

## And Wretches Hang?

Norma Landau, ed., *Law, Crime and English Society, 1660–1830*. Cambridge: Cambridge University Press, 2002. Pp. xii, 264. £ 45 (cloth).

### Daniel Klerman\*

Norma Landau has assembled some of the most distinguished researchers in early modern legal studies to contribute to this volume. The book honors John Beattie and his groundbreaking work on the history of early modern crime and criminal law. The chapters are fascinating and well-researched, although like most books of this nature, little connects them except that they all deal with English law in the period 1660–1830. It would be impossible to discuss each article in depth in an essay of this length, so instead I will focus on a few themes.

#### JUSTICES OF THE PEACE

Eighteenth-century justices of the peace (magistrates) wielded enormous powers, including the enforcement of parliamentary regulations, the investigation of crime, and the trial of all but the most serious felonies. Nevertheless, they usually had no formal legal training and served without salary. One key question is the extent to which abuses of their power could be and were checked. Chapters by Douglas Hay and Norma Landau address this issue, reaching rather different conclusions. Hay examines all criminal prosecutions (informations) in King's Bench against Staffordshire justices in the period 1740-1800 and finds that magistrates were hardly ever prosecuted and that these prosecutions were never successful. In contrast, Landau focuses on metropolitan London, where magistrates invented a procedure to discipline each other. Justices suspected of misconduct were invited to dinner and asked to explain their actions. Depending on the circumstances, the matter might end with an

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apology and promise not to repeat the error, with an investigation, or, most seriously, with a recommendation that the Chancellor remove the erring justice from office. Because London justices relied on fees for much of their income, and because misconduct often diverted fees from one justice to another, Landau concludes optimistically that “it is likely that Middlesex Sessions heard complaints, brought by their competitors, against a remarkably large proportion of its justices who acted both frequently and illegally.”<sup>1</sup> Thus, Landau shows that the London justices’ pursuit of fees, which was often portrayed as a symptom of corruption, may in fact have helped discipline and thus deter misconduct.

Joanna Innes presents another aspect of magisterial activity: their involvement in child labor and its reform.<sup>2</sup> Through their role in supervising the administration of the poor laws, justices of the peace could and did order parish officers to put children of poor families to work. Some of these children were apprenticed to textile factories. Some justices became concerned about working conditions in these factories and issued orders that parish children not be sent to factories that did not adequately protect the health and morals of the children. When factory owners complained that competitive pressure made it difficult to meet these requirements, the justices, in conjunction with private societies such as the Society for Bettering the Condition of the Poor, campaigned for legislation. In response, Sir Robert Peel, himself a factory owner, steered through Parliament the first factory act, the Health and Morals of Apprentices Act of 1802.<sup>3</sup>

#### LAW AND CULTURE

Two of the chapters address the relationship between law and English culture. Barbara Shapiro argues that legal ideas of evidence had a profound effect on English religion.<sup>4</sup> The common law developed the distinction between law and fact, as well as a set of rules about the evaluation of witness testimony. Ordinary Englishmen learned these ideas through their service as jurors, and theologians used them to defend Christianity. Specifically, they argued that Christianity was true because it rests on facts that were reported by reliable witnesses—that is, witnesses who would be persuasive even in a court of law.

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1 Norma Landau, *The Trading Justice’s Trade*, in *LAW, CRIME AND ENGLISH SOCIETY 1660–1830* 46, 62 (Norma Landau ed., 2002).

2 Joanna Innes, *Origins of the Factory Acts: The Health and Morals of Apprentices Act, 1802*, in *LAW, CRIME AND ENGLISH SOCIETY 1660–1830*, *supra* note 1, at 230.

3 42 Geo. 3 c. 73 (Eng.).

4 Barbara Shapiro, *Religion and the Law: Evidence, Proof and “Matter of Fact,” 1660–1700*, in *LAW, CRIME AND ENGLISH SOCIETY 1660–1830*, *supra* note 1, at 185.

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Ruth Paley's fascinating article on slavery and the Somerset case takes a very different approach to the relationship between law and culture.<sup>5</sup> Recent scholarship has shown that when Mansfield decided *Somerset v. Stewart*,<sup>6</sup> he did not free all the slaves in England but merely held that a master cannot compel a slave to leave England. Paley shows that misconceptions about the meaning of the case arose early and influenced the development of the law. In 1774, only two years after *Somerset* was decided, a justice of the peace cited the case to justify releasing a black slave from his master. Abolitionists used misconceptions about Somerset in litigation on behalf of individual slaves and in agitation against slavery more generally. Paley even argues that popular misconceptions influenced at least one early-nineteenth-century decision in King's Bench.

