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CRIMINAL JUSTICE IN THE LOWER COURTS: A STUDY IN CONTINUITY

*Gerald Caplan**

THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880. By *Allen Steinberg*. Chapel Hill: University of North Carolina Press. 1989. Pp. ix, 326. \$39.95.

The Transformation of Criminal Justice chronicles the administration of criminal justice in nineteenth-century Philadelphia, a period when private prosecution was the predominant method for initiating a prosecution.¹ Historian Allen Steinberg has searched intensively through yellowed court files, prison records, and reports from long defunct Philadelphia newspapers to put together a portrait of private prosecution in the magistrates' courts. *The Transformation* is thus a great store of ordinary conflicts, injuries, and grievances; it reveals the commonplace of criminal law — neighborhood quarrels, domestic assaults, disorderly conduct, public drunkenness, destruction and theft of property. It is an unsettling account — an unpleasant reminder of the misconduct and bias which have plagued the administration of justice throughout this nation's history.

The Transformation is an ambitious undertaking. Finding enough data to portray the goings-on in the magistrates' courts must have posed a great challenge; so too the effort to discover in these sources — a mountain of scantily reported cases — themes that give them meaning, that render them more than disconnected disputes, more than a nineteenth-century version of a West reporter.² On the whole, *The Transformation* is a success, although its strength lies more in its

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1. Steinberg defines private prosecution as "the system by which private citizens brought criminal cases to the attention of court officials, initiated the process of prosecution, and retained considerable control over the ultimate disposition of cases — especially when compared with the two main executive authorities of criminal justice, the police and the public prosecutor." P. 5.

2. *The Transformation* is often a hard read, at times, little more than a string of dates, figures, and events cautiously interspersed with a thin layer of interpretation. As a social historian, Steinberg does not display a lawyer's natural interest in the formal structure of the magistracy, its powers and limitations. Matters such as the jurisdiction of the magistrates, their method of appointment and term, and the workings of the fee system eventually are defined, although not early enough in Steinberg's account, nor always precisely or with sufficient detail. Nonlawyers (as well as some attorneys) will not comprehend the meaning of important legal terms. For example, Steinberg frequently refers to defendants being "bound over," but not until page 57 does he define this term.

depiction of urban justice, a richly patterned tapestry, than in its weighing of the merits or significance of magisterial justice.

Although Steinberg is alert to its many shortcomings, his overall assessment of the magistracy is, surprisingly, positive. He sees in private prosecution a special manifestation of self-government, an exercise in power by those without property or influence. An ordinary citizen could take his grievance directly to the judge, who was himself another ordinary citizen, and get his day in court. There was no bureaucratic interference, no police officer or prosecutor standing in the way. Though conceding that the magistrates' courts were "corrupt, easily manipulated, harsh, and sometimes even cruel," Steinberg also finds them "relatively democratic, flexible, expandable, and familiar" (p. 230), and he regrets their passing.

Both Steinberg's revisionist thesis, which views the demise of private prosecution and neighborhood courts as a great loss, and this dissent from it will become clearer as Steinberg's findings are detailed. Part I describes private prosecution in the magistrates' courts. Part II identifies the traditional criticisms of private prosecution. Steinberg's thesis is developed in Part III and critiqued in Part IV. Part V argues that Steinberg overstates the significance of the demise of private prosecution, the "transformation" from which his book takes its title, and in so doing, both underestimates the extent to which characteristics of the old system continued to plague the new, and fails to recognize the promise of the new citywide institutions — the police and public prosecutor — which took its place.

I. THE MAGISTRACY: PROMISE AND PERFORMANCE

At a time when there was no professional police force or public prosecutor, "the authority of the law," as Steinberg observes, "was dependent on its voluntary use by the citizenry" (p. 90). The decision to prosecute was personal, not governmental, and its purpose was to settle a grievance rather than to punish the defendant. A particular individual, not the City of Philadelphia, brought suit; indeed, for minor crimes, the City had no independent interest in law enforcement. Because most cases began and ended in the magistrate courts, private prosecution was the engine driving the criminal justice system.

