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Review of Crime in England, 1550-1800

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townships, with the appointment of each township's constable and with the maintenance of essential services, principally roads and drains. The court proceeded either on the basis of received custom or the breach of specific local by-laws, which were amended and modified from time to time. They took the form of orders backed by threats:

"Item we lay in payne that every householder doe keeps their swyne well ringed in payne of every default 12d."

announced the representatives of the hamlet of Austenberg on the 16th of October 1639. In addition to imposing "pains"—monetary fines, the courts also exercised a preventive jurisdiction, threatening individuals with a penalty if his ways were not amended. Apart from a jurisdiction over affrays the courts were almost exclusively concerned with agricultural misconduct or public nuisance. John Tyas must muzzle his mastiff dog, Thomas Wylde must repair the pavement outside his house, Lawrence Browne must move his muckheap away from William Brownhill's door. The instrument of the leet was the constable, and the malefactors were presented by the jury from the hamlet, normally consisting of four men. Though denial was possible it is extremely difficult to form any picture of the procedure followed, and presumably presentment more or less concluded the question of guilt.

These records, excellently edited with a clearly written introduction which makes them intelligible, provide a fascinating if at times frustrating picture of a rural England that was to survive from the late middle ages into quite modern times; how and where change did occur is only to be discovered through publications of this character. As always the records do not record what everyone knew, nor do they give us the context of the events and transactions which appear in laconic entries on the rolls. They nevertheless give a vivid picture of the business and regulation of a small scale agricultural society essentially controlling its own affairs. Little of the business of either the Court Baron or Courts Leet involved anything which we would immediately recognize as litigation; unlike the common law courts the courts of the manor were not a forum for ritualized conflict, but were essentially administrative in function. Later publications in the same series will no doubt not only throw light on the pace of economic and social change in the manor, but also on the extent to which such institutions continued their regulatory and administrative functions into the nineteenth and even the twentieth century. The decline of the local courts in England has long been a recurrent theme; their persistence may, through the work of scholars who work with these records, eventually find a historian.

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J. S. Cockburn, Editor, *Crime in England, 1550-1800*. Princeton, New Jersey, Princeton University Press, 1977. xiv, 364 pp. \$18.00.

Crime in England, 1550-1800, is the second collection of essays on the social history of crime and the criminal law in early modern England to

appear in recent years. Together with the essays in *Albion's Fatal Tree* (1975),¹ these offerings advance our knowledge of the subject considerably. To be sure, as G. R. Elton cautions, there are methodological problems in a field so new, and Elton's "Introduction" will serve as an excellent starting point for readers concerned with such matters. We must nevertheless recognize the accomplishments of the new school of socio-legal historians. The essays in this volume deal with several related problems: procedure (and its social setting) before the royal courts; the local sources of crime and accusations of criminal behavior; minor offenses, locally tried or otherwise settled; and social views toward the system of criminal law and the criminal. I shall follow this rough order in commenting upon these fine essays and their subject matter.

J. H. Baker's review of common law criminal procedure provides a useful resource for students of the royal courts and an institutional setting for several of the ensuing essays. The notes to Baker's essay guide the reader to a selection of the kinds of sources that supplement the assize records themselves. The extant assize records begin only around 1550, whereas the formative era of early modern criminal law and its administration dates back to the late fifteenth and early sixteenth centuries (as Baker has further demonstrated in his pathbreaking "Introduction" to the second volume of his edition of Spelman's *Reports*).²

J. M. Beattie's masterly analysis of mid-eighteenth-century Surrey assizes examines the treatment of felony suspects in the royal courts. Beattie reveals the community-based social forces that shaped the application of the formal legal procedures of the assize. According to Beattie, a flexible multi-stage legal process was manipulated to achieve for the defendant a punishment that was seen to fit his crime. The process of selection of offenders for condemnation or for mercy was principled and in accordance with widespread social concepts of just deserts.

