

## COMMENTARY

### Recent Themes in English Criminal Justice History

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The three books under consideration here illustrate some of the important themes developing in the history of English criminal justice. The first book presents a careful study of the legal profession at a key moment when both the institutions of legal administration and the law itself were undergoing significant revision and reform. The second studies how recent advances in gender and literary theory might suggest a re-examination of the nature and patterns of criminality in early modern England. The third explores the interaction between the state and those living on the margins of society and traces the spread of social and institutional networks in a period of rapid urbanization and industrialization. Although the three books deal with distinct topics in various locales and in different time periods, each makes important contributions to the study of crime and law in the past, while also speaking to questions about the administration of justice in the present.

Garthine Walker

*Crime, Gender and Social Order in Early Modern England*

Cambridge: Cambridge University Press, 2003

Garthine Walker's deliberately provocative study presents an important example of how the considerable historiography on gender can be integrated with studies on crime to forge a deeper understanding of the criminal justice system in early modern England. Her principal concern is to bridge the work of an earlier generation of quantitative historians with more recent work in history informed by post-structuralism, literary theory and gender theory.

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\* The observant reader may notice that the publication dates on the books herein reviewed belie the title of the review itself. Though Dr. Smith submitted the article in a timely fashion, it was accidentally omitted from the issue in which it was supposed to appear. We apologize to Dr. Smith for the inconvenience, and are sure our readers will still find the article of interest.

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Walker has more than one bone to pick with early historiography. In her survey of the previous literature and in her analysis and interpretation of the data she has collected (chiefly for the county of Cheshire), she argues for the existence of a much more prominent role for women when it comes to historical criminal activity. Walker argues that much of the previous historiography of crime and the law was misdirected by present-day assumptions about gender stereotypes. This led to a reading of the available evidence as prone to both misinterpretations and underestimations of the role played by women as both victims and perpetrators of crime. Historians who have relied on quantitative analyses of the existing court data (in other words, nearly all practitioners in the field since the late 1960s) are charged with having adopted a research methodology which has repeated the error of categorizing crime in a manner that automatically discounts women from assuming a statistically significant role. Since fewer women in the seventeenth century moved far enough along in the process of arrest, indictment, trial and conviction for their criminal acts to be recorded, it was impossible for later historians who aggregated available statistics to find female participation in any significant numbers. Criminal justice historians should certainly acknowledge this point, but Walker suggests they also reconsider the reasons why it was that women who had made it to trial and were convicted seemed to suffer much more harshly than did men.

There can be some debate over Walker's sources and the quantitative methodologies she relied on to draw these striking conclusions. While it may be true that women who were in the end convicted and punished for serious offences suffered serious penalties at a high rate, Walker is less forthcoming about what could happen in the steps along the path from being accused of a crime to being convicted, and what might happen to men as compared to women. As other historians have shown, there were many opportunities and incentives for women to step out of the process and avoid the formal trial. Women were forced away from the trial courts by various mechanisms of mercy and mitigation, not to mention partial verdicts or outright acquittals against the evidence when they did come to trial. Surely this is indicative of some measure of deliberate leniency on the part of a male-dominated criminal justice system.

A second issue brought up by Walker is the gendered language used to define crime by which male criminal behaviour became the normative standard, and against which female criminality was measured and judged unusual or exceptional. Walker argues that this assumption, backed by the reliance of historians upon the official records of crime, has constructed female criminal activity as the exception to the rule and led to a flawed perception of the criminal justice systems in the past as one that was easier on female offenders. The idea of the leniency of the courts towards women accused of "male" crimes is in need of revision. She supports this challenge by pointing to the outcomes of a number of trials of female offenders before the Cheshire courts for crimes of violence and

crimes against property and the punishments merited out. Her methodology leads to claims that in some instances women suffered disproportionately severe punishments for similar offences to men. In the case of homicide for example, Walker found that no convicted women in her sample were pardoned while more than three quarters of convicted men were (136). The statistical sample upon which these conclusions rest yields a small absolute number of cases, and it would have been helpful had Walker included her sample size along with the aggregate percentages in her tables for added clarity.

Where Walker is most at ease is in her subtle discussion of the situational contexts of criminality and the analysis of the discourses of crime. Walker demonstrates a keen ear in hearing the “subject positions” as she calls them, deployed by female and male litigants in various cases, in order to construct their versions of the events in question. This literary analysis of court documents proves an effective way of revealing the gendered nature of the language of accusation, of appeal, of defence, or of contrition. Her analysis reveals that women were active in many forms of criminal activity and that they engaged in forms of crime that was far from “petty”. Women could be as brutal, devious and incorrigible as men, while women also participated in criminal activities that exploited their particular economic and social roles in society and drew upon their common knowledge of prices, value and marketability. For example, it became necessary to fence stolen goods. Walker builds on her previous work to show that conventional assumptions that women were dependent on male guidance in their criminal activity fall short of the evidence, and that male and female criminality in the past had much more in common than hitherto perceived.

