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Crime, justice, and discretion in England, 1740-1820

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Crime, Justice, and Discretion in England 1740-1820

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Clive Emsley

Crime and the law, particularly during the period of the Hanoverian Bloody Code, has been a popular area of research for a quarter of a century. The publications that emerged from Edward Thompson and the young scholars who gathered round him at Warwick in the late 1960s and early 1970s were the inspiration for much of the recent work, and though they were first published in the mid 70s, it remains difficult for anyone working in the area to avoid some reference to, or assessment of, Thompson's *Whigs and Hunters* and Douglas Hay's essay 'Property, Authority and the Criminal Law'.⁽¹⁾ Peter King's *Crime, Justice, and Discretion in England 1740-1820* is on a par with the groundbreaking research of Thompson and his students. It has been a long time in coming, but every paragraph teems with evidence of King's mastery of the secondary sources, his painstaking archival research, and judicious consideration of the material he has assembled.

The book is rooted in the Essex experience though it ranges much wider than that county. The time span covers the period that, in King's estimation, constitutes 'the golden age of discretionary justice' in England (p. 355) and he sets out to chart the pattern of crime and the path of victims and the accused through the criminal justice system. This system, in an analogy used by King, was like a corridor of interconnected

rooms - judicial spaces that moved from pre-trial procedures at one end to punishment at the other. Each space had a different shape according to different legal constraints and different customary expectations. Different social groups had different roles and hence varying influence in the different spaces. The law regarding the appropriation of property was slanted against the poor, yet it was never an instrument that was, or could be, employed solely in the interests of the ruling elite. Indeed, the social group that played a key role as both prosecutors and jurors was, King convincingly argues, the middling sort. But this group was never homogeneous, moreover it seems probable that members of the middling sort, when victims, exercised their discretion by pardoning, sometimes in conjunction with other informal sanctions, many more offenders than they ever brought before the courts.

The issue that seems most to vex contemporary commentators, politicians, and the general public is the extent of crime. The British Crime Survey purports to give a more accurate assessment than the police statistics for the late twentieth and early twenty-first centuries, but neither existed for the eighteenth century. Recognising the problems with first, the construction of crime statistics from indictment membranes and second, the nebulous 'dark figure' of crime, King begins with a courageous attempt at a form of victim survey based on his reading of a collection of diaries; he moves from here to assess the options open to the victim of a crime during the long eighteenth century. This first judicial space in his corridor through the criminal justice system is the least judicial of all; magistrates, constables, thief-takers, prosecution associations all might assist the victim, but it was the victim's choice whether to involve them, and it was also the victim's choice whether or not to let the matter drop, to seek to use the law, or to look to some other form of satisfaction. The discussion of this last option leads on to what is, perhaps, the least explained part of the book - what was it that prompted the decline of the informal, extra-judicial sanction? Was it simply the changes in the law introduced from the 1820s? Did the changes in the magistracy, particularly the image shift from patriarch to patrician as described by Norma Landau (2) and largely accepted by King, play an important part? And if so can the experience of William Hunt in the Wiltshire of the 1740s be comfortably compared with Samuel Whitbread's practice in early nineteenth-century Bedfordshire? Were there perhaps, as François Ploux has detected for the rather different context of the Haut-Quercy, increasingly fewer individuals of any weight within the communities where infrajudicial practices thrived, who were prepared to bring victims and offenders together and to organise agreements? (3) And if so, how might this be explained?

The middle section of the book focuses on crime indictment patterns and the offenders, but always stressing the impact of the discretionary nature of the system which produced both the patterns and those who emerged labelled as offenders. Here King revisits some of the most hotly contested debates regarding eighteenth-century crime, but he finds something new to say particularly about the interrelationship between war, want and crime, and about offending peaks and the lifecycle of the eighteenth-century poor. Poverty, King concludes, 'provides the foundations for an analysis of the relative vulnerability of different groups to indictment for theft, [yet] the core explanation for many prosecutions probably lay elsewhere, most centrally perhaps in the changing reactions to victims and magistrates to the group most affected by war, recruitment, and demobilisation - unattached, unskilled, mobile young men' (p. 217).

Historians are always at the mercy of their sources, and King is particularly good in his discussion of the usefulness of various forms of documentation and the serious lacunae that exist. Much of his discussion of the impact of war is based on material from the 1780s and focuses upon concerns about crime in the aftermath of the disastrous American War. It is tempting to wonder whether these concerns might have been exacerbated by the fact of defeat - the only war which the Hanoverian regime lost against Bourbon France - and also by the internal unrest and dissension of the early 1780s. Moreover the wars which followed, against Revolutionary and Napoleonic France, were qualitatively and quantitatively different from their eighteenth-century predecessors and, sources permitting, the concerns about crime during this period with its peaks of popular radicalism, serious food shortages, massive industrial unrest, increasing concerns about tax rates, and Malthus's hard-headed, rational explanation of the plight of the poor, perhaps merits a more detailed investigation at some stage. Whether the scale of these wars and the concerns that they generated hastened changes in policing and penal policy are not questions that can readily be answered, but they warrant some

examination.