The distinctive feature of the magistrates' courts was the absence of attorneys — no public prosecutor, no defense lawyer — only the parties themselves and the magistrate (typically a neighborhood merchant or politician) to settle the matter. The absence of lawyers was not due to unavailability or cost alone; it reflected a widely shared bias against attorneys. Since colonial times, there had been agitation for a " 'plain and simple' legal code . . . that would 'allow laymen to plead their own cases' " (p. 94). As one defender of the magistracy put it:

[W]e as a community require a body of men [as magistrates] to whom the mass of the people can go with freedom. We want a magistracy known to the people We have a class of population who, instead of appealing to members of the bar, would rather go to their neighbor, and ask his advice. [p. 218]

Whereas in civil law litigation, arcane forms of pleading still dominated, and operated (as in Dickens' novels) to defeat just claims, the prosecution of minor crimes by private citizens involved few procedural formalities. The magistrates did not turn anyone away because of improper pleading.

That the magistrates themselves were not trained in the law (and that many in fact lacked formal education) was considered more an advantage than a deficiency. It was irrelevant, as one supporter of the magistracy argued, that a magistrate spelled spoon "spune" or wife "yife." That was "just exactly the true way to spell it among some people" (p. 218). The proponents of the magistracy respected the magistrates' common sense and good judgment and despised the lawyers' reliance on procedural rules. "[I]t is not law we want, but justice" (p. 94).

"Justice," then, meant local courts, open and informal, presided over by neighborhood judges who might have personal knowledge of the controversy or the litigants, and who shared the values of the community. Such judges could readily decipher the rights and wrongs of a dispute, could cut to its core unimpeded by cold, impersonal rules or cumbersome procedures, and, most important, they would render decisions that made sense to the litigants. Complainants could speak for themselves, and defendants would be protected from "the terrors of *anonymous* prosecutors" (p. 95; emphasis in original).

Because neither the citizen prosecutor nor the magistrate went by the book, definitions of what constituted crime were flexible and elastic. Private prosecution, Steinberg observes,

gave citizens the power, in practice, to define crime. . . . The determination of what acts would provide grounds for a criminal charge was made among the participants in the communities where the acts took place. [Magistrates] provided people with the freedom to police themselves, to determine when the law should be invoked and, often, how far the criminal justice process should continue [p. 77]

The prospect of a judicial solution to disputes offered risky acts of retaliation or self-help. A woman who was outraged because another woman cut her clothesline could choose to go to court rather than ignore the offense or take revenge (p. 263 n.45). Because so many complainants were stuck in ongoing relationships with those they were accusing, private prosecution often was aimed more at reaching a settlement allowing things to get back to normal than in punishing the accused. A magistrate might be able both to settle the matter and to bring the parties together.

II. CRITICISMS OF THE MAGISTRACY

The actual performance of the magistrates was far removed from this romantic vision. Critics zealously documented its shortcomings: The magistrates' courts (1) were disorderly and undignified; (2) were arbitrary and undisciplined in their procedures; (3) created new offenses without prior notice; (4) appealed to the malice and spitefulness of complainants; and (5) were enveloped in a culture of accommodation, favoritism, and greed.

By all accounts, the magistrates' courts lacked the orderliness and dignity associated with judicial process. The courts were crowded, hurried, even unruly places where "[d]efendants, prosecutors, and witnesses were shuttled in and out . . . pleading and testifying, in trials that sometimes lasted only a few minutes . . . [and] [c]ourt officers . . . in constant motion, usher[ed] parties about, escort[ed] prisoners to the lockup, and quiet[ed] noisy spectators" (p. 21). Adding to the congestion and confusion were "hundreds of loafers," seeking entertainment from the tales of the litigants (p. 13). In this setting, hearings had a wild flavor.

A second criticism flowed from what the defenders of the magistracy saw as a plus: freedom from formality and procedural technicality. In practice, the disregard for establishing and following rules operated as a license for some magistrates to proceed arbitrarily. If a magistrate thought a complainant was the actual wrongdoer in the matter, he might reverse the parties, thereby turning the defendant into the victim and incarcerating the complainant. Dispositions of cases were often inconclusive; a magistrate might permit a prosecutor who was unsuccessful in another court to start proceedings anew before him — or, allow a defendant in an ongoing proceeding before another magistrate to become a complainant in the same matter before him, and thereby turn his accuser into the accused, with both matters proceeding simultaneously (p. 45).

Nor did the magistrates require that the aggrieved party be the one to prosecute. Charges were brought by friends, neighbors, or relatives of the victim, as when a son charged his father with abusing his mother (p. 46), or when a father charged his son-in-law with assaulting his daughter (p. 66). Indeed, a conviction might occur without a complainant. When, for example, a prosecutor did not appear, an intimidated defendant confessed and the judge then sentenced him to six months (p. 79). Never mind that the accused was unrepresented, not advised of the privilege against self-incrimination, or that uncorroborated confessions were thought unreliable. These were lawyers' objections.