Allyson N. May

*The Bar and the Old Bailey, 1750-1850*

Chapel Hill and London: The University of North Carolina Press, 2003

In most of the trials featured in Walker’s study, lawyers would have rarely made an appearance, a fact that was common in most early modern trials. The more frequent appearance of lawyers in criminal trials was not to begin until the eighteenth century. Allyson May offers the first comprehensive study of the creation of a professional cohort of lawyers working at London’s storied Old Bailey court in the eighteenth and nineteenth centuries. The Old Bailey was London’s principal criminal court in the eighteenth century and was the crucible for many significant changes in attitudes towards crime, legislative reform, and changes in the practical administration of justice. May’s study traces the increasingly central role that lawyers played in the trial experience and the development of professional sensibilities among a core group of London lawyers. She covers a broad range of primary and secondary material in order to piece

together micro-biographies of many of the key lawyers who toiled in and around the Old Bailey. The result is a carefully argued, well-crafted, and illuminating study of the personal and professional experience of advocacy work over the century after 1750, an age of significant social and cultural change. May's book is one of a handful of recent, important studies of the legal profession and the emergence of the modern, adversarial trial and will stand as one of a trio of must-read books on lawyers.<sup>1</sup>

May's central concern is the history of the criminal bar at the Old Bailey. Based on her meticulous research May has been able to reconstruct the careers of several London practitioners. Men such as William Garrow, who developed a reputation in the late eighteenth century as a tough defence counsel, and Charles Phillips, a prominent barrister and Victorian anti-death penalty campaigner, each get extensive treatment. May also includes a helpful appendix containing brief biographies of all her key players; but this is no hagiography. May shows how professionalization and the creation of an Old-Bailey-centred practice was fraught with multiple problems, grounded in the larger eighteenth century questions of how the legal system operated and what role should be assigned to lawyers in that system. What she reveals is an accidental history, in that the community that emerged was created as the result of a culmination of piecemeal reforms and changes rather than from any concerted, coordinated effort.

Lawyers had traditionally been absent from felony trials in early modern England and the trial was largely a contest between the victim (as prosecutor) and the defendant. When lawyers were actively involved in trials, it was on behalf of the prosecution. Defendants had no right to legal counsel. As more victims began to hire prosecution counsel in the increasingly commercialized world of eighteenth-century London, the former mode of trial between two often equally unprepared and un-coached litigants began to disappear, resulting in a lopsided trial. Lawyers gained greater familiarity with the needs of defendants in felony trials and the way the defendants' rights and reputations were threatened by their ignorance of the law and inadequate preparation for trial. Both lawyers and judges came to understand the advantages held by a prosecutor with counsel in tow, and developed a more sensitive appreciation for the role that defence counsel could play within the criminal trial. Defence counsel began to receive permission to appear in limited roles by the discretionary authority of the presiding judges from the 1720s but it is not until the 1750s, May argues, that a collective of minor lawyers (and occasional stars) began to take on defence work at the Old Bailey as a regular part of their jobs.

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<sup>1</sup> The other two being David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford: Oxford University Press, 2000) and John H Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003).

By and large these barristers were not interested in driving forward significant reforms to the trial process. Indeed, barristers were reluctant to promote and accept a bill protecting the right of defendants to be represented by legal counsel. May attributes this to a combination of self-interest and conservatism within the legal profession (one that is generally resistant to change), coupled with a larger concern over the balance of sides in the trial. The *Prisoners' Counsel Act* of 1836, which granted the accused the right to be represented by legal counsel and allowed counsel to speak to the jury on behalf of their client, was a development imposed from on high. May shows that it was Whig politicians who saw political advantages in pushing this change as part of a larger reform agenda that brought about this change, rather than any response to calls from the courtroom. Many of the Old Bailey counsel feared the new act would give rather too much power to the defendants and by encouraging "professional adversarialism" (p 201) the trial would only move further from its true objective: to arrive at the truth.

The moral complications that arose from this new legislation that now imposed the defendant's right to counsel emerged most dramatically in a case where Charles Phillips, for the defence, heard his client, who was on trial for murder, confess in the midst of the trial. The client refused to alter his plea to guilty, forcing Philips to balance his moral qualms with a professional responsibility newly constructed by a law that he did not support in the first place. May contends that Philips took an important position for the profession and for the modern criminal trial by continuing for the defence and maintaining that the defendant had not yet been convicted by the court.

Peter King

*Crime and Law in England, 1750-1840: Remaking Justice from the Margins*

Cambridge: Cambridge University Press, 2006

Peter King's collection of both new and previously published essays brings together five of his most important and influential earlier articles with five new chapters based on new research. The essays are organized into four themes: youth, gender, violent crime, and attacks on customary rights. The themes provide an organizational framework for the book; but it is the very fine introductory essay distilling King's ideas of where the field of criminal justice history should turn that is of most interest. The subtitle of the book is "Redressing Justice from the Margins", a topic in which King hopes to see further research and fresh work done.