At one level, Beattie's work supports Douglas Hay's argument that such selective enforcement ultimately enhanced the authority of the ruling classes.³ At another, it seems to me, Beattie's evidence suggests that such enforcement was not commanded by simple fiat. It suited the views and the interests of society generally, reflecting the power of all those upon whom authorities depended for the working of the system of criminal justice. This should come as no surprise. English rulers had since the middle ages attempted to convert their weakness into strength through the pardon system, benefit of clergy, and the pragmatic acceptance and even encouragement of merciful jury verdicts. If these devices underscored the beneficence and majesty of the law, they did not conceal from contemporaries that literal enforcement of capital laws lay beyond the power of the Crown. In practice,

1. Douglas Hay, et al., eds., *Albion's Fatal Tree* (1975). See also, E. P. Thompson, *Whigs and Hunters* (1975).

2. J. H. Baker, ed., *The Reports of Sir John Spelman*, Vol. 2, 299-346, Selden Society (1978).

3. Douglas Hay, "Property, Authority and the Criminal Law" in Hay, et al., eds., *op. cit.*, 17-63. See also E. P. Thompson's important comments and variations upon this theme in Thompson, *op. cit.*, 245-269.

enforcement entailed accommodations in which much of society played important roles.

Several of the essays in this volume shed light on factors conditioning prosecution of crime, that is, on the use (and misuse) of the legal system from the assizes down to the parish. In one way or another, these studies substantiate that view of the relationship between social life and the formal legal process that Beattie's essay sets forth. Legal institutions, doctrines and officials were manipulated by the populace even as the populace was manipulated by them.

J. S. Cockburn presents a cautious and well-conceived correlation of the incidence of property crimes and the price of grain in Elizabethan and Jacobean England. He believes that contemporaries' fears that crime was on the increase, although exaggerated, were not entirely unfounded. Indictment statistics show that thefts were on the increase, especially during the periods of economic hardship. One wonders, however, whether these periods also experienced increased vigilance and reporting, more zealous prosecution. Cockburn also draws attention to the important difference between "opportunistic" and truly premeditated theft that the general form, "*feloniter*," so often conceals from our view, but that may have influenced contemporary juries. This distinction, it should also be noted, may have influenced victims of theft in their decision whether or not to prosecute—willingness to distinguish between the simple vagabond and the professional thief may have been less common during periods of economic hardship. Hence, the old warning continues to require sounding: indictment statistics remain a rough yardstick of criminal activity.

Though he analyzes an offense—witchcraft—that perhaps was *sui generis*, A. D. J. Macfarlane isolates social attitudes and tensions that may have influenced the pattern of accusation generally. Accusations of witchcraft tended mostly to be intravillage and they served to a large extent as an excuse for breaking with a neighbor one disliked but felt guilty about repudiating. What, one wonders, drove people to cover up their personal antipathies (even from themselves) in making so serious a charge? And why the many confessions in witchcraft cases? Was there, for example, a connection between the new prosecutorial methods of the sixteenth century, especially the more extensive and more informed pre-trial questioning of the accused on the basis of detailed evidence given by witnesses for the prosecution, and the increase in witchcraft accusations and confessions in Tudor England? Did the process, even without making use of torture as on the Continent, cause those accused to see themselves as others saw them?

The English government was precocious in the creation of legal procedures for the righting of wrongs, but the misuse of such procedure is also a theme that has a long history. The creation of new offenses and causes of action gave greater scope for abuse at all levels. Rulers purchased jurisdiction and authority for the high price of providing sophisticated means by which the populace at large could carry on its petty warfare. Nonetheless, not all legal machinery was equally susceptible to misuse. In his study of misdemeanors in early seventeenth-century Wiltshire, M. J. Ingram effectively contrasts debt and assumpsit actions, which required "highly specific grounds," to actions in trespass, whose "flexibility" made them "useful instruments for vexatious exploitation." He also observes that it is difficult

for us to discern the truly malicious prosecution from the honest recourse to law: participants themselves were probably naive regarding their true motives. Alongside the frequent recourse to litigation there were well-developed mechanisms for arbitration, so that many suits, honest or otherwise, were settled long before participants lost control over them to intrusive court officials. The ease of accusation and of settlement suited the rhythms of relations in English villages within which, after all, life had to go on.