A third and far more serious criticism also attacked what defenders of the magistracy saw as a virtue: indeterminacy in the definition of criminal offenses. The latitude that magistrates gave prosecutors

meant that “almost anything that annoyed or irritated a person could be treated as a crime, for whatever motives a prosecutor might have” (p. 77). Thus, new crimes were created promiscuously to meet a complainant’s needs, as when a husband was prosecuted for preventing his wife from sleeping by “refusing to come to bed and making too much noise” (p. 48) or when a landlord prosecuted a tenant for “leaving candles burning too late at night” (p. 69).

A fourth criticism, one of the most persistent, was aimed at the citizen prosecutors. Critics attacked them for filing baseless charges, for litigating out of spite or malice, and for bringing paltry matters into court. The press, in particular, alleged such practices, routinely faulting the poor as being litigious. For example, in 1848 one paper condemned “‘the miserable outcasts of society’” who race to the courthouse with their petty grievances, “‘each endeavoring to . . . have their opponents arrested before they were taken into custody themselves . . . expend[ing] . . . the greatest portion of the money that falls by accident within their grasp’” (p. 26; footnote omitted). Another report, investigating the lives of the Philadelphia underclass in 1853, found thousands of “‘poor wretches’ living in ‘hovels which are not fit to be the abiding places of swine,’” yet not too poor to enjoy as their “‘greatest luxury’” litigation, “‘actions and cross-actions for defamation . . . assault and battery — the suits often encouraged by unscrupulous magistrates’” (p. 1). A third newspaper chided “‘hard working people’” who managed “‘to secure sufficient money’” to attend court daily with their families, sometimes waiting weeks to prosecute cases, “‘very few’” of which had legal merit.³

Fifth, the most serious criticism of the magistracy challenged its fairness and impartiality. Criticism focused on the structure of the magistracy as a fee office. The magistrates earned their living from fees paid by complainants, and thus litigation lined their pockets. As Steinberg puts it, the magistrates “were motivated by the profitability of the fee system, and this set the tone for the whole of [the administration of] criminal justice.”⁴ When a magistrate declined a case, “it was not because the case was unusually trivial,” but commonly be-

3. P. 56. Steinberg shares the view that the poor were litigious, and his sources — reformers, state court judges, and news accounts — render this conclusion plausible. But it is equally possible that Steinberg’s sources were just expressing annoyance with the poor and working class for using the courts. The middle-class view might well have been that the poor should work hard, stay out of trouble, out of sight, and certainly out of court. Perhaps they thought it unseemly to settle personal matters involving one’s spouse, relatives, or neighbors in public.

4. P. 25. A leading prison reform group, the Philadelphia Society for Alleviating the Miseries of Public Prisons (PSAMPP), in the conduct of routine prison inspections, frequently uncovered evidence of magisterial abuses. Typical was the conclusion of one inspection that “‘some of the magistrates . . . appear to use their authority rather to enrich themselves than to serve the purposes of public justice’” (p. 96), and of another that “‘most of the cases of imprisonment for minor offenses would not be heard [by the magistrates], except for the costs which accrue upon them.’” P. 97.

cause the litigants, "often women and blacks," could not afford the magistrate's fees (p. 44).

Moreover, since the magistrates had no investigative staff they had little capacity to discover unfounded complaints by "ignorant persons . . . [which would otherwise] result in the imprisonment of the innocent" (p. 194). Thus, in some unknown number of cases, perhaps a great many, private prosecution represented an unconscionable alliance between an ill-motivated complainant and a greedy judge.⁵

Although even the better magistrates may have been tempted to accept doubtful cases in order to earn a fee, some were corrupt in the most fundamental sense: they accepted bribes and they solicited them. Extortion is perhaps too technical a characterization, but it captures the spirit of these transactions.⁶ The ultimate scope of magisterial corruption must remain speculative, but apparently it was extensive. As one Philadelphia judge observed, "[c]omplaints of the rapacity of the local magistrates have come down to us, continuously, from the earliest periods."⁷

Some magistrates, for example, exacted fees from defendants whom they had bound over (*i.e.*, incarcerated pending trial for a felony in the state courts). Individuals bound over might have to endure a prolonged confinement, as much as several months, before their case would be heard unless they could raise bail or induce the magistrate to change his mind (p. 99). Magistrates commonly had such second thoughts. For example, in 1854 over four fifths of those detained on assault and battery charges (for an average of eleven days) were discharged prior to trial by the magistrate who made the original commitment. This is an unsettling figure which suggests that either magistrates were making commitments for the purpose of forcing a settlement among the parties, presumably on terms favorable to the prosecutor (and thereby lawfully earning the magistrate a settlement fee), or accepting a payoff from inmates who had finally managed to raise the money. Either way it would seem that the magistrates abused their authority since, as Steinberg points out, they "resolved a

5. The annual report of one prison scorned private prosecutors for their "'malignity'" and "'desire for pecuniary gain'" and magistrates for their "'illegal and scandalous conduct.'" P. 194.