Criminal justice historians have explained the operation of the English courts from the medieval period to the present and have offered substantial insights into the workings of the Assizes and the quarter sessions. We are now much better informed with regard to the patterns of crime, prosecution, and punishment, but

most of that work has relied on the records of the courts, from the quarter sessions upwards to the high courts. Much of the work (though by no means all) has been quantitative and administrative in methodology and subject, and less has been done to integrate the work of the courts with the work of other institutions concerned with the control of crime, the regulation of the parish and county, and the management of the poor. In his new essays, King continues the argument developed in his book *Crime, Justice and Discretion* (Oxford, 2001) that by focusing on the work of the lesser courts, particularly the summary complaints presided over by magistrates around the country, as well as the interventions made by charitable institutions and by local officials, historians can begin to open up the ways in which the law presented a “multi-use right” (as King says elsewhere) to people from all social classes.

Historians, King argues, have paid a rather lopsided attention to the role of Parliament and the decisions of the high courts in making and revising legislation, especially in the first half of the nineteenth century. The origins of that legislation are too easily ascribed to the efforts of reform-minded individuals and key parliamentarians. In King’s view, men like Robert Peel or Lord Sidmouth and other reform-minded MP’s responsible for legislative changes to the law owe more than has yet been appreciated to the undocumented work of the people associated with those on the margins of society (meaning physically those outside of London and socio-economically those at the bottom rungs of the social ladder). Their intimate knowledge of the hardships of life for the vast majority of the population came through their daily work in an array of public and private institutions and their modifications and experiments with implementing the law on the ground often preceded new legislation by years or decades.

King is interested in exploring the interaction of legal authorities with officials who worked in and on behalf of private institutions such as charities, hospitals and other facilities or organizations who shared similar concerns with state authorities over the life experiences of those on the margins of society. England’s growing population meant a gradual increase in the proportion of women, children, the sick and the poor in need of assistance and protection at various points in their lives. One subject that King has examined before, and develops in two new essays here, is the emerging interest in the late eighteenth and early nineteenth centuries in the lives of children on the margins. The new essays reveal the increasingly important role of the reformatories, such as the London Refuge for the Destitute and other institutions, in dealing with juvenile offenders. King traces with great care the intricacies of the emerging social networks of charity and philanthropy and offers a sense of the flow of particularly young, impoverished people through various public and private institutions whose limited resources were under constant pressure to change and adapt. The extension of the reformatory school idea was thus a practical response to

impromptu experiments in sentencing tried by local magistrates desperate to nip an apparently growing social problem in the bud.

The decline of customary rights in an age of increasing individualism and anonymity is another theme pursued here. King's two essays dealing with rural disputes over property rights and the customary practice by the rural poor of gleaning the fields after the harvest speak to the kinds of challenges to customary, communal practices that the spread of capitalism brought. Following Edward Thompson, King shows how two groups – the landowners and the rural poor – made use of the law and the courts to contest competing understandings of rights. He demonstrates that despite the disproportionate power accorded to landowners and the extension of legal protections for property rights that favoured the elite, the rural poor continued to exert their customary rights to glean and turned to collective action when their rights were threatened. He thus shows how the legally disenfranchised were able to exert power and to defy the strict interpretation of the law through a locally-based process of negotiation and ongoing social conflict. The cases he cites are clear examples of how the law made at the centre by way of high court rulings, does not always translate into an immediate alteration of traditional practice.

Overall, King makes the case for the margins both creating and reforming the law. The drive behind initiatives to make new legislation very often came as a result of the day-to-day business of the magistrates, jury men, parish authorities, overseers and other low-level officials who were the workhorses of the criminal justice system. It was their daily work that highlighted the strengths and weaknesses of the early modern state and it was out of the localized, pragmatic and practical decision-making by these men and women that the law was forged. King shows just how important the piecemeal modifications of routine procedure to fit local circumstances were to gradually effecting changes in the law.

Though legislation was written by elite experts at the political centre of English society, the application of the law is what matters to King. It was, he argues, the use of the law as a framework for dispute resolution and problem solving that was important. Those representatives of the state – the local justices of the peace most notably, but also parish and poor law officials, overseers, and later the police – who were face to face with the problems of social life were the real agents of the state in putting the law into practice. As King's collection soundly demonstrates, when the work of these "less formal law-based aspects of justicing practice" (page 69) is situated in conjunction with the workings of the formal criminal justice system, the sources and motivations for shaping and remaking the law can be more fully appreciated.

All three books make important contributions to the fields of criminal justice history, historical criminology, as well as institutional, political, social and legal history. These are three examples of top quality historical scholarship, based on careful and detailed research of a range of archival and printed sources, written in

clear and convincing style. Students and scholars will find the books of much use, but practitioners might also find in these books a number of historical insights into key questions of relevance to the administration of the law today - from the proper and best role for lawyers in the courtroom, the persistence of systemic gender biases in various institutional structures, to the role of the minor players in the overall network of people involved in making, shaping and using the law.