T. C. Curtis has turned to seventeenth century Cheshire quarter sessions to discover how relatively serious cases arose and to determine which ones were carried forward. The similarities between his and Ingram's findings are striking, though not surprising: seemingly trivial antipathies and sudden clashes bred accusations, some of questionable faith, and these were settled either by informal arbitration or in accordance with formal legal procedures whose existence had given scope to many of the accusations in the first place. Curtis looks to patterns of jury verdicts in order to determine which cases were brought on the basis of general social support for prosecution and which ones were brought for "alien" political reasons. This must remain the roughest sort of guide: juries may have approved prosecution but considered its rigors sufficient and acquitted defendants in many cases involving breaches of widely and strongly held social mores. Curtis strikes a note common to many of the essays, however, in his observation that local criminal process was "an intricate chorus of negotiation" and in his caution against the assumption that any one group could continuously control resolution of conflict. Too many different social groups were called upon to play a role at one stage or another.

Prosecutorial discretion and the degree to which ruling groups could control enforcement are also the subjects of P. B. Munsche's thoughtful study of the enforcement of game laws in late eighteenth-century Wiltshire. Munsche recognizes the importance of "bonds of deference," but he argues that non-enforcement at the prosecutorial level was more a product of the landowners' weakness than of their strength. Prosecution only turned the sometime poacher into a professional thief; landowners instead sought to deal with poachers outside of the courts and short of breaking the crucial and controlling link of employment. Munsche pays close attention both to the legislative process and to the social and economic realities that shaped the interests and limited the powers of the legislators.

J. A. Sharpe's study of a seventeenth-century Essex parish deals with offenses triable at the most local level, the most minor kinds of infractions. Not surprisingly, Sharpe concludes that for these offenses there was no criminal class. Members of virtually all classes were charged with such offenses, including many who subsequently were chosen to act as officials in the parish. There was no real "polarity between the law breaker and the forces of law and order." Sharpe's work accords with the conclusions of the contributors who analyze higher levels of the system, that very trivial conflicts often underlay the more serious charges heard at quarter sessions and assizes.

These several essays suggest that the closer one gets to the village, the more complex and open ended—the less obviously "controlled"—the process of law enforcement tended to be. Indeed, the less fixed legal concepts

tended to be. In Curtis' words: "local men regarded [the law] less an unalterable score and more as a theme upon which they could improvise." At the assize level the air was thinner. Process was more certain and routine: a more single power exerted itself. What is perhaps most striking, however, as Beattie's essay demonstrates, is how much improvisation crept into the process even at its highest level where more serious offenses were tried and so much more was at stake.

Toward the close of his essay Beattie suggests that, at the felony level, the criminal law was by the middle of the eighteenth century showing signs of the profound changes that were to culminate in the Victorian reforms. The leaders of English society were coming to believe that the "excessive hardship" of prescribed punishment with "capricious irregularity" of enforcement encouraged crime, and that certainty of moderate and proportional punishment was both more humane and more likely to deter. Authority based on the deference of those accorded mercy would, in time, give way to a more rational and more even-handed campaign against crime.

For the time being, however, selective enforcement would continue. Its evils would become increasingly apparent and no part of the criminal law would be free from the criticisms of the reformers. R. W. Malcolmson's study of infanticide in the eighteenth century reveals how far judges and jurors might go in order to nullify a harsh statute. Although both the statute and its selective enforcement helped to bring the system of criminal law into disrepute, the law of infanticide was hardly dead letter. Malcolmson argues that social attitudes, supported by "religious doctrine and legal pronouncement," drove some women into "almost total isolation"; in their necessarily secret lives they were without "the most basic forms of social solace." If later, having been apprehended and tried, such women were often pitied and made the objects of legal mercy, the law had nonetheless already taken a toll.