#### ACCESS TO LAW

One of the mysteries of English legal history is how so many ordinary people could afford to litigate. A large part of the answer, of course, is that most were barred from the legal system by their poverty. Nevertheless, chapters by Douglas Hay, Nicholas Rogers, and Ruth Paley suggest that elites who had congruent interests often financed litigation by the poor. For example, Hay shows that wealthy gentlemen who sought an additional avenue to pursue their own disputes with a particular justice financed several prosecutions against Staffordshire justices of the peace.<sup>7</sup> Similarly, Paley reveals that habeas corpus petitions by slaves were put forward by abolitionist societies and, in one case, by a merchant who had done business with a slave before his enslavement. Likewise, Rogers uncovers evidence that merchants, ship-owners and other propertied men were responsible for legal challenges to impressments (forced naval service), because they did not want valued employees taken from their service.<sup>8</sup> This research has rather mixed implications for the rule of law in eighteenth-century England. On the one hand, the fact that the poor had access to the courts at all is significant. On the other hand, their access depended on the good will of their social superiors, who, as a matter of grace, ideology, or self-interest, could be persuaded to finance litigation on their behalf.

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5 Ruth Paley, *After Somerset: Mansfield, Slavery and the Law in England, 1772–1830*, in LAW, CRIME AND ENGLISH SOCIETY, 1660–1830, *supra* note 1, at 165.

6 Lofft 1, 98 Eng. Rep. 499 (K.B. 1772).

7 Douglas Hay, *Dread of the Crown Office: The English Magistracy and King's Bench, 1740–1800*, in LAW, CRIME AND ENGLISH SOCIETY, 1660–1830, *supra* note 1, at 19.

8 Nicholas Rogers, *Impressment and the Law in Eighteenth-Century Britain*, in LAW, CRIME AND ENGLISH SOCIETY, 1660–1830, *supra* note 1, at 71.

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Litigation was also expensive for defendants. Of course, they could reduce litigation costs through settlement, but poor defendants might not be able to make acceptable settlement offers. Hay suggests that borough magistrates, who tended not to be as wealthy as country justices, often found themselves intimidated by threats of litigation. Donna Andrew demonstrates another option for poorer defendants: public apology in the *Daily Advertiser*, a London newspaper.<sup>9</sup> This paper published more than a thousand apologies during the late eighteenth century, often explicitly as the resolution of actual or threatened lawsuits. Although the apologists and recipients of the apologies came from all walks of life, the working poor—servants, drivers, and laborers—were much more likely to give apologies than to receive them.

#### PRE-REFORM CRIMINAL LAW

Eighteenth-century criminal law is often viewed as dysfunctional, crying out for the reform that eventually came in the nineteenth century. David Lieberman<sup>10</sup> and Randall McGowen<sup>11</sup> attempt partially to resuscitate its reputation. Lieberman argues that Blackstone performed important conceptual work in identifying the criminal law with the redress of public wrongs, as distinct from the civil law, which concerned private wrongs. Although this distinction seems second nature to modern lawyers, Lieberman shows how innovative it was in the context of eighteenth-century law, in which crimes could be prosecuted privately by appeal and in which the civil action of trespass alleged violation of the king's peace. McGowen examines forgery legislation. By one count, over sixty statutes imposed the death penalty for various kinds of forgery, most of them passed in the eighteenth century. These statutes are often used to illustrate the "bloody code," the fact that eighteenth-century English law relied excessively on capital punishment, especially for the punishment of property crimes. McGowen shows that much of the legislation was enacted in tandem with the new fiscal instruments of the state: bank notes, exchequer bills, and stamps signifying the payment of taxes on paper and other commodities. Most of the legislation was never enforced in court, and McGowen argues that its primary value was symbolic.

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9 Donna T. Andrew, *The Press and Public Apologies in Eighteenth-Century London*, in LAW, CRIME AND ENGLISH SOCIETY 1660–1830, *supra* note 1, at 208.

10 David Lieberman, *Mapping Criminal Law: Blackstone and the Categories of English Jurisprudence*, in LAW, CRIME AND ENGLISH SOCIETY 1660–1830, *supra* note 1, at 139.

11 Randall McGowen, *Making the "Bloody Code"? Forgery Legislation in Eighteenth-Century England*, in LAW, CRIME AND ENGLISH SOCIETY 1660–1830, *supra* note 1, at 117.

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## INTERDISCIPLINARITY

This book, and much early modern legal history more generally, is notable for its lack of interdisciplinarity. Unless one considers legal history itself to be interdisciplinary,<sup>12</sup> only Shapiro's chapter describing the impact of law on religion makes a serious attempt to engage multiple fields. Perhaps this is appropriate. Interdisciplinarity is often superficial, sometimes contributing little more than obfuscatory jargon. Perhaps it's best for historians to uncover and describe "the facts" and leave it to others to show how those facts fit into broader theories or schema. On the other hand, one wonders whether scholars could profitably learn from disciplines such as literature, economics, political science, or anthropology, and whether understanding might be enriched by analyzing law in a broader cultural context, as Shapiro does.