6. Since magistrates were prosecuted only occasionally, direct evidence of wrongdoing is lacking and reliance must be placed on the allegations of responsible sources such as prison reform groups and the judges of courts of record. Reports of individual cases are not sufficiently detailed to suggest judicial favoritism as opposed to poor judgment. It is impossible to tell what might have motivated the magistrate who ordered a washerwoman to be charged with larceny because she lost a lock of hair left inadvertently in a vest pocket by its owner, or the magistrate who allowed a saloon keeper to bring eight separate suits against his wife for larceny. P. 263 n.45.

7. *Commonwealth v. Alderman Hagan*, 9 Philadelphia Reports 574 (1872), quoted in PENNSYLVANIA ATTY. GEN., REPORT ON THE INVESTIGATION OF THE MAGISTERIAL SYSTEM 1 (1965).

large number of the cases that they had officially sent elsewhere" (p. 42).

A similar situation appears to have existed regarding defendants who could not post bail; magistrates detained individuals, it was alleged, until they received a "sufficient consideration" (p. 122). "[C]ritics insisted," Steinberg reports, "that magistrates released vagrants prematurely either because they received a payment in the prisoner's behalf or because they wanted to make the unfortunate vagrant susceptible to another commitment (and thus earn . . . another fee)" (pp. 124-25). In addition, some claimed that the magistrates extorted money from larceny prosecutors in exchange for the return of property recovered from thieves (p. 107).

In sum, from the record Steinberg has compiled, there is much truth to the hyperbolic charge of one critic:

All the worst acts of the professional politician are exerted to secure the position of [magistrate] for those who are unfitted for it by training, by habits, and by character; and it is only because their victims are habitually the poor and friendless that their brutal and venal tyranny fails to . . . arouse the sternest popular indignation.⁸

To others, the Office of the Magistrate had become "so odious in the city of Philadelphia that you cannot get decent men to accept the position."⁹

8. Pp. 215-16 (quoting MEMORIAL TO THE CONSTITUTIONAL CONVENTION OF PENNSYLVANIA FROM THE CITIZEN'S MUNICIPAL REFORM ASSOCIATION (1873)). Citizens most likely accepted magisterial corruption as just another unpleasant fact of life, something ordinary, not particularly indicative of low character. The judges behaved no worse than other officials and probably better than legislators. The citizenry probably understood that those with power would use it to advance their own interests and, apart from a persistent, noisy coterie of reformers, tolerance seems to have run high.

But there must have been some limits on "acceptable" misconduct. Studies of corruption indicate that it operates within a culture and is bounded by shared understandings. See generally Caplan & Murphy, *Fostering Integrity in Police Agencies*, in LOCAL GOVERNMENT POLICE MANAGEMENT (3d ed. forthcoming). It is thus misleading to assert, as some historians have, that "the people . . . preferred corruption" (p. 107), if by this is meant that the citizenry allowed the magistracy to do whatever it wanted. Steinberg tells us little about where the lines between acceptable and unacceptable judicial misconduct were drawn, and we are largely left to speculation. An analysis of the occasions when magistrates were prosecuted might suggest where the unwritten limits on abuse of office were set.

Paradoxically, it may be that the more pervasive the corruption, the more likely there will be public acquiescence to it. In this regard, a recent public opinion survey of residents' attitudes toward the Philadelphia police is revealing. The great majority of citizens surveyed thought well of the police, even though they also believed the police misbehaved frequently. Almost three fourths of the respondents (70%) rated the Philadelphia police as doing a good or excellent job overall. At the same time, about one half thought the police took bribes "often" (11%) or "sometimes" (38%). PHILADELPHIA POLICE STUDY TASK FORCE, PHILADELPHIA AND ITS POLICE: TOWARD A NEW PARTNERSHIP app. A at 170 (1987). Perhaps nineteenth-century Philadelphians held similar, contradictory views of the police, suggesting that Lincoln Steffens was correct in asserting that "Philadelphia is simply the most corrupt and most contented." L. STEFFENS, *THE SHAME OF THE CITIES* 136 (1957).