Some culprits did suffer the fullest rigor of the law. Authorities made the most of these awful occasions, publicizing the wages of sin. The parade to Tyburn, the last rites, the opportunity to confess publicly, execution—all played to a carnival audience. We are very far from understanding the peculiar mixture of emotions that public execution evoked, although it is a commonplace that the condemned held a fascination for the public. Those awaiting execution were also luminaries in the life of the eighteenth-century Newgate, according to W. J. Sheehan's essay. Those awaiting trial found solace in the prison's microcosm of the larger society's slum life, and they, like the rest of the common public, experienced awe in the presence of the few who had been scheduled to hang. Peter Linebaugh skillfully portrays the Newgate ordinary, who attended to the religious needs of those condemned persons, and who exploited this fascination. The condemned—and their ordinary—made the public pay for its morbid pleasure, even while the fast-selling *Accounts*, many of whose details Linebaugh shows can be verified, served also to legitimate the sentence of death, for which the bench and the public at large shared ultimate responsibility.

How then, on the basis of these essays and other recent scholarship, does it all—tentatively—add up? The capital law of felony, clearly, covered far too much ground. For centuries the crown chose not to dismantle this law, indeed, even increased its scope, although royal and local officials

lacked the resources to enforce it. Within this law a sorting process took place; royal grace and merciful acquittal were only the most visible forms of the widely dispersed powers of mitigation. The patterns of enforcement suggest that it was mainly the true professional and the vicious amateur whom society condemned. And society's perceptions of suspects were probably affected both by the times and by the suspect's relationship to the community that judged him. Strangers were particularly suspect; in urban areas, many, if not most, persons were "strangers." False accusation, whether well meant or malicious, swelled the numbers brought before courts at all levels, for all offenses, and intensified the need for giving defendants both the benefit of doubt and mercy, especially at the highest levels where lives were at stake. Those who in the end did hang were a distilled residue produced by a complex, broad-based social and political process. Their special and terrible fate both terrified and fascinated. It evoked horror and celebration, awe and pity, and the deeply satisfying feelings of retribution and justice. As ever, the primal urges of mercy and mercilessness lay side by side, vying for dominance, shaping and being shaped by the system of criminal law.

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Robert M. Ireland, *Little Kingdoms: The Counties of Kentucky, 1850-1891*.
Lexington, The University Press of Kentucky, 1977. ix, 184 pp. \$11.50.

Robert M. Ireland's second book on the history of county government in Kentucky, *Little Kingdoms: The Counties of Kentucky, 1850-1891*, continues into the period of the third state constitution his earlier study, *The County Courts in Antebellum Kentucky* (1972)¹ which covers the period of the first and second constitutions, 1792-1850. The history of local government is seldom written competently. For all its importance in the political life of the nation, the county has yet to receive the scholarly attention it deserves, and it largely remains what H. S. Gilbertson called it in his 1917 study, "the dark continent of American politics." Professor Ireland's new book, along with his earlier one, is a tentative step toward illumination. Drawing upon a wealth of sources—judicial, legislative, and journalistic, as well as papers and constitutional debates—Ireland constructs a readable account of the proliferation of Kentucky's semi-autonomous units of local

1. See Ellis, Book Review (*County Courts in Antebellum Kentucky*), 18 *Am. J. Legal Hist.* 178 (1974). Ellis criticizes Ireland's first book on these grounds: (1) for its broad coverage and lack of depth exemplified by his generalizations supported by illustrations apparently selected for their drama or color, (2) for its "failure to make any real effort to relate activities of the county courts to the broader legal problems of the day," and (3) its uncritical use of *antebellum* American political historical theory as a framework for his own analysis of local political development in Kentucky. *Id.* 180-182. It is fair to note here that Professor Ireland has not avoided these problems in his second book.