## QUANTIFICATION

As I have noted elsewhere, legal history is remarkably devoid of quantitative analysis.<sup>13</sup> A number of chapters, including those by Hay and Andrew, provide some simple case counts, but there is not a single regression or correlation. Again, the lack of statistical analysis is probably appropriate, since most aspects of eighteenth century legal history do not lend themselves to a quantitative approach. One admirable use of quantitative data features in King's important chapter on impressments and crime.<sup>14</sup> King argues that the much-discussed correlation between war and lower crime rates is illusory. While others have argued that war reduced crime by sending crime-prone young men abroad and by providing better employment conditions for those who remained, King argues that prosecutors often dropped prosecutions of property offenders during wartime on the condition that the accused enlist. Thus, crime rates may have stayed the same, but offenders were merely diverted from the criminal justice system. King supports his argument with graphs showing the changing age-composition of property offenders (a greater percentage of fifteen- to twenty-five-year-old men during peacetime than during war) and with newspaper reports.

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12 See Jonathan Rose, *English Legal History and Interdisciplinary Legal Studies*, in *BOUNDARIES OF THE LAW: GEOGRAPHY, GENDER AND JURISDICTION IN MEDIEVAL AND EARLY MODERN EUROPE* (Anthony Musson ed., forthcoming 2005).

13 Daniel Klerman, *Statistical and Economic Approaches to Legal History*, 2002 U. of Ill. L. Rev. 1167. There are, of course, exceptions—works of quantitative sophistication by legal historians. One of the contributors to this volume has produced a noteworthy work in this genre. See Douglas Hay, *War, Dearth and Theft in the Eighteenth Century: The Record of the English Courts*, 95 PAST & PRESENT 117 (1982).

14 Peter King, *War As a Judicial Resource. Press Gangs and Prosecution Rates, 1740–1830*, in *LAW, CRIME AND ENGLISH SOCIETY, 1660–1830*, *supra* note 1, at 97.

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## LEGAL TRAINING

Most if not all of the contributors to this volume have doctorates in history but no legal training. For the most part, their historical background is reflected in the thoroughness of their research—their willingness to delve deeply into archives, to search broadly in newspapers and contemporary pamphlets, and generally to view reported cases as at most a starting point for research. On the other hand, there are points where legal training might have been helpful. For example, Paley spends almost half of her important and otherwise persuasive chapter discussing the fascinating case of Little Ephraim Robin John and Ancona Robin Robin John. Unfortunately, Paley may have misinterpreted the settlement that resolved the case. In brief, the Robin John brothers were African traders who had been enslaved in dubious circumstances during a conflict in western Africa. An English captain who participated in their enslavement brought them to America. After sales in Dominica and Virginia, they managed to board a ship to England, where a friend sought a writ of habeas corpus on their behalf from King's Bench, where Mansfield was chief justice. The case was settled when the captain who took the brothers from Africa paid £120 to the Virginian who claimed to own them. The settlement, which was submitted to the court, stated that the payment was “the purchase money or value of the said two Africans.”<sup>15</sup> Paley interprets the agreement as evidence that “[c]learly neither Lord Mansfield nor his ‘Honourable Court’ were as convinced as more recent commentators had been that *Somerset* had indeed abolished slavery in England.”<sup>16</sup> This is unpersuasive. It is well known that Mansfield wished to avoid ruling in cases involving the legality of slavery. Approval of the settlement allowed Mansfield to dispose of the case without setting a precedent. It thus tells us little about the court's view of the legal issues. In addition, the fact that the settlement mentioned the “purchase money or value of the said two Africans” does not prove that anyone believed they were slaves at the time of the settlement. Rather, it merely recognizes that they had previously been purchased under the assumption that they were slaves. Nevertheless, the terms of the settlement can, tell us something about the parties' predictions of how the case was likely to be decided if it had proceeded to trial. If the parties had believed that the court would rule that the brothers were slaves, then any payment to the putative owner would have come from the Robin John

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15 Ruth Paley, *After Somerset: Mansfield, Slavery and the Law in England, 1772–1830*, *supra* note 5, at 174.

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brothers or their friends. The fact that the payment came from the captain suggests that the parties probably believed that the court would rule that the brothers were not slaves and that the captain had acted wrongly when he took them from Africa and sold them in America. There are, of course, other possibilities. Perhaps the captain believed he had done nothing wrong but decided to purchase the brothers' freedom in order to secure their favor in future commercial dealings. Although the settlement thus tells us little about Mansfield's views, the fact that the payment came from the captain suggests that the parties viewed the key legal issue as the legality of the enslavement in Africa. It thus implies that they did not interpret *Somerset* as having abolished slavery in England. Another piece of evidence confirms this view—the affidavits prepared on behalf of the brothers did not argue that slavery had been abolished in England.<sup>17</sup> Thus, while neither the settlement nor the affidavits give us evidence of Mansfield's views, they do support Paley's broader argument by providing an indication of the opinion of the legal profession, which is just as important.

#### CONCLUSION

This collection of essays represents much that is excellent about early modern legal studies. Each chapter addresses an important issue, presents arguments supported by careful research, and conveys its theses in clear, jargon-free language. Like most scholarship in this field, it is produced by historians without legal training and is neither interdisciplinary nor quantitative. Given the high quality of the essays reviewed here, I doubt that a change in training or methodology would produce generally better results, although it might yield a few additional insights.

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<sup>17</sup> *Id.* at 172.