mentalités in significant part rested. As a result, anxiety shifted to the specter of a society caught in a deterministic web, disabled and devitalized by forces beyond its control. In the realm of penal policy, this shift led to a re-conceptualization of the offender as not the willful "enemy of society", but rather as "human wreckage." Naturally enough, it was gradually realized that the deliberately inhuman and rigid disciplinary model created for the willful offender could have little useful effect upon the enfeebled and unfortunate victim of

[25] Wiener p. 3.
[26] Wiener p. 11, and cf. pp. 92–156.

heredity and environment. A new reform movement began to press for the disestablishment of the monolithic Victorian system and its replacement with more flexible therapeutic and welfarist institutions. By the end of Wiener's period, at the beginning of the First World War, a new era had dawned.

The broad contours of Wiener's argument are compelling. Indeed, many facets of them are well known, and in some ways it is his methodological claims which are more controversial. In the remainder of this review I will focus briefly upon two of them: the use of "literary approaches" and his stance in regard to "revisionist" interpretations of the emergence of modern penal institutions.

In *Chapter 6*, "The De-Moralizing of Criminality", Wiener attempts to demonstrate the underlying continuities between Victorian crime fiction and Victorian criminology and social policy. He justifies this procedure by claiming that, "the artificial barriers long established between fictional and factual or programmatic cultural work have been lowered and we have come to appreciate both the hidden agenda in fiction and the fictive element in non-literary discourse."[27] Though Wiener presents this deconstructionist claim as uncontroversial, there are many historians, including myself, who still believe that there are important differences between documentary sources (no matter how carefully we may often have to treat them) and the narratives of fiction. Apart from this, it is also not clear how much Wiener's study gains from his (often strained) attempt to show, for example, that the development of Dickens' view of criminality parallels that of Victorian policymakers.[28] Since we have abundant evidence about the attitudes of the policy makers, as well as about the philosophical, scientific, political, and social debates in which they participated, what does an examination of "crime fiction" make clear

[27] WIENER p. 215.

[28] See also his unconvincing treatment of Sir Arthur Conan Doyle. He argues that the Sherlock Holmes stories reveal that the "social order was no longer threatened" (p. 220), and that the criminal was no match for the police and modern science (pp. 218–224). Here Wiener ignores the fact that the sheer incompetency of the police which serves as the backdrop for Holmes' genius can hardly be altogether comforting for a public who had to rely on the former rather than the latter. Further, though Holmes may remark in "The Copper Beeches" that, "Man, or at least criminal man has lost all enterprise and originality," (quoted by WIENER p. 223), he meets his equal in the demonic genius of Professor Moriarty who made a science of crime in the way that Holmes made a science of detection.

which would have otherwise been obscure? Wiener, in my opinion, does not sufficiently address this question.

Wiener rejects early on the "revisionism" of Foucault and other scholars who have applied similar approaches to the study of British institutions (e.g., Ignatieff and Garland).[29] His justification for this rejection is that Foucault's interpretation is too simplistic in that it merely replaces humanitarian reform with social control in its account of the prison.[30] This is itself a gross oversimplification of Foucault, but more importantly, Wiener's own text betrays a deep absorption of Foucault's ideas. Take, for example, his characterization of mid-century Victorian liberalism in regard to penal policy: "Yet we can now see the penal legislation of the 1860s and early 1870s not as a peripheral anomaly, but as an expression of the disciplinary subtext of Gladstonian liberation."[31] This Foucauldian talk of the "disciplinary subtext" of liberalism is not exceptional, but part of a pattern which runs throughout the book. When discussing the development of policies on education and mental deficiency, Wiener concludes: "As time went on, educational incapacity, pauperism, and drunkenness were increasingly linked to the emerging concepts of social deficiency and a problem population. The moral problems of the nineteenth century were becoming the administrative ones of the twentieth century."[32] One could multiply such examples, but I will offer only one more. One of the best known, and most controversial claims of Foucault's Discipline and Punish is that the prison quickly came to serve as a kind of "factory" which "manufactured" delinquents, that is a permanent criminal underclass. In his discussion of the transformation of the Victorian mentality, Wiener emphasizes how contemporaries had come to see the prison as "a vast punishing machine"[33] where the criminal is "manufactured ... into what is called the habitual criminal."[34] In short, Wiener's summary dismissal of Foucauldian approaches seems somewhat precipitous. This is perhaps not a major

[29] WIENER pp. 7–8.

[30] WIENER p. 8: "To replace humanitarian reform by social control is to offer one simplism in place of another. Human motives and even interests are more complex and more problematic, and the institutions of criminal justice have responded to a greater variety of motives and served a wider array of interests than that of 'social control.'"

[31] WIENER p. 152.

[32] WIENER p. 201.

[33] M. Davitt, quoted by WIENER p. 328. Cf. also the numerous similar statements at pp. 326–336.

[34] Havelock Ellis, quoted by WIENER p. 240.

shortcoming. But more significant is the way in which a deeper confrontation of Foucault, Ignatieff, Garland, Donzelot, and others, would have forced Wiener to examine more closely whether the rift between mid-century disciplinary confinement and late-century therapeutic penality is as fundamental as he imagines. It is here, of course, that the revisionist and progressive interpretations most violently clash, and it is a point at which Wiener's attempts to find an independent middle ground seem least successful.