9. Pp. 216-17. The criticism of fee offices continued well into the twentieth century. As late as 1965, there were 32 states in which magistrates were remunerated by an assessment against the parties based upon the outcome of a case or the volume of litigation. PRESIDENT'S COMM. ON

III. STEINBERG'S THESIS

There are, it must be noted, difficulties in characterizing Steinberg's position. More than occasionally, even a close textual reading will not disclose whether Steinberg is extolling, condemning, or simply describing. But this much seems clear: after calculating all its shortcomings, Steinberg remains favorably disposed to the magistracy and private prosecution. Its shortcomings are outweighed by its strengths.

Steinberg's argument goes something like this: private prosecution in the magistrates' courts was democracy in action, a glittering illustration of popular sovereignty, of the exercise of power by those without property. Private prosecution gave the poor and working classes control over their lives.

In Steinberg's words, "[a]ccess to the law on a pay-as-you-go basis was popular,"¹⁰ and the administration of justice was "based on a voluntary popular participation in which virtually everyone believed" (p. 91). The magistrates "provide[d] an essential community service" (p. 106) and "private prosecution represented the dignity and citizenship of Philadelphia's poor and working classes as least as much as it represented their oppression" (p. 114).

The right to initiate a prosecution conferred power on the people in several ways. First, it provided ready access to powerful decisionmakers. Citizens could proceed directly to court without fear that some bureaucrat would block their path. Second, citizens did not have to cast their complaint in some special technical form. If they could speak, they would be heard. Moreover, the magistrate had the power to create new crimes as justice demanded.

Thus, private prosecution was a form of private legislation; a complainant started not with a law that he claimed the defendant had violated, but with a sense of injury. He came to court to tell the judge his story and expected sympathy and relief. Working together, judge and prosecutor, and perhaps the accused, would define the situation without regard for whether it posed a civil or criminal matter or violated some specific enactment. As Steinberg puts it (without, regrettably, giving details), decisions concerning what acts would

provide grounds for a criminal charge were made among the participants in the communities where the acts took place. [Magistrates] provided people with the freedom to police themselves, to determine when the law should be invoked and, often, how far the criminal justice process should continue, even though in an imperfect and sometimes exploitative way. [p. 77]

LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 34-35 (1967) [hereinafter TASK FORCE REPORT: THE COURTS].

10. P. 106. If contemporary anecdotal evidence is relevant to judging the nineteenth-century experience, it is hard to believe that the magistracy was equally popular with everyone. If more data were available, it likely would disclose that different groups — women, blacks, defendants — held widely varying evaluations of the magistracy.

The consequence, Steinberg declares, was a "system of criminal justice that was . . . a vibrant and effective means of neighborhood-based self-government" (p. 230). It arose

out of the same logic of self-government that inspired the creation of the United States, a logic that contended that, as long as the people controlled it, the law and state power could be beneficial and benevolent. . . . Through private prosecution, even the poor, many of them disenfranchised, had a stake in the legal and political system, received something palpable from it, and asserted that democracy in America was something special. [p. 231]

Consequently, Steinberg laments the demise of private prosecution. Its passing signaled a new impersonality in citizen-state relations, the substitution of professionals (police officers and prosecutors) and bureaucracies for face-to-face dealings among neighbors (p. 223). It "delegitimated the relationship through which the citizenry had exercised considerable control over the process of prosecution and through which there had been widespread and ready access to the criminal law."¹¹ He concludes: "[P]erhaps the recovery of the American tradition of private prosecution can help in fashioning a way to revive an American commitment to law and democracy."¹²

IV. CRITIQUING STEINBERG'S THESIS

It is not easy to grab hold of the specifics supporting Steinberg's thesis. When identifying the defects of the magistracy, Steinberg employs unmistakably pejorative terms (for example, "corrupt," "arbitrary," "easily manipulated") (e.g., pp. 61, 106, 230). His praise of the magistracy, however, is abstract and vague — the magistracy was "flexible, expandable, and familiar" (p. 230). Most regretfully, he does not give his abstract praise concreteness. Thus, when Steinberg asserts that the magistrates performed "an essential community service" (p. 106), his meaning cannot be determined. The magistrates did perform an essential service in the sense that they had exclusive jurisdiction for certain claims, but, based on what Steinberg reports, they seem to have performed it badly. That many persons took their grievances to the magistrates did not necessarily mean they thought them "eminently courts of the people" (p. 218), as the champions of the magistracy (Steinberg among them) argued, or that they felt that magistrates decided cases fairly. The magistrates had a monopoly — for the poor