The third section of the book addresses the most dramatic and public moments of the process through the judicial system: trial, verdict, sentence and the ritual of punishment. Again discretion played a central role from the pious perjury of juries, who, often in collusion with the judge, saved offenders from the gallows by finding them guilty of lesser offences than those for which they were charged, through to the crowds that gathered around the punishment scaffolds and, regardless of the expectations of authority, chose to commiserate with those they regarded as unfortunate, usually humble property offenders, while they abused murderers and sexual offenders. This section also provides an interesting window on the practices of petitioning for pardon concluding forcibly that the pardoning process was not something that simply belonged to, or met the needs of the Hanoverian elite. Pardons, King suggests, were ultimately motivated by two different, and potentially conflicting forces: first, the perceived needs of the social context regarding a particular kind of crime - if there were serious public concerns about, for example, burglary at a particular moment, then a convicted burglar was unlikely to be reprieved; and second, the nature and personal circumstances of the offender - age, gender, good character, infirmity, poverty, the perceived potential for reform, could all play a role here.

The concluding chapter revisits some of the key debates of the past twenty-five years by exploring the role of the criminal law in social relations during the long eighteenth century. The law, King stresses, had different meanings for different people; moreover, the meanings understood by an individual or a group in one context, could be rather different in another. In King's perception the law in Hanoverian England was not simply a means of class control, but nor was it neutral. Its workings could result in people suffering a long, agonising death jeered at and abused by a crowd; but its discretionary elasticity could enable victims, jurors, judges and others to massage situations into what they as individuals, or as groups, saw as a fair resolution to an offence. All social classes sought to use the law and it thus became an arena of struggle and negotiation within which accommodation appears as generally far more important than mystification.

In sum, the book is well researched, cogently argued and stimulating to read. I have two complaints, neither of which King could do much about. This book should be on the shelf of every library where eighteenth-century English history, not to mention criminal justice history, is taught; but in this day when budgets are always under pressure I suspect that some institutions will balk at paying £55.00. Second, the publisher's rationale for the price is, doubtless, that this is primarily an academic monograph rather than a student text; however, while the book is thoroughly referenced, there is no bibliography. This means that if you want to pursue a reference it is essential to find the first footnote mention of a particular book or article, and this can take some time and cause not a little frustration in a book of nearly 400 pages.

January 2001

Notes

1. E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, London: Allen Lane, 1975; Douglas Hay, 'Property, Authority and the Criminal Law' in Douglas hay, Peter Linebaugh, EP Thompson, et al, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, London: Allen Lane, 1975. [Back to \(1\)](#)
2. Norma Landau, *The Justice of the Peace, 1679-1760*, Berkeley, Cal.: University of California Press, 1984. [Back to \(2\)](#)
3. François Ploux, 'L' "arrangement" dans les campagnes de Haut-Quercy (1815-1850)', *Histoire de la Justice*, V (1992), 95-115. [Back to \(3\)](#)

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King, Peter. *Crime, Justice and Discretion in England, 1740-1820*. Oxford, 2000. Langbein, J. H. *Albion's Fatal Flaws. Past and Present*, 98 (1982). McGowen, Randall. *The Changing Face of God's Justice: The Debates over Divine and Human Punishment in Eighteenth-Century England*. *Criminal Justice History*, 9 (1988). McGowen, Randall. *The Problem of Punishment in Eighteenth-Century England*. In *Penal Practice and Culture, 1500-1900 :Punishing the English*, ed. by Simon Devereaux and Paul Griffiths. 2004. *Criminal Justice Pathways*. Those accused of a crime in eighteenth- and nineteenth-century London entered into a system that has been likened to a corridor of connected rooms. At each stage, decisions were made that might remove the accused from the system entirely, or propel that person further along the process, in a number of possible directions.Â *Crime, Justice, and Discretion in England, 1740â€“1820*. Oxford University Press, 2000. Radzinowicz, Leon. Dr Clive Emsley, review of *Crime, Justice, and Discretion in England 1740-1820*, (review no. 168) <https://reviews.history.ac.uk/review/168> Date accessed: 11 February, 2021. See Author's Response. Crime and the law, particularly during the period of the Hanoverian Bloody Code, has been a popular area of research for a quarter of a century.