11. P. 225. In the occasional proposal to decentralize urban courts, one can discern an echo of the nineteenth-century advocates of the magistracy. Such proposals reflect nostalgia for simpler times, speedier justice, and greater community participation. Recently, the chief administrator of the New York State courts recommended the creation of "community courts" in New York City neighborhoods to handle minor crimes. These courts would be informal and speedy, with volunteer lawyers serving as judges in their own neighborhoods where possible. Glaberson, *Shift to 'Community Courts' Urged for New York City*, N.Y. Times, Sept. 27, 1990, at B1, col. 2.

12. P. 232. To this Steinberg adds: "As a beginning, we might ask whether we must less frequently be clients and suspects in order more often to be citizens." *Id.*

they were the only game in town. If Steinberg is suggesting that the magistrates' courts outperformed successor courts by providing more or better justice, he offers no support for such an inference.

Steinberg's meaning is also unclear when he notes approvingly that citizen prosecutors "retained considerable control over the ultimate disposition of cases" (p. 5). Steinberg's examples reveal how a complainant could strike a deal with a defendant, agreeing to abandon prosecution perhaps in exchange for some consideration. Although such bargaining is not inherently undesirable — indeed, it is routine in civil matters — it poses threats of abuse in a legal system that allows charges to be filed rather indiscriminately. Such bargaining makes sense in a legal system where the judges carefully screen each complaint for sufficiency and merit before authorizing a charge to be filed. But in Philadelphia, as noted earlier, the fee system prompted magistrates to accept complaints somewhat promiscuously. They had incentives to accept cases lacking merit, to incarcerate defendants, to coerce settlements, and to favor prosecutors with political clout or fat pocketbooks — incentives, in short, to work injustices on innocent persons. Thus, giving the complainant "considerable control" in this setting has an extortionate ring.

Yet even if all the judges were salaried, conscientious, and honest, Steinberg's description of magisterial practices looks like an indictment to a lawyer. What he describes is not law by any conventional definition. No lawyer would feel comfortable with a judicial system so unstructured, so willing to dispense with rules, definitions, and procedural regularity,¹³ without knowing precisely what benefits would result. If there are cases that suggest that a rudderless judiciary performs well, Steinberg does not identify them. His examples evidence garden variety judicial misconduct — impulsive, arbitrary, biased, and no cause for nostalgia or romantic reminiscences about revitalizing democracy in twentieth-century America.¹⁴ Even to an ardent populist, to one highly suspicious of lawyers, the power of citizen prosecutors to "define crime" (p. 77) would be unacceptable. The due process idea that one is entitled to fair warning that certain behavior is prohibited is no transient notion dismissable as lawyers' pettifogging. "It has always been thought to be of primary importance that

13. Whether it be to intimidate a friend or neighbor, resolve a private dispute, extort money or other favors, prevent a prosecution against oneself, express feelings of outrage and revenge, protect oneself from another, or simply to pursue and attain a measure of legal justice, an enormous number of nineteenth-century Philadelphians used the criminal courts. . . .

P. 78.

14. Recall Steinberg's statement quoted at note 12, *supra*, with which he ends his book: "[P]erhaps the recovery of the American tradition of private prosecution can help in fashioning a way to revive an American commitment to law and democracy. As a beginning, we might ask whether we must less frequently be clients and suspects in order more often to be citizens." P. 232.

our law, and particularly our criminal law, should be certain: that a man should be able to know what conduct is and what is not criminal. . . ."¹⁵ Judges should not create new crimes, the criminal law may not operate retroactively, and crimes must be given sufficient definiteness to guide behavior. When the law is unclear as to what conduct is prohibited, well-intentioned citizens will break the law and judges will act capriciously. Since the magistrates routinely incarcerated defendants for weeks or months, such unbounded discretion to define crimes must have worked many injustices, much suffering.

V. THE LOWER CRIMINAL COURTS AFTER "THE TRANSFORMATION"

Looking at criminal justice in the lower courts today, the problem is not, as suggested by Steinberg, that the growth of large-scale bureaucracies, coupled with professionalized administration of exacting legal standards, wrought undesirable changes, but, conversely, that so much of the legacy of the magistracy has survived. Until the last several decades, many of the conditions that characterized Philadelphia's nineteenth-century magistrates' courts were still much in evidence in urban courts. Many studies of the lower criminal courts described them in the same unflattering terms.¹⁶ In 1967, the President's Commission on Law Enforcement and the Administration of Justice concluded that its most "disquieting" findings related "to the condition of the lower criminal courts."¹⁷ The Commission found "the conditions of inequity, indignity, and ineffectiveness . . . to be widespread."¹⁸ Commission staff were "shocked" by the "cramped and noisy courtrooms, undignified and perfunctory procedures, and badly trained personnel" that they observed.¹⁹ Even more troubling, they found that "speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication."²⁰ Professor Edward Barrett similarly captured the common experience in his study of lower criminal courts, noting that court professionals gave "scant re-

15. *Shaw v. Director of Prosecutions*, H.L. App. Cas. 220, 281 (1962) (Lord Reid).

16. See, e.g., H. SUBIN, *CRIMINAL JUSTICE IN A METROPOLITAN COURT* (1966); Note, *Metropolitan Criminal Courts of First Instance*, 70 HARV. L. REV. 320 (1956).

17. TASK FORCE REPORT: THE COURTS, *supra* note 9, at 29.

18. *Id.*

19. PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 128 (1967). Likewise, 11 years later, in 1980, the American Bar Association disparaged the "hectic and undignified atmosphere in which proceedings [in the lower criminal courts] are often conducted," stressing that neither "overcrowding" nor "[a] babble of conversations, official or private, should . . . be tolerated." STANDARDS FOR CRIMINAL JUSTICE § 6-1.1(b) (1980) (commentary).

20. PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 128 (1967); cf. Pye, *Mass Production Justice and the Constitutional Ideal*, in *MASS PRODUCTION JUSTICE AND THE CONSTITUTIONAL IDEAL* 1 (C. Whitbread ed. 1970).

gard" to the litigants.²¹ "They are numbers on dockets, faceless ones to be processed and sent on their way."²² In short, the demise of private prosecution and the magistrates' courts did not change things all that much.

True, new bureaucracies were created — centralized courts, elected prosecutors, and a full-time constabulary — and there were new gatekeepers. Citizen complainants now had to persuade not only the magistrate, but first the police before a charge could be filed. But once the police were satisfied, judicial acquiescence was likely to follow.²³ The magistrates took "[a] sympathetic attitude toward the views of the police" and sometimes shared in their illicit gains.²⁴ Thus, the same citizens who had gone to the magistrate now went to the police (or, in mid-twentieth century, to the prosecutor) to lodge a complaint and exercised about the same "considerable control" over their case as before. As before, if a citizen chose to ignore an injury, that would be the end of the matter; in the absence of a complaint, the police ordinarily would not take the initiative and, indeed, probably never would learn of the incident.²⁵

21. Barrett, *Criminal Justice: The Problem of Mass Production*, in the AMERICAN ASSEMBLY, THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 21 (H. Jones ed. 1965).

22. *Id.*

23. The end of the fee system in 1875 had little impact on the prevailing judicial culture. It remained informal, subject to political manipulation, and corrupt. See generally COMMITTEE OF SEVENTY, JUDICIAL SELECTION GOVERNANCE STUDY (1983) (tracing judicial performance and reform efforts to upgrade the judiciary from colonial times).

Elsewhere, the fee system continued well into the twentieth century. Writing in 1945, Professor Sunderland echoed the complaints of nineteenth-century Pennsylvania reformers: "The primary evil resulting from the fee system is the pressure it exerts on each justice who operates under it to get more business in order to enlarge his income." Sunderland, *A Study of the Justices of the Peace and Other Minor Courts*, 21 CONN. B.J. 300, 331 (1947); cf. Vanlandingham, *The Decline of the Justice of the Peace*, 12 KAN. L. REV. 389, 392-4 (1964).

24. TASK FORCE REPORT: THE COURTS, *supra* note 9, at 34 (quoting Sunderland, *supra* note 23, at 333).

25. Oddly, Steinberg does not see the police as part of the tradition of popular sovereignty he identifies with the magistracy. Indeed, the police offered many of the same services in superior form. Until the advent of motorized patrol many decades later, moreover, it would seem that the citizenry knew the police even better than they knew the magistrates. The officer on the beat was visible, not office-bound like the magistrates (who held other jobs as well), and knew the residents as individuals. As a neighbor from down the street or across the way, an officer might be both sensitive to community biases and values and, in much the same way as the magistracy, susceptible to influence. Moreover, he would be able to resolve some problems more quickly than the magistrates. On duty around the clock, the police could respond to a domestic assault or property dispute before it was over, and their power to arrest provided a powerful incentive to the parties to quiet down and settle their dispute peacefully. Given their easier accessibility, the police could reach a far larger constituency than the magistracy, sometimes more meaningfully.

Steinberg's point that the administration of justice became less intimate and the "traditional [police] relationship with the citizenry . . . [became] more punitive and coercive than the relationship with [the magistrates]" (p. 222) was not a byproduct of the end of private prosecution; its roots lie in substituting motorized patrol for foot patrol. This development did profoundly separate the police from the policed. See generally J. SKOLNICK & D. BAYLEY, *THE NEW BLUE LINE* (1986) (describing the modernization of law enforcement).

As Philadelphia and its police department grew, a police officer was more likely to be a stranger to the parties who sought police intervention; but whether, as Steinberg suggests, this

Eventually, however, citizen complainants did lose their special status in the administration of criminal justice. This was the real transformation and it occurred well after 1880 when private prosecution ended. By mid-twentieth century, "disenfranchisement" of citizen complainants, particularly those without means or power, was apparent in big city courts. This was largely a consequence of enormous expansion of the powers of the public prosecutor — in particular, the virtually unreviewable discretion not to charge. Now that prosecutors were elected officials servicing a citywide constituency, and were often from a different social class than the litigants, the decision to charge no longer was rooted in a familiarity with the litigants and their world outlook. Instead, it was rendered impersonally and with different aims. Prosecutors now functioned as part of the judicial system, responding to the court rather than to the community. They had no incentives comparable to the discredited fee system to accept cases for prosecution. Commonly, they were under pressure from beleaguered judges to further reduce crowded calendars. Under these circumstances, litigants, both complainants and defendants, were treated more uniformly, but (as the following example suggests) perhaps less fairly.

Those who prosecuted in the District of Columbia circa 1964 encountered an office policy which proscribed treating a "cutting" as a felony unless the victim required 100 stitches. Ninety-nine stitches or less constituted simple assault even though the requirement for felonious assault, use of a dangerous weapon, was met. Even the 100-stitch cases were sent back for misdemeanor treatment if the victim had healed well by the time of trial. One cannot imagine such practices in the more client-centered magistrates' courts in the nineteenth century.²⁶ Unlike the nineteenth-century Philadelphia magistrates who looked toward the people, mid-twentieth-century police and prosecutors served institutional masters and pursued organizational goals.

Over the last several decades, the lower courts have been up-

was largely a disadvantage is far from clear. Arguably, it imported a desirable impartiality into the exercise of police discretion.

26. The conversion of complainants from citizens to supplicants was nowhere as clear as in the case of battered women seeking relief. Whereas Steinberg reports that the magistrates were responsive to the complaints of women abused by their husbands, a century later the battered wife was an unwelcome sight. The police referred her to the prosecutor, and the prosecutor threw up his hands. A typical Monday morning in the U.S. Attorney's Office could look like a hospital emergency room. Women who had been beaten over the weekend formed a long queue to tell their stories to the greenest assistants. Hearing citizen complaints was one of the first assignments given to new prosecutors, mostly men, and a form of punishment for those who came tardy or were guilty of some minor dereliction. Prosecutorial responses might initially be warm, but they quickly became unsympathetic. "You married him, lady" was a common reproach. The complainant who asked for an arrest warrant for her husband because she wanted him to treat her better — stop drinking, give her some money, and come home at night — was said to be abusing the criminal process because she did not really want her husband put in jail. Such a charge would not have been made by a Philadelphia magistrate during 1800-1880.

graded, in some instances dramatically so. As a result of momentous societal changes — Supreme Court decisions expanding the rights of defendants, heightened regard for victims, especially minorities, and federal funding for criminal justice — a more uniform, fairer administration of justice has emerged. In particular, the Supreme Court's decision in *Argersinger v. Hamlin*,²⁷ conferring a right to counsel in misdemeanor cases where there was a possibility of incarceration, worked significant changes. The wholesale introduction of defense counsel into every stage of a criminal proceeding, combined with more frequent and searching appellate oversight, made due process more evident in the lower courts. Counsel often eliminated some of the abuses of both victims and defendants and gave the proceedings more dignity.

Still, one must not overstate the magnitude of this due process "transformation." Readers of *The Transformation* who have tried cases in the lower urban criminal courts will not read more than Steinberg's first few pages before noting, "Things haven't changed that much." It is not the phenomena of private prosecution that will seize their attention, but the striking similarities in the administration of justice for the poor.

27. 407 U.S. 25 (1972).